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THE DECENNIAL DIGEST

CIVIL, CRIMINAL AND REVENUE

(1921—1930)

S. N. DAR, B. A, LL
Vakil High Court & Reven
Jammu & Kashmir

BY

R. N. IYER

AND

V. V. CHITALEY

Vakil High Court
SRINAGAR

VOLUME III

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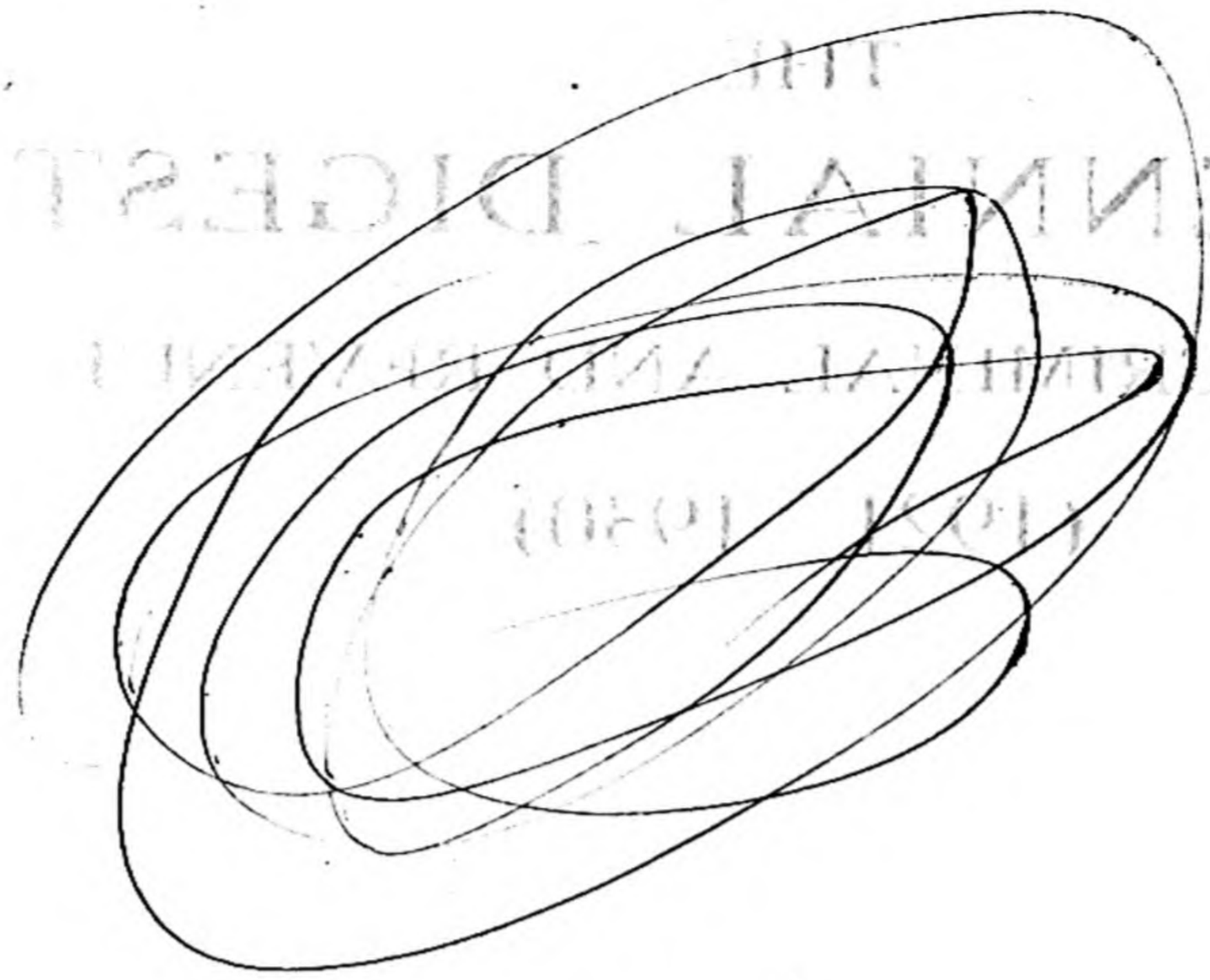

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ABBREVIATIONS EXPLAINED.

Reports.

All. or A.	Indian Law Reports, Allahabad Series.
A.L.J.	Allahabad Law Journal.
A.I.R. 1929 All. or 1929 A. ..	All India Reporter, 1929 Allahabad.
A.I.Cr.R.	All India Criminal Reporter.
Bom. or B.	Indian Law Reports, Bombay Series.
Bom.L.R.	Bombay Law Reporter.
A.I.R. 1929 Bom. or 1929 Bom. ..	All India Reporter, 1929 Bombay.
Bur.L.T.	Burma Law Times.
Bur.L.J.	Burma Law Journal.
Cal. or C.	Indian Law Reports, Calcutta Series.
C.L.J.	Calcutta Law Journal.
1929 Cr. C.	Criminal Cases.
Cr.L.J.	Criminal Law Journal.
C.W.N.	Calcutta Weekly Notes.
A.I.R. 1929 Cal. or 1929 Cal. ..	All India Reporter, 1929 Calcutta.
I.A.	Law Reports, Indian Appeals.
I.C.	Indian Cases.
Lah. or L.	Indian Law Reports, Lahore Series.
A.I.R. 1929 Lah. or 1929 Lah. ..	All India Reporter, 1929 Lahore.
Lah.L.J. or L.L.J.	Lahore Law Journal.
L.R.	Law Reporter (Allahabad).
L.R.A.Civ.	Law Reporter, Allahabad, Civil.
L.R.A. (Cr.)	Law Reporter, Allahabad, Criminal.
L.B.R.	Lower Burma Rulings.
M.L.W.	Madras Law Weekly.
Luck.	Indian Law Reports, Lucknow Series.
Mad. or M.	Indian Law Reports, Madras Series.
M.L.J.	Madras Law Journal.
M.L.T.	Madras Law Times.
M.W.N.	Madras Weekly Notes.
A.I.R. 1929 Mad. or 1929 Mad. ..	All India Reporter, 1929 Madras.
Mys.L.J.	Mysore Law Journal.
N.L.J.	Nagpur Law Journal.
N.L.R.	Nagpur Law Reports.
A.I.R. 1929 Nag. or 1929 Nag. ..	All India Reporter, 1929 Nagpur.
O.C.	Oudh Cases.
A.I.R. 1929 Oudh or 1929 Oudh ..	All India Reporter, 1929 Oudh.
O.L.J.	Oudh Law Journal.
O.W.N.	Oudh Weekly Notes.
P.R.	Punjab Record.
P.L.R.	Punjab Law Reporter.
P.W.R.	Punjab Weekly Reporter.
Pat.	Indian Law Reports, Patna Series.

P.H.C.C.	Patna Supplement to C. W. Notes.
A.I.R. 1929 P. or 1929 Pat. ..	All India Reporter, 1929 Patna.
A.I.R. 1929 P.C. or 1929 P.C. ..	All India Reporter, Privy Council Section.
Pat.L.J.	Patna Law Journal.
Pat.L.R.	Patna Law Reporter.
Pat.L.T.	Patna Law Times.
R. or Rang.	Indian Law Reports, Rangoon Series.
A.I.R. 1929 R. or 1929 Rang. ..	All India Reporter, 1929 Rangoon.
R.D.	Revenue Decisions.
S.L.R.	Sind Law Reporter.
A.I.R. 1929 S. or 1929 Sind ..	All India Reporter, 1929 Sind.
U.P.L.R.	United Provinces Law Reporter.
U.B.R.	Upper Burma Rulings.

Other Abbreviations.

Appl.	Applied.	Expl.	Explained.
Appr.	Approved.	Foll.	Followed.
Comm.	Commented.	F.B.	Full Bench.
Cons.	Considered.	P.C.	Privy Council.
Cr.	Criminal.	Ref.	Referred.
Dist.	Distinguished.	Rel.	Relied.
Disc.	Discussed.	Rev.	Revenue.
Diss.	Dissented from.	S.B.	Special Bench.
Doubt.	Doubted.		

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DECENNIAL DIGEST

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DACOITY

—*See* PENAL CODE, Ss. 395 & 396.

DAMAGES

—*See also* (1) CONTRACT ACT, S. 73.
(2) TORT.

Breach of Contract
Cause of Action
Conversion
Illegal Attachment
Illegal Seizure
Interest
Liability for
Limitation
Measure of
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Special Damage
Tort
Trespass
Miscellaneous

—Breach of Contract.

———*Contract Act, S. 73—Earnest money becomes part of purchase price when contract completed—Vendee's default entails forfeiture—Damages.*

In a contract for sale of immovable property the deposit of earnest money is a guarantee for performance of the contract by the vendee and when the transaction goes forward it becomes part of the purchase price; if by default of the vendee the transaction falls through, the money is forfeited: A. I. R. 1926 P.C. 1, *Foll.* (*Kemp, Ag. C.J. and Murphy, J.*). DINANATH DAMODAR KALE *v.* MALVI MODI RANCHHODDAS & CO.

32 Bom. L.R. 272=A.I.R. 1930 Bom. 213.

———*Measure of, depends on facts of each case.*

The decision of each case of damages for breach of contract depends on its peculiar terms as to the mode, place and time of performance. One case cannot be precedent for other unless terms are similar. (*Tek Chand and Agha Haidar, JJ.*). RATTAN LAL SULTAN SINGH *v.* TEKCHAND CHUNNI LAL.

120 I.C. 785=A.I.R. 1930 Lah. 379.

———*Fixing date of marriage after parties are free to marry implies promise to marry and is not ratification of prior agreement to marry which was void as parties could not contract valid marriage.*

Where a man agreed to marry a woman (plaintiff) during divorce proceedings between her and her husband and after the divorce proceedings had gone through, and consequently the plaintiff became a free woman, the defendant (man) bought her a ring and actually arranged the date on which they were to be married:

Held: that when persons fix a day for their marriage it may be inferred that there is a promise of marriage. And one is not bound to take it as a ratification of a contract which in itself is void, and which, therefore, in law cannot be ratified by anything that can be subsequently done. (*Viscount Dunedin*). THOMAS CHARLES WILLIAMS SKIPP *v.* LILIAN MILDRED KELLY.

94 I.C. 331=1926 M.W.N. 382=3 O.W.N. 453=28 Bom. L.R. 873=43 C.L.J. 430=24 M.L.W. 18=30 C.W.N. 841=A.I.R. 1926 P.C. 27=50 M.L.J. 498.

———*Right to claim specific performance as well as damages—Omission to claim specific performance is no bar to claim damages.*

Where performance of the contract is refused by defendant plaintiff is entitled to claim back the earnest money and damages, provided they are not penal. His omission to claim specific performance does not bar his right to claim damages. (*B.B. Ghose and Panton, JJ.*). NATHURAM BARMAN *v.* ULLUK CHAND BARMAN. **95 I.C. 700=A.I.R. 1926 Cal. 1041.**

———*Suit for damages—Performance of contract to be simultaneous—Each party must show his readiness and willingness to perform his part of the contract.*

In all these cases where the performance of a contract is to be simultaneous and a suit is brought for damages for breach of contract, each party must show that he was ready to perform his part of the contract. For example, in a suit for damages for breach of a contract to sell and purchase, seller must show that he was able and willing to perform his part of the contract and the buyer must show that he was ready and willing to pay the price. (*Kumaraswami Sastri, O.C.J. and Curgenven, J.*). LAKSHMIKANTHAN *v.* NARAYANASWAMI IYER.

97 I.C. 986=1926 M.W.N. 710=A.I.R. 1926 Mad. 1109.

———*Difference between contract rate and market rate on date of breach is the basis—Plaintiff pleading special measure must prove it.*

When there is an available market for the goods, the difference between the contract price and the market price on the date of the breach is the amount of the damages *prima facie* payable and when the plaintiff claims damages on any other special basis

DAMAGES—Breach of Contract.

he must prove his case. (*Spencer and Venkatasubba Rao, JJ.*). RAMALINGAM CHETTIAR *v.* GOKULDAS MADAVJI & CO. **97 I.C. 871=1926 M.W.N. 691= A.I.R. 1926 Mad. 1021=51 M.L.J. 243.**

———*Cause of action based on breach of contract—Damages based on delay cannot be claimed.*

Where the suit as framed is not one brought in tort for damages due to loss occasioned to the plaintiffs on account of the retardation in delivery but simply for compensation for the loss of the articles which were found missing, the action is founded on breach of contract and in no sense on tort based upon the delay and damages founded on delay cannot be claimed. (*Bucknill, J.*). M. & S. M. RY. CO. *v.* FIRM GOPAL RAI RAM CHUNDER. **94 I.C. 510= 1926 P H.C.C. 123=A.I.R. 1926 Pat. 273.**

———*Contract Act, S. 73—Plaintiff must mitigate loss—Vendor with right to re-sell at any time, on vendee's default to pay by due date need not re-sell immediately but must do so within reasonable time—Otherwise he can get damages only on basis of difference between contract and market rates at date of breach.*

A plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect.

Where the vendor had the right to re-sell the goods at any time if vendees failed to pay and take delivery by certain date and where vendee made default.

Held: that the vendor was not bound to resell the goods immediately after the defaults but could do so within a reasonable time afterwards, but that in view of the persistent refusal of the vendees to take the goods and the falling state of the market, the vendors were bound not to delay in re-selling. Should the vendors make unreasonable delay, they can recover only damages on the ordinary basis of the difference between contract rate and market rate at date of breach. 19 All. 535, *Diss. from.* (*Shah, Ag. C. J. and Fawcett, J.*). HARICHAND AND CO. *v.* GOSHO KABUSHIKI KAISHA, LIMITED. **86 I.C. 521=26 Bom. L.R. 921=49 Bom. 25= A.I.R. 1925 Bom. 28.**

———*Contract Act, S. 73—Reasonable compensation is question of fact—If circumstances require so, no damages need be awarded for breach of contract to sell real property—Case-law discussed.*

No hard and fast rule can be laid down for assessment of damages for breach of contracts to sell. The circumstances of each case have to be considered in deciding what is reasonable and proper compensation for the damage caused by a breach of contract. Under S. 73 the Court is not bound in every case to award damages on the basis of a difference between the price at the date of the contract and the market price at the date of the breach. If circumstances require so no damages need be awarded for breach of contract to sell real property where the vendor is not guilty of fraud. (*Shah, Ag. C.J. and Fawcett, J.*). DHANRAJGIRJI NARSINGGIRJI *v.* TATA SONS, LIMITED. **92 I.C. 225=26 Bom. L.R 858= 49 Bom. 1=A.I.R. 1924 Bom. 473.**

———*Specific Relief Act, S. 21—Assignee of decree who resiles from contract may be made to pay price instead of damages.*

There is no invariable rule that in cases relating to movable property damages only should be given. In a suit against a person who agreed to take an assignment of a decree the price which he promised to

DAMAGES—Cause of Action.

pay to the assignor may be decreed. (*Krishnan, J.*). K.S. KRISHNA AIYAR *v.* NYNADIKKAN PILLAI. **82 I.C. 78=20 M.L.W. 328= 1924 M.W.N. 693=A.I.R. 1924 Mad. 801.**

—Cause of Action.

———*Contract Act, S. 23—No cause of action arises against person for merely financing appellants in appeal when costs could not be recovered from appellants.*

Even if a person is known to have financed an appellant, it will not give a cause of action to the respondents to recover damages from the financer personally because they have been unable to recover their costs from the appellant. (*Sulaiman and Pullan, JJ.*). MOHAMMAD IBRAHIM QUARESHI *v.* SYED ABDUL HAMID. **119 I.C. 837= A.I.R. 1929 All. 797.**

———*Specific Relief Act, S. 54—Water of certain tank by immemorial custom used by co-sharers for certain land only in proportion of their shares—Ownership of water is not independent of ownership of land—One co-owner using water for other land—Damage caused to other co-owners—They can sue for damages as well as for injunction to restrain unauthorised use.*

Several co-sharers of an agraharam were entitled to the water of a tank in the same proportion which they owned land in the agraharam. It was customary from time immemorial to use the water of the tank for cultivating certain area of land described as "the wet ayacut under the tank." The water of the tank was not even sufficient for the wet ayacut. One of the co-sharers used the water of the tank to convert some of his dry land into wet land and thereby caused damage to the other co-sharers. The other co sharers sued for injunction as well as damages.

Held: that from immemorial usage must be implied an agreement that the water of the tank was to be used for the wet ayacut only. From the fact that the water was owned proportionately to the land it does not follow that the ownership of water was independent of the ownership of the land. The use of water for other land than the wet ayacut was illegal. Other co-owners can therefore get damages as well as injunction to restrain such use. It would be absurd to say that they should sue for partition of tank water and not for injunction. (*Ramesam and Venkatasubba Rao, JJ.*). VENKATARAMA SASTRI *v.* VENKATANARASAYYA. **113 I.C. 557= 29 M.L.W. 613=A.I.R. 1929 Mad. 25.**

———*Breach of contract to pay money to a third person—No time for payment fixed—Cause of action for damages for breach arises when money is recovered from the party suing.*

For a suit for loss or damage incurred by reason of the failure of a party to the contract to carry out his undertaking to pay money to a third person where no time is mentioned for payment, limitation runs from the time when the money was paid. A.I.R. 1926 *All.* 605, *Rel. on.* (*Walsh and Banerji, JJ.*). RAM RATAN LAL *v.* ABDUL WAHID KHAN. **101 I.C. 691=49 All. 603=25 A.L.J. 411= A.I.R. 1927 All. 435.**

———*Suit for—Temporary injunction wrongfully obtained—Suit is maintainable—Civil P. C., S. 95—Provincial Small Cause Courts Act, Sch. 2, Art. 35 (k).*

Where a temporary injunction is wrongfully obtained on insufficient grounds a suit for damages is maintainable. 9 W.R. 133 and 16 C.W.N. 540, *Rel.*

DAMAGES—Cause of Action.

on. (*B.B. Ghose and Cammiade, JJ.*). HARKUMAR DE v. JOGAT BANDHU. **100 I. C. 318= 53 Cal. 1008=A.I.R. 1927 Cal. 247.**

———*Obstruction from taking water from well is continuing injury—Where damage consequent on an act is actionable rather than the act itself, every damage is actionable.*

A cause of action, in respect of which a plaintiff is entitled to have the prospective damages assessed is distinct from a continuing cause of action, that is to say, a cause of action which arises from the repetition or continuance of acts or omissions of the same kind as that from which the action has been brought. Similarly, where the damage consequent on an act or omission rather than the act or omission itself is actionable, then, as the action is only maintainable in respect of the damage, or is not maintainable until the damage is sustained, an action will lie every time damage accrues from the act. 11 A.C. 127, *Ref.*

The obstruction from taking water from a well is a continuing injury. 6 Mad. 176 and 28 Mad. 72, *Rel. on.* (*Prideaux, A.J.C.*). HARDEO *v.* RAMCHANDRA. **98 I.C. 679=A.I.R. 1927 Nag. 85.**

———*Collector of Custom made to detain goods by representation made maliciously and without reasonable and probable cause—Damages caused by detention are recoverable.*

When defendants through malice and without reasonable and probable cause make certain representation to the Collector and in consequence plaintiff's goods are detained under S. 19-A of the Sea Customs Act, plaintiff can recover damages caused on account of such detention of his goods. (*Pearson, J.*). ALBERT BONNAN *v.* IMPERIAL TOBACCO CO., LTD. **94 I.C. 444=30 C.W.N. 465= A.I.R, 1926 Cal. 757.**

———*Where party would have lost a claim apart from conduct of another man the other man is not liable.*

Where a certain pro-note was accepted though it was void as contravening S. 26, Paper Currency Act (2 of 1910), and in discharge of that pronote the agent of the creditor forged another pronote and thus misled his principal into filing a suit on the forged pronote which was dismissed on that ground, and where the creditor did not seek the alternative claim on the consideration of the original pronote.

Held: that the loss of the creditor was not due to the forged pro-note but to his acceptance of his original pro-note and therefore the agent was not liable for the loss of the debt. (*Coutts-Trotter, C. J. and Krishnan, J.*). VEERASAMI PILLAI *v.* CHIDAMBARAM CHETTIAR. **92 I.C. 819= A.I.R. 1926 Mad. 894.**

———*Breach of Contract—Parties executing lease by unregistered letters—Plaintiff cannot claim damages as he is bound to tender document for defendant's signature nor for non-registration since he could get the letters registered.*

Where plaintiff wrote to defendant terms of the lease which plaintiff accepted and defendant confirmed plaintiff's term by a letter in reply and where the plaintiff claimed damages upon the ground that the defendant had failed to grant him a lease.

Held : that the documents amount to a lease and even if not so, no document being tendered for signature of defendant and defendant not having undertaken to get it registered, defendant was not liable for damages. 9 Bom. 63, *Foll.*

Further inasmuch as the plaintiff himself was entitled and in a position to obtain registration of the lease contained in the two documents, any damage which plaintiff suffered by reason of the non-registration of the said documents would appear to be the result of his own negligence. (*Page, J.*). RAMJOO MAHOMED *v.* HARIDAS MULLICK. **91 I.C. 320=52 Cal. 695=A.I.R. 1925 Cal. 1087.**

DAMAGES—Illegal Attachment

—Conversion.

—The principle for the award of damages in cases of conversion of goods is different from the principle applicable to cases of wrong detainer: 5 I.A. 130 (P.C.), *Foll.* (*Wallace and Srinivasa Ayyangar, JJ.*). SAREDDI *v.* BRAHMAYYA. **115 I.C. 153= 29 M. L. W. 419=A. I. R. 1928 Mad. 1152= 55 M. L. J. 586.**

—Illegal Attachment.

Civil P. C., S. 95—Damages for wrongful attachment, though made in good faith, are recoverable from decree-holder.

The attaching creditor is liable in damages to the person whose property was wrongfully attached even if he has acted honestly. 33 All. 306; A. I. R. 1926 All. 177 and A. I. R. 1925 Nag. 390, *Foll.* (*Johnstone, J.*). MUNSHI RAM v. LACHHI RAM. **112 I. C. 848=A.I.R. 1929 Lah. 200.**

———*Wrongful attachment of stranger's property—Stranger need not prove malice on attaching creditor's part.*

A judgment-creditor is responsible in damages to any person who is not a party to the proceedings and whose property he wrongfully causes to be attached in execution of his decree, without proof of *mala fides*: 17 Cal. 436 (P.C.), *Foll.* (*Sulaiman, J.*). MANGAL CHAND *v.* MT. ZAINAB BIBI. **90 I.C. 266=6 L. R. A. Civ. 595= A. I. R. 1926 All. 177.**

———*Wrong attachment of property—Decree-holder pointing out wrong property for attachment is liable whether he acts honestly or mistakenly.*

Where a decree-holder points out to the bailiff the goods of a wrong person as the goods of the judgment-debtor and the bailiff seizes the goods, the decree-holder is liable to that person for damages even though he may have acted honestly or mistakenly: 17 Cal. 436 (P.C.), *Rel. on.* (*Raza, J.*). RAMJI LAL v. RAM PRASAD. **95 I. C. 443= A. I. R. 1926 Oudh 483.**

———*Attachment before Judgment—Malicious because no reasonable cause for taking it—Sec. 95, C. P. C.—Termination of suit in plaintiff's favour is essential where such termination is possible—Compensation awarded though attachment not completed.*

The plaintiff may be entitled to compensation, even though the attachment was not completed, if, notwithstanding that, he sustained injury by what was actually done.

The absence of reasonable and probable cause for taking legal action in execution or otherwise is, some evidence, from which malice may be inferred.

The termination of the proceedings in the plaintiff's favour, is essential, but this is applicable only to cases in which a distinct termination in favour of one party or other is possible, and not to a case in which the proceedings cannot end by their nature in any judicial disposal. (*Oldfield and Venkatasubba Rao, JJ.*). JOSEPH NICHOLAS *v.* M. R. SIVARAMA IYER. **66 I. C. 760= 15 M. L. W. 442=1922 M. W. N. 242= 45 Mad. 527=30 M. L. T. 269= A. I. R. 1922 Mad. 206.**

DAMAGES—Illegal Seizure.

Illegal Seizure.

—A landlord who seizes or detains the goods of his tenant, because some rent is due and unpaid, acts illegally and is liable for the loss he may cause to the tenant by such unlawful seizure or detention. A landlord has no lien for rent on the goods of his tenant. (*Jwala Prasad, A.C.J. and Das, J.*). BANSIDHAR MARWARI *v.* ANAND DAS.
63 I.C. 44 (Pat.).

—Interest.

———*Trusts Act, S. 88—Person entitled to profits—Difficulty in tracing them—Fixed rate of interest should be allowed in Court's discretion—Rate need not be the current rate—Mesne profits.*

Where a person is entitled to profits and a serious difficulty arises in tracing and apportioning the mesne profits, a fixed rate of interest should be awarded in that case on the value of the property: it will be in the option of the Court either to decree the profits or to decree such interest, which it may deem proper in the circumstances. It need not necessarily be the current rate of interest. (*Misra and Srivastava, JJ.*). AMEER HASAN *v.* MUHAMMAD EJAZ HUSAIN. **117 I.C. 456=6 O.W.N. 51= A.I.R. 1929 Oudh 134.**

———*Interest may be allowed by way of damages.*

Interest can be allowed by way of damages on principles of equity: 20 Mad. 481, *Dist.*; 42 Mad. 661; 31 Bom. 354 and 22 C.W.N. 488, *Foll.* (*Raza and Pullan, JJ.*). MD. ALI MD. KHAN *v.* GUR PRASAD.
105 I.C. 836=4 O.W.N. 1061= A. I. R. 1928 Oudh 89.

—In an action for damages for trespass interest can be allowed as damages. (*Greaves and Mukerji, JJ.*). PANNALAL GHOSE *v.* ADJOI COAL CO.
101 I. C. 62=31 C. W. N. 82= A. I. R. 1927 Cal. 117.

—Liability for.

———*Joint assault entails joint liability for damages.*

Where all the defendants had a common object and proceeded to assault the plaintiff, all of them are responsible for damages resulting from their joint action, although only three out of them took more prominent part than the others and caused injuries to him. (*Niamatullah, J.*). BANSI *v.* HUKAM SINGH. **A. I. R. 1930 All. 216.**

———*Civil suit brought through malice and without reasonable and probable cause—Suit for damages for loss caused lies.*

A suit lies for damages for wrongful interference with the property rights of another by obtaining an order from a Court maliciously and without reasonable and probable cause. (*Pearson, J.*). ALBERT BONNAN *v.* IMPERIAL TOBACCO CO., LTD.
94 I. C. 444=30 C. W. N. 465= A. I. R. 1926 Cal. 757.

———*Civil action taken maliciously and without reasonable and probable cause—Injunction issued in consequence—Loss caused by injunction can be recovered, irrespective of injunction giving an independent cause of action or not.*

Where a suit is brought through malice and without probable and reasonable cause and an injunction is issued by Court as a consequence, loss caused by such injunction can be recovered. Whether the injunction gives an independent cause of action or not the plaintiff can obtain his relief in respect of it as a proceeding forming part of the suit which is itself affected by malice in its entirety. (*Pearson, J.*). ALBERT BONNAN *v.* IMPERIAL TOBACCO CO., LTD. **94 I. C. 444=30 C. W. N. 465= A. I. R. 1926 Cal. 757.**

DAMAGES—Measure of.

———*Person in use and occupation is liable for damages.*

A person not entitled to possession who is in possession is liable for damages for use and occupation: 12 O.C. 140, *Rel. on.* (*Ashworth, J.*). NARAIN SINGH *v.* KAIWAN BAHU. **95 I.C. 957=13 O.L.J. 648= 3 O.W.N. 299=A.I.R. 1926 Oudh 304.**

———*Teacher just like parent can inflict corporal punishment—Punishment to be moderate and reasonable and without malice, etc.—No damages could then be awarded.*

The master as the delegate of the parent may for the purpose of correction inflict moderate and reasonable corporal punishment. Care may no doubt be necessary in this application of this general principle in this country in which this delegated authority may be exercised by persons so dissimilar in status as a schoolmaster and the defendant; and Courts will no doubt not fail to insist on a close scrutiny of the severity of the chastisement inflicted and its justification.

Where the punishment, plaintiff complains of, was such as a parent might expect his child to receive, the conclusion must be that defendant was entitled to inflict it and is not liable because he did so.

If it be administered for the gratification of passion or of rage, or if it be immoderate, and excessive in its nature or degree or if it be protracted beyond the child's powers of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life or limb, in all such cases the punishment is excessive and the violence is unlawful.

The schoolmaster cannot escape liability merely on the ground that chastisement administered to the pupil has not left on the pupil's body any marks of violence or injury. Cases are not uncommon in this country of punishments of extremely grotesque character being indicted involving danger to life or limb of the pupil or resulting in a state of prostration on the part of the pupil and Courts will certainly discountenance resort by the schoolmaster to such barbarous and inhuman forms of correction. (*Oldfield and Venkatasubba Rao, JJ.*). P. SANKUNNI *v.* C.S. VENKATRAMANI. **67 I.C. 514= 15 M.L.W. 501= 1922 M.W.N. 246= 45 Mad. 548=31 M.L.T. 26= A.I.R. 1922 Mad. 200= 42 M. L. J. 460.**

—Limitation

———*Limitation Act, Art. 116—Sale—Vendor's title defective—Claim for damages is governed by Art. 116.*

Claim for damages by a vendee on the ground that his vendor's title is defective is governed by Art. 116. The proper measure of damages is the value of the property at the time of the purchase. (*Rupchand, Ag. J.C.*). SORABJI BILLIMORIA *v.* TARACHAND GHANSHAMDAS. **A. I. R. 1930 Sind 66.**

—Measure of.

———*Encroachment by one of two adjacent colliery owners—Damages equal to price of erecting barrier were given: A. I. R. 1927 Cal. 117, Reversed.*

Where in a suit for damages between two adjacent colliery owners the defendants are found to have wrongfully pierced the margin of coal on the plaintiffs' side of the boundary which would in ordinary course have been left as a barrier the plaintiffs are not bound to wait until any risk emerges, when it might well be too late to construct a barrier and the plaintiffs are entitled to price of the erection of

DAMAGES—Measure of.

an artificial barrier as damages: (*Lord Thankerton*). ADJOI COAL CO., LTD., *v.* PANNA LAL GHOSH.
123 I. C. 726=32 Bom. L. R. 654=34 C. W. N. 483=31 M. L. W. 638=51 C. L. J. 407=A. I. R. 1930 P. C. 113=58 M. L. J. 536.

———*Breach of covenant of title—Market value on date of eviction,*

Held that in a suit for damages for breach of covenant of title the measure of damages is the market value of the land on the date when the plaintiff was evicted by the third party. (*Sulaiman, J.*). MAHOMED SIDDIO *v.* MAHOMED NUH.
124 I. C. 185=1930 A. L. J. 653.

———*Measure of damages against vendee failing to pay portion of purchase money to vendor's creditor is amount of debt with interest.*

Where the vendee fails to pay to the vendor's creditor the portion of purchase money left with him for that purpose, there is a breach and the suit against defaulting promisor is not to make him do something in furtherance of the contract for the time of its performance is passed but is in reality one for damages for the breach of it, the measure of which will be the amount of the debt with interest; 36 Mad. 348 and 3 All. 600 (F.B.), *Rel. on.* (*Das and Fazl Ali, JJ.*). RAM RACHHYA SINGH *v.* RAGHUNATH PRASAD MISSER. **122 I. C. 244=8 Pat. 860=A. I. R. 1930 Pat. 46.**

—The rule as regards damages with regard to persons in fiduciary position is not always different from the rule with regard to other persons: 20 Bom. 633, Foll. (*Wallace and Srinivasa Ayyangar, JJ.*). SAREDDI *v.* BRAHMAYYA. **115 I. C. 153=29 M. L. W. 419=A. I. R. 1928 Mad. 1152=55 M. L. J. 586.**

—Suit for damages for trespass and wrongful removal of underground coal—Coal removed negligently—Market value of coal at pit's mouth less cost of carriage to the bank should be allowed—Value on the day when coal was reduced to possession should be considered. (*Greaves and Mukerji, JJ.*). PANNA LAL GHOSE *v.* ADJOI COAL CO. **101 I. C. 62=31 C. W. N. 82=A. I. R. 1927 Cal. 117.**

———*Plaintiff taking on lease a shop from defendant for his business as Commission Agent—Defendant refusing to give possession.*

Plaintiff took on lease a shop from defendant at a monthly rental and paid him some advance. Subsequently defendant refused to give him possession. Plaintiff sued defendant for damages on the basis of what his earning as Commission Agent would have been for the period for which possession of the shop was not given to him.

Held: that plaintiff's income would depend on his own ability and business capacity as a Commission Agent. Further, as there were two or three similar shops available in the same mandi, and instead of occupying one of these he apparently chose to do no business, it cannot be said that he suffered a loss because of the failure on the part of his lessors to give him possession of the premises leased to him. Under the circumstances he was entitled only to a refund of advance paid by him. (*Shadi Lal. C. J. and Broadway, J.*), NEKI RAM *v.* PARBHU DOYAL. **100 I. C. 662=28 P. L. R. 101=9 L. L. J. 89=A. I. R. 1927 Lah. 844.**

———*Contract of sale of goods—Breach—Re-sale.*

P contracted to sell to D certain goods which P had agreed to purchase from R. The contract under which P sold to D contained an express

DAMAGES—Measure of.

stipulation that all the terms of the contract between R and P should be embodied as part of the contract, between D and P and he was bound under the contract to pay any loss or damages which P could have sustained by reason of D's breach of the contract so far as R was concerned.

Held: that the damages payable by D were only in law what P would be compelled to pay R. If he chose to pay a claim which R could not enforce he cannot claim as against D. If there was a long delay in the sale by R which delay was at P's instance he could get a right of action against D only if it was shown that D by his conduct or by request wanted the time of the contract to be extended. If without reference to D, P asked R to extend the time for the performance of the contract P and not saddle D with any damages, if there was a finding that the delay was not reasonable. (*Kumaraswami Sastri and Venkatasubba Rao, JJ.*). RAMIER AND BRS. *v.* DURVAS J. SUBBIER. **96. I. C. 42=A.I.R. 1927 Mad. 352=50 M.L.J. 264.**

———*Tort-feasor aware even constructively of damages is liable for it—Existing circumstances at date of tort and not subsequent events determine damage.*

In the case of tort as in contract if at the time when it is committed the tort-feasor knows, or as a reasonable person in the circumstances ought to have known that the commission of the tort may reasonably cause damage which would not usually result from the commission of the wrongful act, these damages become and are deemed to be the reasonable and natural consequences of the tort which has been committed. In cases where the damage is fixed and definite, and due to conditions determined at a particular date, the amount of damages is assessed by reference to the then existing circumstances and subsequent changes would not affect the result. In ordinary circumstances Court is to ascertain the value of the goods at the time of the conversion and in case the plaintiff could by going into the market have purchased other goods of the like quality and description, the price at which that would have been done, would be the particular measure of damages. (*Page, J.*). ROGERS PYATT SHELLAC CO. *v.* JOHN KING AND CO. **95 I. C. 1042=53 Cal. 239=A. I. R. 1926 Cal. 564.**

———*Contract Act, S. 74—Debtor failing to pay at the stipulated time—Mortgagee is entitled to damages, measure would be the rate of interest, but Court can reduce the rate.*

The mortgagee is entitled to damages on account of the failure of the debtor to pay the debt at the stipulated time, and the measure of damages would *prima facie* be the rate of interest agreed upon, although the Court has discretion to reduce that rate if it is found to be unusual: A.I.R. 1922 Lah. 254, *Foll.* (*Findlay, J.C.*). CHINKATIA *v.* VITHOBA. **96 I. C. 491=A. I. R. 1926 Nag. 484.**

———*Prospective damages must be granted in case of complete cause of action, but not where the cause of action is not the act but the damage arising therefrom.*

Where plaintiff claimed Rs. 3,000 damages in respect of his having been forcibly dispossessed of certain *sir* fields on the ground that this would have been the net profit he might have obtained from the fields by self-cultivation

DAMAGES—Measure of.

Held: this amounted to a suit for prospective damages and the plaintiff was not entitled to claim in the circumstances of the case, where the cause of action was not over and done with and it was still continuing from day to day even after the suit was filed. When the cause of action is complete it would be most mischievous to say you shall not have all you are entitled to in your first action, but you shall be driven to bring a second, a third or a fourth action for the recovery of your damages. In such a case obviously, prospective damages can be allowed.

A cause of action in respect of which a plaintiff is entitled to have the prospective damages assessed must be distinguished from a continuing cause of action, that is to say, a cause of action which arises from the repetition or continuance of acts or omissions of the same kind as that for which the action has been brought. Similarly, where the damage consequent on an act or omission rather than the act or omission itself is actionable, then, as the action is not maintainable until the damage is sustained, an action will lie every time damage accrues from the act. Prospective damages are not recoverable where the cause of action is not the act, but the damage arising therefrom. (*Findlay, O. J. C.*). YADO *v.* AMBASHANKAR. **92 I.C. 75= A.I.R. 1926 Nag. 260.**

———*Natural causes aiding defendant's acts—Apportionment of damage not possible—Actual damages must be awarded.*

Nominal damages are intended only where the plaintiff has sustained *damnum sine injuria*, that is, where a right of his has been infringed, but not so as to cause any sensible damage. But where the defendants' acts strengthened by other natural causes caused real damage to the plaintiffs, and where no definite portion can be assigned to any of the causes, nominal damages is not the proper relief to be awarded to plaintiff. *Feize* v. *Thompson* (*1* Taunt 121,), *Dist.*; 6 Bom. L. R. 899 and *Fletcher* v. *Smith*, (1876-77) 2 A.C. 781, *Foll.* (*Ramesam, J.*).G. SEETHA RAMA SWAMI *v.* SECY. OF STATE.

91 I.C. 489=21 M.L.W. 449=1925 M.W.N. 352= A. I. R. 1925 Mad. 682.

—Where the period during which the vendors might have delivered the bales of May shipment extended to 31st October ; *Held*, that in assessing damages for non-delivery of bales of May shipment, the market rate of the 1st November might be taken into consideration. (*Sanderson, C.J. and Richardson, J.*). PANNALAL SAGORE MULL *v.* MUKHRAM RADHAKISSEN. **80 I.C. 87=39 C.L.J. 77= A.I.R. 1924 Cal. 637.**

———*Breach of promise of marriage.*

In an action for damages for breach of promise of marriage, plaintiffs are entitled to recover money actually thrown away and also damages to credit and reputation by reason of the refusal. 7 B.H.C. R. 122, *Foll.*; 39 Bom. 682, 714, *Not Foll.* (*Schwobe, C.J.*). KANDASWAMY NAIDU *v.* KANNIAH NAIDU.

78 I.C. 573=1924 M.W.N. 373=20 M.L.W. 60= A.I.R. 1924 Mad. 692 (a)=46 M.L.J. 366.

—Damages for infringement of Copyright is the amount of the proceeds of the sale of the offending work and general damages for infringement. (*Le Rossignol and Campbell, JJ.*), MESSRS. KHOSLA BROS. OF LAHORE *v.* THACKER'S DIRECTORIES, LTD. **67 I. C. 983.**

———*Contract Act, S. 73—Agreement to convey certain number of well sites—Suit for damages for breach of contract for failure to convey—Measure is difference between contract price and market price on day of breach.*

DAMAGES—Special damage.

Where defendant agrees to convey certain well-sites to plaintiff but fails to convey the same a suit for compensation for the breach of contract is governed by S. 73 and the measure of damages will be the difference in the contract price and the market price on the day of the breach. (*McCall, A. J. C.*). MAUNG MO HNAUNG *v.* MA SHWE MYA. **4 U. B. R. 35=4 U. B. R. 38= U. B. R. 41=A. I. R. 1921 U. B. 16.**

———*Breach of contract for delivery—Market rate—Rates in other markets are irrelevant*—Bona fide *rate in the same market is a guide.*

Of the market rate in a particular place of any day, actual *bona fide* or ready sales on that day are the best evidence. The rates in a different market which was not accessible in time on the day of delivery are of little use ; still less the costs of production. For trade purposes the rate of another quality of goods which would be a nearest substitute for the quaiity in question is no basis. (*Madgavkar, A. J. C.*). GOWARDHANDAS *v.* RAWJI HIRJI & CO. **76 I. C. 62=18 S. L. R. 320= A. I. R. 1921 Sind 22 (d).**

—Negligence.

———*Negligence causing injury—Expenses, pain and loss of income are to be considered.*

There are three items to be considered. (1) Expenses (2) Pain and suffering (3) Loss of income where plaintiff has suffered injury owing to negligence of defendant. (*Crump, J.*). VISHNU DIGAMBAR *v.* B. B. & C. I. RY. **85 I. C. 416= 25 Bom. L. R. 881=A. I. R. 1924 Bom. 278.**

—Railway Company.

———*Breach of contract—Railway Company entrusted with goods to be carried—Route not fixed—No delay in delivery—Railway is free to carry goods by any route.*

Where there was no contract on behalf of the Railway Company that they would carry the goods by any particular route and there was nothing except the name of the place of despatch and the name of the place of consignment contained in the contract between the parties concerned.

Held : so long as the goods were delivered at the place of consignment and so long as they were delivered in due course, *i.e.*, within a reasonable time, it mattered not to the plaintiffs or to any one else by what particular route the goods may have been, for the convenience of the Railway Company, despatched by the carriers. (*Bucknill, J.*). M. & S. M. RY. *v.* FIRM GOPAL RAI RAMCHUNDER. **94 I. C. 510= 1926 P.H.C.C. 123= A.I.R. 1926 Pat. 273.**

—Special damage.

———*Very great inconvenience constitutes—C.B.C. S.* 91.

Where the plaintiff would, every day and every hour of the day when he desired to leave his house by the entrance on a particular side, be compelled to go the other way and travel at least 3 or 4 times as far and 3 or 4 times as fast if he were pressed for time.

Held : that that would amount to special damage or a more particular form of nuisance suffered by him than by the general public. The Court ought to consider, even although a particular form of nuisance is not capable of being translated into rupees and annas, whether it is a substantial grievance which constitutes a wrong peculiar to the plaintiff which

DAMAGES—Tort

in the ordinary way Court of justice would remove by granting an injunction. (*Walsh, Ag. C. J. and Ryves, J.*). MD. RAZAKHAN *v.* MD. ASKAR KHAN. **85 I.C. 304= 46 All. 470=22 A.L. J. 729= 6 L. R. A. Civ. 67=A. I. R. 1924 All. 599.**

—Tort

———*Malicious prosecution—Damages can be awarded separately for arrest and prosecution.*

In a suit for damages for malicious prosecution it is competent to award damages under two heads, *viz.*, a malicious arrest and malicious prosecution. (*Jai Lal, J.*). NURKHAN *v.* JIWAN DAS. **99 I.C. 638=A.I.R. 1927 Lah. 120.**

—In a libel suit no rule can be laid down for measuring damages. Each case must depend upon its own particular facts. (*Fforde and Campbell, JJ.*). KAIRUDDIN *v.* TARA SINGH. **99 I.C. 300= 7 Lah. 491=27 P.L.R. 812=A.I.R. 1927 Lah. 20.**

———*Wrongful arrest—Decree against the estate of the deceased—Wrong order by the Court to arrest the heir in execution—Arrest in execution—Decree-holder is liable.*

A money-decree was passed against the estate of a deceased person in hands of his heirs. On an application made to execute the decree the Court directed execution to issue against defendant No. 1 (present plaintiff, one of the heirs). In execution the plaintiff (defendant No. 1) was arrested under order obtained from the Deputy Registrar and brought before the Registrar of the Court who made the following order: 'Decree against the estate of the deceased. No execution by arrest should have been issued against the first defendant's person. Warrant of arrest was bad and illegal and not justified by the tenor of the decree'. Accordingly the defendant was released. In an action for damages for wrongful arrest:

Held: that the plaintiff was entitled to damages for wrongful arrest. The decree entitled the defendants to execute it against the property of the deceased in the hands of defendant No. 1 and they must be taken to have been aware when they applied for the arrest of the plaintiff that such conduct was not justified. (*Macleod, C.J., Kajiji and Kemp, JJ.*). VELJI BHIMSEY AND CO. *v.* BACHOO BHAIDAS. **87 I.C. 199=48 Bom. 691=26 Bom. L.R. 349= A.I.R. 1925 Bom. 118.**

—A person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does so and does not succeed in confining it to his own property, he is answerable for all the damage which is the natural consequence of its escape though the escape may not be due to any fault or negligence on his part. But there is absolutely no logic in making a person liable in damages for causing an alleged injury to a thing which from its nature is incapable of sustaining such injury. (*Kinkhede, A.J.C.*). GOPALA BEGUM *v.* DAMA BABU. **78 I.C. 656= A. I. R. 1924 Nag. 229.**

———*Overflow of rain water—Washing away of land on the bank of a water course.*

An owner of property as also his neighbours are entitled to protect themselves against water which they have not brought on their lands of their own accord and they can divert that water to protect themselves from damage. The owners on the banks of a *nala* by erecting dams passed the whole water into the *nala* and in consequence of that combined

DAMAGES—Trespass.

water the land of the plaintiff, was damaged. In a suit by plaintiff it was held that he had no cause of action against the defendant who was owner of the lands on the opposite banks of the *nala*. (*Macleod, C.J. and Heaton, J.*). SHIDRAMAPPA *v.* MAHOMED YUSUF. **59 I.C. 391=22 Bom. L.R. 1107.**

—Trespass.

—An act of wrongful possession is an act of trespass which gives rise to a cause of action to a suit for damages in tort. (*Kinkhede, A.J.C.*). NAGO *v.* MULTANMAL. **97 I. C. 1028=A.I.R. 1927 Nag. 9.**

———*Minimum damages are amount for which owner would have reasonably let the land to the trespasser—Additional amount may be awarded according to the animus accompanying the wrong.*

When a wilful trespasser uses land of another without the permission of the owner, the damages to be awarded to the latter ought in no case to be less than the amount which, taking all circumstances into consideration, a careful and reasonable landlord would have consented to let the land for, or less than the amount which the trespasser would have had to pay as the result of reasonable negotiations for such use or occupation of the land. In addition to this minimum, the owner of the land has a right to an additional amount to be determined by the animus with which the wrong was committed by the trespasser; but the Court in determining this additional amount would consider whether the owner by his conduct did his best to prevent the wrong or he merely looked on and encouraged the wrong hoping to recover damages. *Williams* v. *Corrie* I. C. B. R. 841 and *Jagan* v. *Vivian*, 6 C. App. 742, *Applied*. (*Sreenivasa Aiyangar, J.*). RAMASAMI NAYAKAR *v.* MEENAKSHISUNDARAM CHETTIAR. **85 I.C. 268= 20 M.L.W. 836=A.I.R. 1925 Mad. 222= 47 M.L.J. 922.**

———*Items of damages must be proved and not guessed.*

In a suit for damages against a trespasser all items of damages should be proved. (*Dalal, J. C.*). SAHDEO *v.* RAGHUBAR. **81 I. C. 573= A. I. R. 1925 Oudh 142.**

———*Trespasser* bona fide *working mine—He is entitled to his expenses for severing coal and bringing it to bank.*

Obiter: Where a trespasser acts under a *bona fide* belief that he has a title to the coal, all that he is entitled to claim is that, in assessing damages the Court should not act harshly towards him and that he ought to be allowed the expense of severing the coal as well as bringing it to bank. (*Das and Macpherson, JJ.*). SHASHI BHUSAN BANERJI *v.* RAMJAS AGARWALA. **83 I.C. 205=3 Pat. 85= A.I.R. 1924 Pat. 02.**

———*Plaintiff is at least entitled to nominal damages—Principles of assessing damages are different in Contract and Tort.*

Damages for trespass are at large but at least the plaintiff is entitled in every case to nominal damages. If a defendant makes a *bona fide* mistake, a Court ought to be content to award nominal damages but if a defendant takes a risk which he knows to be a risk and persists in fighting when he knows or ought to know that he is wrong, his conduct ought to be measured in some way by the special damages which the Court is entitled to award. The measure of damages in contract is quite different to that in tort. In contract the plaintiff can only recover the actual pecuniary loss. In tort he is entitled to special damages for tres-

DAMAGES—Miscellaneous.

pass to property. (*Walsh and Ryves, JJ.*). SOHA LAL *v.* AMBA PRASAD. **69 I.C. 685= 20 A.L.J. 888=A.I.R. 1922 All. 526.**

—Miscellaneous

———*There is no preliminary decree in suits for damages.*

A preliminary decree which is followed by a final decree is unheard of in suits for breach of contract claiming damages. (*Fforde and Agha Haidar, JJ.*). BEGG SUTHERLAND AND CO. *v.* BAHADUR CHAND. **110 I.C. 177=A.I.R. 1928 Lah. 841.**

———*Measure of damages is not interfered with unless clearly wrong.*

Measure of damages fixed by the lower Court in India will not be interfered with unless the measure is very clearly wrong. (*Viscount Dunedin*). THOMAS CHARLES WILLIAMS SKIPP *v.* LILIAN MILDRED KELLEY. **94 I.C. 331= 1926 M.W.N. 382=3 O.W.N. 453= 28 Bom. L.R. 873=43 C.L.J. 430=24 M.L.W. 18= 30 C.W.N. 841=A.I.R. 1926 P.C. 27= 50 M.L.J. 498.**

———*Cannot be awarded in excess of Court's pecuniary jurisdiction.*

A Court cannot award damages in excess of its pecuniary jurisdiction. (*Newbould and Graham, JJ.*). NABIN CHANDRA *v.* ABDUL GAFUR. **91 I.C. 436= A.I.R. 1926 Cal. 596.**

—Damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act of a wrong-doer cannot be regarded as too remote. As in contracts special damages, which the parties at the time when the contract was first entered into contemplated might result if a breach of the contract was committed, become reasonable and natural in the circumstances relating to that particular contract, so in the case of tort, if, at the time when it is committed the tort-feasor knows, or as a reasonable person in the circumstances ought to have known, that the commission of the tort may reasonably cause damages which would not usually result from the commission of the wrongful act, these damages become, and are deemed to be, the reasonable and natural consequences of the tort which has been committed. (*Page, J.*). SUNDERMULL *v.* LADHURAM KALURAM. **83 I.C. 757=50 Cal. 667= A.I.R. 1924 Cal. 240.**

———*High Court will not interfere with lower Court's decision except on a question of principle.*

On a question of quantum of damages, it is not the practice of the High Court to interfere with the decision of the Court of first instance, except on a question of principle. (*Das and Ross, JJ.*). BISSESWAR LAL HABEBASIA *v.* RUP KISHORE CHOUBEY. **62 I.C. 72=2 P.L.T. 255= A.I.R. 1921 Pat. 341.**

———*Injured party is not bound to spend money for possible advantage to tort-feasor though he must act reasonably.*

Even those who have been wronged must act reasonably however wide the latitude and discretion that is allowed to them within the bounds of reason, but how can a wrong-doer be heard to complain that the person injured has not laid out money for the wrong-doer's benefit, and in order to minimize the damages which he is liable to pay by reason of the tort which he has committed? There is no ground in reason or in equity why the injured party should incur expenditure, or invest money which otherwise he might employ for his own benefit in order that a possible advantage thereby may accrue to the wrong-doer. He is not bound to enter into such a contract which may be either to his advantage or to his detriment according as the market may rise or fall. (*Page, J.*). ROGERS PYATT SHELLAC CO. *v.* JOHN KING & CO. **95 I.C. 1042= 53 Cal. 239=A.I.R. 1926 Cal. 564.**

DEBTOR AND CREDITOR—Combination of Capacities

DAMDUPAT.
See (1) CONTRACT ACT, S. 74.
(2) C. P. CODE, S. 34 AND O. 34, Rr. 2, 4 AND 5.
(3). INTEREST.

DANCING GIRL.
See (1) HINDU LAW.
(2) PENAL CODE, Ss. 372, 373.

DANDIDARI.
See LAND TENURE.

DARPATNI.
See PATNI REGULATION.

DASI.
See HINDU LAW—SUCCESSION.

DASIPUTRA.
See HINDU LAW.

DATTA HOMA.
See HINDU LAW—ADOPTION—CEREMONIES.

DATTAK MIMAMSA.
See HINDU LAW—TEXTS.

DAYABHAG.
See HINDU LAW—TEXTS.

DAYA VIBHAG.
See HINDU LAW—TEXTS.

DEADLY WEAPON.
See PENAL CODE, Ss. 148, 302 & etc.

DEAD PERSON—Decree against.
See CIV. PRO. CODE, O. 22.

DEAF AND DUMB.
See (1) CRIMINAL P. C., S. 341.
(2) EVIDENCE ACT, S. 119.
(3) HINDU LAW.

DEATH-BED GIFT.
See MAHOMEDAN LAW.

DEATH-ILLNESS.
See MAHOMEDAN LAW.

DEATH OF PARTY.
See CIV. PRO. CODE, O. 22, R. 6.

DEATH REGISTER.
See EVIDENCE ACT, S. 74.

DEBT.
See (1) C.P. CODE, O. 21, Rr. 4 & 46.
(2) CONTRACT ACT, Ss. 59 & 60.
(3) DEBTOR AND CREDITOR.
(4) HINDU LAW.
(5) T.P. ACT, S. 58.

DEBTOR AND CREDITOR.

—Charge on Property.

———*Creditor has no charge over property purchased with money advanced—T.P. Act, S. 100.*

There is no law applicable to India by which a creditor, who has advanced money, is entitled to a charge over the property acquired with the money advanced. 16 Bom. L.R. 733, *Dist.* (*Walsh and Mukerji, JJ.*). ANNAPURNA CO., LTD., *In the matter of.* **93 I.C. 93=24 A.L.J. 347= A.I.R. 1926 All. 397.**

—Combination of Capacities.

———*A person advancing money to himself as manager of family—Factum, time and purpose must be strictly proved.*

In a suit for recovery of loans advanced by a person to himself as manager of a family the fact that such loans were advanced, and the time when

DEBTOR AND CREDITOR—Costs of Collection.

and purpose for which they were advanced, must, generally speaking, be proved satisfactorily. (*Srinivasa Aiyangar and Curgenven, JJ.*). AMMALU AMMA *v.* NARAYANAN NAIR. **111 I.C. 210= 51 Mad. 549=29 M.L.W. 460= A.I.R. 1928 Mad. 509 (a).**

—Costs of Collection.

———*Creditor sending men to debtor's house to recover debt—Debtor is not liable for the cost of such men.*

If a creditor sends his men to collect the outstanding due to him he is not entitled to charge the debtor with costs of sending men to the debtor's place. (*Devadas, J.*). KRISHNAYYA *v.* NOOKAYYA. **109 I.C. 649=A.I.R. 1928 Mad. 476 (1).**

—Landlord and Tenant.

———*Contract Act, S.* 60—*Advance amount paid by tenant to landlord—Landlord is entitled to appropriate same towards rent due though suit for rent due is barred by limitation.*

When an advance amount is paid by the tenant to the landlord under a stipulation that the same is to be applied towards the last year's rent due under the tenancy the landlord is entitled to appropriate the same towards the rent due for the instalments due for the final year, though a suit for rent due in respect of such instalments might be barred by limitation. *Waller* v. *Lacy*, 1 Man. & G. 54, *Dist.* (*Anantakrishna Ayyar, J.*). KRISHNASAMI IYER *v.* NATESA IYER. **A.I.R. 1930 Mad. 594 (a).**

—Master and Servant.

———*Workman's Breach of Contract Act* (XIII *of* 1859).

A provision by which the advance to the workman is to be repaid by periodical deductions from the amount of his wages and should in any case be worked out by him does not simply create a relation of debtor and creditor but does create relation of master and servant. 13 Bom. L. R. 548 and 1 Weir 681, *Dist.* (*Oldfield and Hughes, JJ.*). SOMANNA *v.* CHELLAPATHI RAO. **60 I.C. 52=44 Mad. 53= 22 Cr.L.J. 196=A.I.R. 1921 Mad. 618 (b).**

—Mortgage.

———*Person authorised to deal with property by Letters of Administration and also by powers-of-attorney from heirs—He mortgaging property—Creditor need not enquire into application of money borrowed.*

A person had authority to deal with certain property by Letters of Administration and powers-of-attorney from the heirs. He mortgaged the property but the creditor did not enquire with regard to the disposal of the money borrowed.

Held: that there was no need for the creditor to make enquiries with regard to the disposal of money. A man with such authority may be dealt with safely, provided he keeps within limits of the authority. If every man who does business with an attorney had to go beyond the four corners of the power-of-attorney and had to enquire into the destination of the money which he lent and so on, ordinary business would be impossible. The special rules applying to the *karta* of a joint Hindu family do not apply to people acting under powers-of-attorney. (*Das and Baguley, JJ.*). N.N. CHETTIAR *v.* TAN MA PU. **112 I.C. 261=6 Rang. 411= A.I.R. 1929 Rang. 5 (c).**

———*Payment of mortgage-money by mortgagee in breach of express conditions in the deed for making such a payment will not be binding on the mortgagor.*

Where a mortgage bond expressly provided that the mortgagee was not to deposit a sum of money

DEBTOR AND CREDITOR—Payment of Debt.

raised on the bond in Court until a specified event did not happen and also stated that the mortgagor would not be liable for such amount if the condition was broken, and the mortgagee paid the sum into Court to the credit of the mortgagor in breach of the conditions of the bond, and it was then attached by some creditors of the mortgagor.

Held: that the mortgagor is entitled to hold the mortgagee to the terms of the agreement and so is not liable to make good the amount, so paid into Court contrary to the agreement. (*Das and Allanson, JJ.*). RAMKRIPAL DAS *v.* RAJENDRA SINGH. **103 I.C. 884=A.I.R. 1927 Pat. 388.**

—Payment of Debt.

———*Arbitration—Rights of parties—Award directing payment of money—Party directed to pay is bound to seek other party and offer payment.*

There is no law prohibiting a party from discharging the obligations imposed on him by the award until the passing of the decree in accordance with it. On the other hand, it is settled law that if the award directs payment of money to a particular person, at a particular time, the party, who is to make the payment, is bound to seek out the other party and to offer payment to him at the appointed time, and if he fails in this, he does so at his own risk. (*Tekchand and Dulip Singh, JJ.*). J. KAIKABAD *v.* F. KHAMBATTA. **124 I.C. 339= A.I.R. 1930 Lah. 26 (f).**

———*Contract Act, S.* 49—*No specific contract—Payment must be made at creditor's place.*

Where no specific contract exists as to the place where the payment of the debt is to be made it is the duty of the debtor to make the payment where the creditor is: A. I. R. 1927 P. C. 156, *Foll.* (*Macnair, A. J. C.*). RAMCHANDRA TEJMAL *v.* MOHANLAL. **121 I.C. 668=13 N.L.J. 4= A.I.R. 1930 Nag. 207 (c).**

———*Civil P. C., S.* 20—*Price of goods or debt must be paid at seller's or lender's residence.*

Ordinarily, money is borrowed, the repayment of the money must be presumed to have been agreed to be made at the place of residence of the lender: A. I. R. 1926 All. 477 and A. I. R. 1925 Lah. 555, *Rel. on.* (*Addison, J.*). HARDIAL HARGOPAL *v.* BATHAL DAS CHHANGAN LAL. **118 I.C. 898= A.I.R. 1929 Lah. 868 (1).**

———*Debtor paying debt to a person other than creditor—Onus is on debtor to prove that the person was authorised by the creditor to receive payment.*

It is elementary law that when a creditor sues the debtor for the payment of a debt and the defence is that the debtor paid the debt to another person it is for the debtor to prove that the other person had or had been held out to the debtor by the creditor as having had the authority of the creditor to receive payment of the debt on behalf of the creditor. (*Sir John Edge*). MD. KHALEEF SHIRAZI AND SONS *v.* TANNERIES LYONNAISES. **94 I.C. 767=49 Mad. 435=53 I.A. 84= 3 O.W.N. 568=1926 M.W.N. 495= 24 M.L.W. 115=44 C.L.J. 67= 28 Bom. L.R. 1391=31 C.W.N. 1= A.I.R. 1926 P.C. 34=51 M.L.J. 570.**

———*A issuing cheque in favour of B on C—C crediting the amount in B's account and debiting to A's account—A will be deemed to have paid money to B, as soon as entry is made.*

Where A issues in favour of B a negotiable cheque on C, and C credits the amount of the cheque in B's account and debits to A's account, the

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moment these adjustments are made in C's account books, A is absolved from his liability to B for the cheque amount. (*Hallifax, A.J. C.*). NARAYANDAS *v.* PANDURANG. **93 I.C. 212=9 N.L.J. 1= A.I.R. 1926 Nag. 359.**

———*Every debt implies a promise to repay.*

Every loan carries with it an implied promise, to repay it, even though no express promise written or verbal, is made to repay it. (*Wadegaonkar, A.J. C.*). TAPIRAM *v.* JUGALKISHORE. **92 I.C. 305= 21 N.L.R. 169= A.I.R. 1926 Nag. 209 (b).**

—Want of consideration.

———*Evidence Act, S.* 102—*Debtors major literate and rich businessmen — Creditor not professional money-lender—Execution admitted—Onus to prove want of consideration lies on debtors.*

Debtors were majors and literate having a fair knowledge of English and claiming to be businessmen possessed of large property. They were neither "expectant heirs" nor had just come of age. The creditor had not been proved to be a professional money-lender and the execution of the pro-notes in question was admitted.

Held: that the onus to prove want of consideration should be placed on them: 25 Bom. 367, *Dist.* (*Tek Chand and Hilton, JJ.*). DIN MOHAMMAD *v.* BADRI NATH. **120 I.C. 417=11 L.L.J.511= A.I.R. 1930 Lah. 65 (a).**

DEBTS AND JOINT FAMILY BUSINESS.

See HINDU LAW.

DEBTS FOR IMMORAL PURPOSES.

See HINDU LAW—ALIENATION.

DEBUTTAR PROPERTY.

See HINDU LAW—RELIGIOUS ENDOWMENT.

DECEASED BROTHER'S WIDOW'S MARRIAGE ACT (1921, 11 & 12 Geo. V., Ch. 24).

—Retrospective Effect.

———*Deceased Wife's Sister's Marriage Act* (1907, 7, *Edw. VII, Ch.* 47)—*Effect in India—Act is retrospective and is to be allowed in Courts in India.*

An intervening marriage could not do away with the cansonical bar of affinity which existed by both the Statute Law of England and that of the English Church in 1920 between a lady and her deceased husband's brother; the Act of 1921 read with the Act of 1907, is retrospective in effect so far as it declares that, in English law, the marriage between a man and his deceased brother's widow, whenever and wherever they took place, should not be regarded as illegal simply on the ground of that peculiar affinity. The true test as to whether a particular marriage ought to be regarded as a valid marriage (where a question of affinity arises) is to apply to the case the personal law of the community (*i.e.*, the religious community) to which the parties concerned belong, after the passage in England of the Act of 1907. (*Bucknill, J.*). ADELAIDE CHRISTIANA LISH *v.* DAVID LISH. **83 I.C. 951= 1924 P.H.C.C. 138=2 Pat. L.R. 125= 6 P.L.T. 303=A.I.R. 1924 Pat. 624 (b).**

DECENNIAL SETTLEMENT REGULATION (Ben. Reg. 8 of 1793).

—Enhancement of Rent.

———*Landlord and Tenant—Rent fixed in perpetuity cannot be enhanced.*

No doubt a suit to enhance rent proceeds on the presumption that a zemindar holding under the Permanent Settlement has the right from time to time to raise the rents of all the rent-paying lands within his zemindari according to the *paraganah* or current rates unless either he is precluded from

DECENNIAL SETTLEMENT REG. (1793).—S. 5 —Enhancement of rent.

the exercise of that right by a contract binding on him or the lands in question can be brought within one of the exemptions recognised by Reg. VIII of 1793. Consequently in each case the nature of the tenure and the conditions under which it is held is the primary question to be determined. Where the grants show that the rate of rent was fixed in perpetuity, it is unnecessary to rely upon the doctrine that fixity of rent may be presumed from uniformity of rent for a long series of years. (*Mookerji and Chotzner, JJ.*). ABINAS CHANDRA DAS *v.* MAJUB ALI CHOWDHURY. **70 I.C. 273= 27 C.W.N. 328=36 C.L.J. 196= A.I.R. 1922 Cal. 461 (2) (a).**

———*Proprietors of land—Settlement does not decide question of title.*

The words "proprietor of land" as used both in the Bengal Code of 1793, and in the Madras Code of 1802, have a technical signification. They refer to zemindars, independent talookdars and others who pay the revenue assessed upon their estates immediately to Government. It would not be correct to say that any question of title was decided as the result of permanent settlement. A settlement with a person under the Bengal system does not establish in the person settled with a right to the land if he did not already possess it; but a settlement is an arrangement made by that person with the Government with respect to the revenue only. Consequently the fact of settlement with a person under the regulations does not conclude the question of proprietorship as between that person and the true proprietor. Thus, both as regards the rights of the ryots, and as regards the claims of other persons to be settled with, the rights of the actual possessor are subject to question, and are not concluded or rendered absolute by the fact of settlement.

The Pitiz Chiefs were held "actual proprietors of the lands" within the meaning of S. 5 of Regn. 8 of 1793 and that although they had lost the right to claim separation from Ramgarh and for that reason must be considered as dependent talukdars, they are still the actual proprietors of the lands and cannot be considered as leaseholders: 21 W. R. 358 (P.C.), *Foll.*; 17 W. R. 41 (P.C.), *Ref.*; *Jugodi's case* (A. I. R. 1926 Pat. 369), *Diss. from.* (*Das and Adami, JJ.*). KAMAKHAYA NARAIN SINGH *v.* BHUVANESHWAR LAL SINGH. **115 I.C. 204= 7 Pat. 594=A.I.R. 1928 Pat. 516 (a).**

—S. 4—Dowls after confiscation.

—The fact that dowls were taken from the holders of the taluks after the confiscation does not make the taluks independent, if in point of fact at the Decennial Settlement or in pursuance of the Regulation relating thereto separate engagements had not been made in respect of them. (*Greaves and Mukerji, JJ.*). BIRINDRA KISHORE *v.* DURGASUNDAR. **98 I.C. 211=A.I.R. 1927 Cal. 136 (b).**

—S. 5—Enhancement of rent.

———*Rent of Taluks held long before Zemindari is not liable to be enhanced.*

The owner of taluks which were formed long before the zemindari, comes within the description of a taluqdar in S. 5 (3) of Regulation VIII of 1793 which was not repealed when the zemindari was created. The rent of such a taluq cannot therefore be enhanced. 22 C. 214 (P.C.), *Foll.* (*Newbould and B.B. Ghose, JJ.*). BIRENDRA KISHORE MANIKYA BAHADUR *v.* ALI AHMAD. **84 I.C. 86= 39 C.L.J. 605=A.I.R. 1924 Cal. 1015 (c).**

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DECENNIAL SETTLEMENT REGULATION (1793) —S. 5—Taluqdar.

—S. 5—Taluqdar.

———*Construction—Talukdar may be actual proprietor or merely a lease-holder.*

It appears from Cls. 5 and 7 that a taluqdar may be the actual proprietor of the land, or he may be a lease-holder only, and he is the latter if the taluk is held under a writing in sanad from a zemindar which does not expressly transfer the property in the soil, but only entitles the talukdar to possession so long as he continues to discharge the rent or perform the conditions stipulated therein. (*Sir Lancleot Sanderson*). RAJAH BEJOY SINGH *v.* SURENDRA NARAYAN. **111 I.C. 345=56 Cal. 1=55 I.A. 320=48 C.L.J. 268=26 A.L.J. 1233=33 C.W.N. 7=28 M.L.W. 855=1928 M.W.N. 841=10 P.L.T. 66=A.I.R. 1928 P.C. 234 (b)=55 M.L.J. 456.**

———*No separation of jama—Presumption is against his being an independent talukdar.*

Where a *talukdar* is shown to have taken no steps under the Regulation to obtain separation of his jama, the presumption would be that he was not an independent *talukdar* under S. 5 of the Regulation. (*Mr. Ameer Ali*). SRINATH RAY *v.* P. UDAI NATH. **82 I.C. 879=28 C.W.N. 145=33 M.L.T. 408=1923 M.W.N. 702=A.I.R. 1923 P.C. 217 (b).**

—S. 7—Taluqdars.

———*Taluqdars holding taluqs under writing have no right to subsoil.*

Taluqdars where taluqs are held under writings or sanads are leaseholders only and as such they have no mineral rights in the land. It is the zemindar who has the entire rights to minerals. (*Das and Wort, JJ.*). GOPI RAM *v.* JAGARNATH. **A.I.R. 1929 Pat. 685 (d).**

DECISIONS.

See PRACTICE—PRECEDENTS.

DECLARATION.

See SPECIFIC RELIEF ACT, S. 42.

DECLARATION OF TRUST.

See (1) HINDU LAW—RELIGIOUS ENDOWMENT.
(2) MAHOMEDAN LAW (WAKF).
(3) TRUST.
(4) TRUSTS ACT.

DECLARATORY DECREE.

See (1) EXECUTION.
(2) SPECIFIC RELIEF ACT, S. 42.

DECLARATORY RELIEF.

See SPECIFIC RELIEF ACT, S. 42.

DECLARATORY SUIT.

See SPECIFIC RELIEF ACT, Ss. 4, 42.

DECREE

See also (1) CIVIL P. C., SS. 2 (2), 47, 96, 152 and O. 9, R. 13.
(2) EXECUTION.
Amendment of—*See* CIVIL P.C., S. 152.
Assignment.
Compromise Decree—*See* **Compromise Decree.**
Construction.
Date of.
Effect of.
Executability.
Execution.
Ex-parte.
Finality of.
Form of.
Fraud.
Minor.
Setting Aside.
Validity of.

DECREE—Construction—Compromise Decree. —Assignment.

———*Contract Act, S. 25—Assignment can be made—Judgment-debtor becoming insolvent.*

Assignment of decree is valid notwithstanding that judgment-debtor has become insolvent. 43 C. 999, *Dist.* (*Krishnan, J.*). K.S. KRISHNA AIYAR *v.* NYNADIKKAM PILLAI. **82 I.C.78=20 M.L.W. 328=1924 M.W.N. 693=A.I.R. 1924 Mad. 801 (b).**

—Construction.

Compromise Decree.
Conditional Decree.
Costs.
Declaratory Decree.
Instalment Decree.
Interest on.
Mesne Profits.
Mortgage Decree.
Partition.
Personal Liability.
Reference to Judgment & Pleadings.
Rules of.
Settlement Court.
Vagueness.
Miscellaneous.

—Construction—Compromise Decree.

———*Consent decree providing each party to bear its costs but not stating that previous interlocutory orders for costs should be superseded—It cannot supersede them.*

A decree by consent, one of the terms of which is that each party should bear its own costs, cannot supersede previous interlocutory orders for costs passed during the course of the suit, if the decree does not specifically state that they should be so superseded: *Beynon & Co.* v. *Godden & Son*, (1878) 4 *Ex. Div.* 246 and *British Natural Premium Provident Association* v. *Bywater*, (1897) 2 Ch. 531, *Rel. on.* (*Lort Williams, J.*). KEDARNATH BHUTRA *v.* JOHORMULL BHUTRA. **57 Cal. 469=A.I.R. 1930 Cal. 465 (a).**

———*Contract Act, S. 73—Compromise decree providing for injunction preventing sellers-defendants from selling goods to third parties and providing for damages in case of breach—Defendants making breach and paying damages as per compromise— Decree cannot be said as satisfied—Decree—Construction.*

On the 1st March, 1916 the respondents contracted with the appellants for the purchase of 38,000 tons of their manganese ore by instalments over an extended period. The contract contained provisions to secure to the buyers the exclusive supply of the seller's ore till the contract quantity had been worked out. In 1921 the buyers commenced a suit alleging deliveries of ore by the defendants to third parties in breach of the contract. During pendency of the suit the parties arrived at an agreement of compromise, and the terms were embodied in a compromise decree dated 28th February, 1922. Cl. 2 of the decree restrained the defendants from selling the ore from mines mentioned in the agreement of the 1st March, 1916 or alienating the mines themselves till they have delivered the whole remaining balance. Cl. 10 provided "that in the event of the defendants failing to deliver the full quantity of 4,000 tons of ore of the stipulated grade in any particular year or violating any of the conditions of this compromise, the defendants shall pay to plaintiffs damages at the rate of Re. 1 (rupee one) per ton on the whole of the quantity which may then have remained undelivered out of the total quantity of 31,234 tons and the same shall be recovered by execution of this decree." A breach occurred and the

DECREE—Construction—Compromise Decree.

defendants presented an application for leave to deposit Rs. 28,649-2-9 to be paid over to the decree-holders, and for an order declaring the decree to have been thus fully satisfied. The decree-holders applied for execution of their decree by seizure and delivery to them of certain manganese ore, alleged to be lying at several mines and railway sidings, and by the appointment of a receiver and other relief. The trial Court granted application of defendants judgment-debtors and held that the decree-holders were not entitled to the relief prayed but must take in satisfaction the amount deposited by the judgment-debtors. This decision was affirmed in appeal. On appeal to Privy Council,

Held: that Cl. 10 did not enable the judgment-debtors to render nugatory all their obligations under the prior part of the contract, whenever it suited their pockets to do so. It provided that they shall pay at the specified rate, if they fail to perform the contract in any respect, but it did not say that such payment was to be a full and exclusive satisfaction of all obligations under the contract. The payment into Court did not make the decree a satisfied decree. It provided a mode of enforcing such payment but it did not say that the other terms would not be enforced by execution of the decree, namely, by applying to the Court to enforce the injunction. (*Viscount Sumner, Lord Sinha, Sir John Wallis and Sir Lancelot Sanderson*). SIR BISSESSAR DASS DAGA *v.* EMMANUEL VAS. **107 I.C. 25=47 C.L.J. 162=30 Bom.L.R. 243=55 Cal. 238=32 C.W.N. 509=55 I.A. 58=27 M.L.W. 655=26 A.L.J. 667=24 N.L.R. 17=1928 M.W.N. 951=A.I.R. 1928 P.C. 27=54 M. L. J. 122.**

———*Trust created with properties belonging to the persons absolutely—Surviving trustee cannot appoint successor in absence of express power.*

There is no authority for the proposition that in cases where two or more persons create a trust with properties belonging to each absolutely, the surviving trustee has the right to appoint trustee in the absence of any express power conferred on him. The general rule is that the heirs of the founder or founders have such a right.

U and *R* were brothers and succeeded to certain properties as reversioners. *R* filed a suit against *U* for partition and a compromise decree was passed. By the compromise decree certain properties were set apart for the performance of religious trusts. *U* was constituted, by the rajinama decree, the trustee, but as he was old and blind, his son was allowed to be in actual management of the trust properties and to perform the trust. The rajinama decree provided that if there was default in performing the duties, then *R* would have the right to get possession of all the immovable and moveable properties in execution. He was given the right also to collect the produce thereof, pay the tirva of the same and perpetually get performed all the *viniyogas* without obstruction and any omission whatever.

Held: that no power was given under the decree to *R* to appoint a successor: 15 Mad. 199 and 12 Cal. 117 (P. C.), *Foll.* (*Kumaraswami Sastri and Wallace, JJ.*). VENKATARAYA *v.* VASUDEVA. **108 I.C. 294=1928 M.W.N. 127=A.I.R. 1928 Mad. 897 (a).**

—A compromise decree provided: "In case any of the parties does not complete the work of execution of the pottah and *kabuliyat* within the said time, then any of the parties shall be competent to have that executed on taking the protection of a competent Court."

Held: that the words are sufficiently wide and general to cover an application for execution to the competent Court to have the patta and *kabuliyat* executed. (*Cuming and B. B. Ghose, JJ.*). ASHWINI COOMAR *v.* RAMGOPAL. **95 I.C. 179=A.I.R. 1926 Cal. 975 (a).**

———*Consent decree on mortgage silent as to relief under Civ. Pro. Code, O. 34, R. 6—Question not arising in the suit—The decree does not bar subsequent application for the relief—Civ. Pro. Code, O. 34, R. 6.*

Where a suit for sale on the basis of a mortgage is compromised, and a decree is passed on the basis of the compromise, the fact that the compromise does not expressly state the mortgagor's personal liability for the balance does not bar an application under Civ. Pro. Code, O. 34, R. 6 but not for costs which were agreed to be recoverable from the property. (*Daniels, J. C.*). SHRI RAM *v.* SURAJ BALI. **88 I.C. 507=A.I.R. 1926 Oudh 27 (2) (a).**

—A consent decree has no greater sanctity than a contract between the parties. (*Rupchand Bilaram, A. J. C.*). R.E. NARAINDAS SUNDERDAS. **93 I.C. 331=20 S.L.R. 197=A.I.R. 1926 Sind 133 (c).**

———*Direction that rent provided in compromise be entered in revenue papers is not incorporation of compromise into decree.*

The mere fact that the decree directed that entries should be made in the revenue papers of the rent provided in the compromise cannot be regarded as equivalent to the embodiment of the terms of the compromise in the decree. (*Neave, J.*). SANTU *v.* ABHAINANDAN PRASAD. **81 I.C. 297=A.I.R. 1925 All. 32 (h).**

———*Consent decree is but a contract.*

A consent order is a mere creature of the parties and it is not the less a contract and subject to the incidents of a contract, because there is superadded the command of the Judge. (*Mookerjee and Suhrawardy, JJ.*). GANESH CHANDRA PAL *v.* CHANDRA MOHAN DATTA. **84 I.C. 730=28 C.W.N. 984=A. I. R. 1925 Cal. 199 (a).**

———*Defendants to get a certain sum and rest of estate to be divided equally between the parties—No indication that expenses incurred by defendants were included in the sum specially allowed to them—Defendants are entitled to half share of legitimate expenses.*

A person applied for Letters of Administration in virtue of the will left by a Hindu widow. He was opposed by some people but ultimately Probate was granted to him. Then the defeated party filed a suit against him for declaration regarding a portion of the property. This suit was compromised and the compromise decree concluded as follows:—Defendants are entitled to Rs. 500 out of the estate and that the rest of the estate be divided equally (*i. e.*, the plaintiffs get half and the defendants get half). Parties to bear their own costs."

Held: That in spite of this the words of the decree could only be read as meaning the net estate after legitimate deductions had been made. There was nothing in the wording of the compromise to show that any expenses incurred by the defendants were taken into account in calculating the sum of Rs. 500 and in a case of this sort the estate meant the amount which paid estate duty and

which came into the hands of the administrators or its executors. Hence the defendants were entitled in addition to the sum of Rs. 500 specially allowed to them by the decree, to a half share of the expenses incurred by them in connection with the testatrix's funeral and in connection with obtaining the Probate and realising the assets. (*Harrison, J.*). JAYA LAL *v.* SHUGAN CHAND.

86 I. C. 673=26 P. L. R. 71=
A. I. R. 1925 Lah. 470.

———*Decree on an award by Debt-Conciliation Board is not consent decree.*

A decree passed on an award by the Debt Conciliation Board is not a consent decree, but only a decree based upon an award, and the executing Court cannot go behind it. 15 N. L. R. 39, *Foll.*, 31 Bom. 15 and 35 Bom. 239, *Dist.* (*Baker, J. C.*). GANGARAM *v.* GANPATRAO. **88 I. C. 135=**
A. I. R. 1925 Nag. 361 (a).

———*Compromise decree giving plaintiffs lands by way of maintenance on plaintiffs paying rent for dawam—No under-proprietary title is conferred in the lands—Entries made in Settlement papers on basis of the decree as the tenure being under-proprietary are of no consequence—Record-of-Rights.*

Predecessors-in-title of defendants instituted a suit for the recovery of the land comprising an area of 25 *bighas* 13 *biswas* 13 *biswansis* and asked that certain lands be decreed to them by way of maintenance so that they might cultivate them and that they would pay rent therefor like tenants and would manage to support themselves by those means. The plaintiffs' predecessors-in-interest agreed to this with the result that a decree was passed.

Held: that the decree cannot be construed to have conferred under-proprietary tenure on the defendants' predecessors, and if that was the true interpretation of the decree, the entries made in the papers of the first and the subsequent settlements as regards the nature of the tenure being under-proprietary were of no consequence. (*Wazir Hasan, A. J. C.*). GAYA PRASAD *v.* ALAM SINGH.

88 I. C. 53=A. I. R. 1925 Oudh 751 (b).

———*Amendment of—Grant of stay of execution on parties—Agreement is not amendment of decree.*

Grant by Appellate Court of stay of execution in consequence of agreement between parties does not amount to amendment of decree in terms of the agreement so as to make the agreement enforceable in execution upon the appellate Court affirming the original decree. 5 W. R. Mis. App. 1 ; 7 Mad. 400, *Dist.* (*Mullick and Kulwant Sahay, JJ.*). MANGAL PATHAK *v.* MESAR SINGH. **85 I. C. 110=**
1924 P. H.C.C. 273=
A. I. R. 1925 Pat. 128.

———*Consent decree in mortgage suit charging amount on mortgaged property and making it payable in instalments—Judgment-debtor relieved from other liability—Decree is final and property can be sold in execution without separate suit.*

The contention in execution proceedings that the decree in question was not a final decree and that it was only a declaratory decree and not capable of execution is not sound when the decree was a consent decree passed in a suit founded on a mortgage bond, against the heirs of the deceased mortgagor, making the decretal amount payable by instalments with a charge on the mortgaged property, the personal liability of the judgment-debtor being excluded and property other than the mortgaged property being exempted from liability. The

decree was a final decree ; the judgment-creditor had the right to bring the property charged to sale in execution and a separate suit for sale of the property was unnecessary. (*Raymond and Madgavkar, A. J. C.*). MURAD *v.* DAYARAM.

78 I. C. 49=A. I. R. 1925 Sind 156 (c).

———*Consent decree is no more than a contract.*

A consent decree cannot operate to a larger extent than the contract itself. (*Mookerjee and Chotzner, JJ.*). MALCHAND BOID *v.* OSMAN ALI MANDAL. **80 I. C. 307=38 C. L. J. 272=**
A. I. R. 1924 Cal. 159 (b).

———*Consent decree in a mortgage suit fixing time for payment is not a preliminary decree and is excusable.*

Where a compromise decree was passed by which in default of payment by defendants of a certain amount plaintiff was to execute the decree after the fixed date personally against defendant No. 1 and also by sale of the mortgaged property and also out of the other properties of the other defendants.

Held: that the decree was a consent decree and was executable being not a preliminary decree. (*Schwabe, C. J. and Waller, J.*). SUBRAMANIA PILLAI *v.* RAKKUMUTHU MOOPAN. **79 I. C. 418=**
19 M. L. W. 502=1924 M. W. N. 454=
A. I. R. 1924 Mad. 645 (a).

———*Compromise decree is but a contract with superadded command of a Judge.*

It is well settled that a contract of parties is none the less a contract because there is superadded to it the command of the Judge. It is still a contract of the parties, and there is no analogy between a decree giving effect to a compromise agreement between the parties, and a decree obtained upon contest. (19 C. W. N. 1228, *Foll.*). (*Miller, C. J. and Foster, J.*). C. J. SMITH *v.* A. KENNY.

81 I. C. 298=2 Pat. 749=
A. I. R. 1924 Pat. 231.

———*Compromise fixing 2 years for payment and for immediate sale on default—Plaintiff dying before the 2 years—Compromise was held not to be a preliminary decree requiring to be made final and heirs of plaintiff need not be brought on record within 3 months—Civil P. C., O. 22, R. 12, O. 34, R. 4.*

At the hearing of the appeal a petition was put in on behalf of both parties to the effect that it had been agreed between the parties that the plaintiffs would get a decree for Rs. 70,000 inclusive of all costs and interest up to the said date, and that the said amount would be paid by the defendant within two years therefrom with interest at the rate of Rs. 4-8-0 per cent. per annum till realisation, and that in default of payment within the said period of two years, the said amount of Rs. 70,000 with interest at the said rate till realization would be realized by the sale of the properties mentioned in the plaint. Thereupon it was ordered that the said petition should be filed as record and that the defendant and the plaintiffs should give effect to and be bound by the terms thereof.

Held, that the intention of the parties, as far as the same can be gathered from the compromise decree, was that immediately on the expiration of two years from the date of the decree, the plaintiffs would be competent to realise the moneys due to them by the sale of the properties mentioned in the plaint, that under the provisions of O. 22, R. 12, C. P. C., it was not necessary to apply in the suit, which had come to an end, for substitution of the heirs of the plaintiff and of the deceased defendant who had died in the meantime. A. I. R. 1922 P. C. 187, *Dist.* (*C. C. Ghose and Panton, JJ.*).

DECREE—Construction—Compromise decree.

RAJA HEMENDRA LAL SINGH DEO *v.* FAKIR CHAND DATTA. **74 I. C. 929=27 C. W. N. 621=50 Cal. 650=A. I. R. 1923 Cal. 626.**

———*Consent decree—Consent decree is subject to the incidents of an ordinary contract.*

The contract of the parties is not the less a contract, and subject to the incidents of a contract because there is superadded the command of the Judge. (*Mookerjee and Panton, JJ.*). GOPAL KRISHNA *v.* HARINATH. **66 I.C. 766=34 C. L. J. 157= A. I. R. 1921 Cal. 565 (b).**

—Construction—Conditional decree.

———*Money-decree on failure to execute lease in accordance with consent decree—Lease executed accordingly but refused to be accepted by decree-holder—He cannot execute the money-decree.*

In a suit for specific performance of a contract of lease by the lessee it was ordered that if the lessor did not grant a patta according to the terms of the consent decree within a fixed period the lessee would be entitled to a money-decree of a certain amount. The lessor tendered a patta according to the terms of the consent decree. But it was refused by the lessee as not fulfilling the terms of the consent decree.

Held: on construction of the consent decree that the patta was in accordance with it and the lessee was not entitled to a money decree which was passed in the alternative. (*Sir Lancelot Sanderson*). MAYASANKAR BHAGWANJI *v.* SACHINDRA MOHAN GHOSH. **A.I.R. 1930 P.C. 147.**

———*Payment by plaintiff's mortgagee is valid.*

Where in a suit to set aside a sale a conditional decree was passed that plaintiff decree-holder should pay certain sum within a certain time and the payment was made by plaintiff's mortgagee instead of plaintiff by depositing money in Court.

Held: that the condition was satisfied by a payment of the sum into Court, and that the mortgagee though he was not a party had a right to make the deposit. (*Lord Salvesen*). MAHOMED RAHIMTULLA HAJI *v.* ISMAIL ALLARAKHIA. **80 I. C. 411= 5 L.R.P.C. 105=26 Bom. L.R. 549=1924 M.W.N. 422=51 I. A. 236= 48 Bom. 404=34 M.L.T. 99=22 A.L.J. 931=29 C. W.N. 584=A.I.R. 1924 P.C. 133=46 M.L.J. 567.**

———*Limitation Act, Art.* 182—*Non-payment within time being not penalized, ordinary limitation applies.*

A decree was silent as to the effect of non-payment of the decretal amount within the time limited.

Held: the decree-holder is entitled to enforce his decree at any time within the period of limitation prescribed for execution of decree in Art. 182 of Schedule 1 to the Limitation Act notwithstanding the fact that the amount was deposited after the fixed time. 19 I. C. 856; 14 A. 350, *Foll.* (*Moti Sagar, J.*). MAHABIR PERSHAD *v.* KARTAT SINGH. **76 I.C. 144= A.I.R. 1924 Lah. 635 (b).**

———*Payment after date fixed without extension of time disentitles decree-holder to execute decree.*

Where a decree ordered payment by the appellants of a sum of money into Court by a certain date upon which the respondents were directed to re-convey the land to them and where the appellants failed to pay the money within time and did not obtain extension of time.

DECREE—Construction—Declaratory Decree.

Held: that though the appellants subsequently paid the money they were debarred from executing the decree. (*Young and Baguley, JJ.*). MA PU MAI *v.* KO SIT TIN. **85 I. C. 352=3 Bur. L.J. 163= A. I. R. 1924 Rang. 375.**

———*Ordering, deposit of money—Is not a preliminary decree.*

A conditional decree ordering a deposit of money to be made within a certain time is not necessarily to be construed as a preliminary decree and the order restoring possession to J. D. from whom possession had been taken in execution under a mistake, a final decree. (*Daniels, J. C.*). DORILAL *v.* MT. JAMAGA. **72 I.C. 879 = A.I.R. 1923 Oudh 16 (e).**

—Construction—Costs.

Where the Privy Council reversed the decree of the High Court and restored that of the Trial Court, which awarded interest on costs, the proper construction of the P.C. decree is that interest ought to be allowed on the costs of the Trial Court, and in the absence of a specific direction no interest is to be allowed on the costs in the High Court. (*Chatterjea and Pearson, JJ.*). KIRANCHANDRA *v.* SHYAMAPADA. **63 I.C. 709 (c).**

—Construction—Declaratory decree.

———*Mortgage-decree—Payment of principal with interest on instalment ordered—In default of payment plaintiff to be entitled to possession—Decree held to be wrong and merely declaratory and not executable.*

A compromise decree was as follows: "In future defendant I shall be liable to pay interest and principal by instalments. In default of payment of any instalment for two years together the plaintiff will be entitled to take possession of the land." The decree-holder filed an application in execution alleging that there had been default in payment of interest as agreed.

Held: that the last part of the decree was wrong and that the paragraph must be taken to have been merely declaratory and hence decree was not executable: 7 S.L.R. 192, *Rel. on.*; A.I.R. 1928 Mad. 61, *Ref.* (*Dulip Singh, J.*). BANUMAL *v.* PARAS RAM. **120 I.C. 597=30 P.L.R. 701= A.I.R. 1930 Lah 110.**

———*Compromise by way of family arrangement, granting one party allowance, incorporated in decree—Allowance was to be recovered periodically in whatever manner person liked—No mention of execution proceeding—Allowance could be recovered by execution.*

In the course of a partition suit *T* and *J*, father and son, executed a compromise by way of family settlement and a decree was passed in terms of the compromise. In that it was agreed that *J* should pay *T* a sum of Rs. 25 a month by way of maintenance and a provision was included in the compromise which was incorporated in the decree, that in the event of non-payment, *T* should be able to recover the amount from person and property of *J* in whatever manner he liked.

Held: although no execution proceeding was explicitly mentioned in the case, and although such proceedings were mentioned in connexion with an allowance of a third party to the suit, who was also party to the compromise, the decree was not merely declaratory decree and was capable of execution: 15 O. C. 99, *Dist.*; A. I. R. 1922 Oudh 34, *Ref.* (*Pullan, J.*). TIRBENI SAHAI *v.* JAGDAMBA SAHAI. **122 I. C. 623=7 O. W. N. 390= A. I. R. 1930 Oudh 302.**

DECREE—Construction—Declaratory decree.

———*Form of—Inference of clear and definite order from language in decree satisfies requirements of executory decree—Use of words "I order" is unnecessary.*

If a clear and definite order can be inferred from the language used in a decree, that is sufficient to meet the requirements of an executory decree. It is not necessary that it should contain the words "I order." Where the language used in a decree is imperative "she shall receive from a person Rs. 18-8 p. m. as maintenance allowance" and the decree further provides that the parties are to enforce their claims and rights in execution, the words amount to an order: 9 Bom. 108, *Dist.* 24 I. C. 861 and 1 S. L. R. 184, *Ref.* (*Percival, J. C. and Aston, A. J. C.*). VERHOMAL *v.* MT. RADHANBAI. **A. I. R. 1930 Sind 223 (a).**

———*Precedents cannot be applied—Decree, in a suit on mortgage by widow of mortgagor, declaring plaintiff's right to recover possession and further declaring devolution of right on her death—No period for paymens of mortgage money fixed—Decree is purely declaratory—Subsequent suit for redemption is not barred either by Civil P. C., S. 11 or S. 47.*

On a question of interpretation of a document precedents can hardly arise. Each document must be construed on its own language and in the light of surrounding circumstances if relevant; it is not right for the Court in interpreting a decree to allow to be controlled by decisions in which other documents have been interpreted.

In a suit by widow of the mortgagor in respect of the mortgage, a decree was passed in favour of the plaintiff, declaring the right to redeem and the right to recover possession on payment of a certain amount and further declaring devolution of the right on the death of the plaintiff, but no period for the payment of the mortgage money was fixed.

Held: that the decree was to be interpreted as purely declaratory in the nature of the plaintiff's right to redeem the mortgaged property leaving it open to the plaintiff to claim actual possession whenever she found it convenient to do so on payment of the mortgage money.

Held: further, that a subsequent suit for redemption was neither barred by the rule of *res judicata* nor by the provisions of S. 47, Civil P. C. (*Wazir Hasan and Gokar Nath Misra, JJ.*). SURAJ BAKHSH *v.* GANGA BAKHSH. **105 I. C. 93= 4 O. W. N. 882=A. I. R. 1927 Oudh 457 (a).**

—A compromise decree provided that plaintiff would recover a certain sum from defendant and the latter would be entitled to certain cattle, and that if the plaintiff took any of the cattle he would be responsible therefor. On the plaintiff's application for recovery of the money by execution, defendant objected that the plaintiff had taken certain cattle which had been assigned to the defendant and that the value of those cattle should be set off against the amount claimed by the plaintiff.

Held: that inasmuch as the decree had only declared the right of the defendant to the cattle his remedy was to sue the plaintiff for the value of the cattle taken by the latter and that he could not claim a set-off in execution proceeding. (*Broadway and Moti Sagar, JJ.*). JIWAN MAL *v.* NANAK CHAND. **63 I. C. 975 (Lah.).**

———*Certain sum directed to be paid—Further proceedings necessary to ascertain what set-off, judgment-debtor is entitled to as adjustment made since decree—Decree is not declaratory and is executable—Execution—Specific Relief Act, S. 42.*

DECREE—Construction—Instalment decree.

Where the decree directs the Principal judgment-debtors to pay a certain sum and this is the decree which the decree-holder wishes to execute, the fact that, in a certain view of the matter, further proceedings might be necessary to ascertain what set-off the judgment-debtor was entitled to against the decree in adjustment that has been made, does not make the decree a declaratory decree. (*Kennedy, J. C. and Madgavkar, A.J.C.*). DONALD GRAHAM & CO. *v.* KEWALRAM. **79 I.C. 477=16 S.L.R. 245= A.I.R. 1921 Sind 132 (e).**

—Construction—Instalment decree.

———*Deposit of money—Tender made on specified day but delay in payment—Deposit is not valid.*

A judgment-debtor under a decree had to pay certain sum annually to the opposite party on 14th September, and in default he was liable to ejectment from certain property. On 14th September, he brought a tender for the sum to the Court. The Sub-Judge, was on leave but he signed the tender on the following day directing the judgment-debtor to deposit the money. He, however, did not withdraw the tender till 17th September on which date he deposited the money in the Treasury.

Held: that the deposit was made beyond time and though the money was tendered on the 14th the judgment-debtor delayed to take the tender from the Court: A.I.R. 1927 Oudh 263; A.I.R. 1926 All. 602, *Dist.* (*Pullan, J.*). SHEO NATH *v.* MT. GANESHA. **105 I.C. 734= A.I.R.1928 Oudh 209 (1).**

———*Failure to pay—Default clause—Court has wide powers to relieve party from consequences of default—Equity.*

The amount due under a decree was to be paid in instalments. On failure to pay two instalments, the whole amount then due could be recovered by sale of certain property over which a charge was created. The first instalment was paid when the second became due. The judgment-debtor applied to the Court for extension of time for the payment of second instalment and on the dismissal of the application, the amount of the second instalment was paid into the Court. In the meantime, the third instalment became due. The decree-holder did not accept the payment of the second instalment and applied to the Court to recover the balance due by sale of the property:

Held: As a Court of equity the High Court had wide powers to do what seemed to it just. There is no injustice in putting the decree-holder exactly in the same position as if no default has been committed because the decree-holder has the security of the property for the balance of the decretal amount and interest was running on that amount. (*Macleod, C.J. and Shah, J.*). NARSINHA GOPAL *v.* BALWANT MADHAV VADGAONKAR. **64 I.C. 570= 46 Bom. 463=23 Bom. L.R. 1238= A.I.R. 1922 Bom. 170.**

———*Compromise decree—Part-payment accepted by decree-holder—Right to interest is not lost.*

In a compromise decree, the decree was to be paid up in instalments. On failure to pay within the date fixed, the decree-holder was to get interest at 1 per cent. per mensem from the date of default and he was at liberty to execute the decree. After the due date the judgment-debtor made payments to the decree-holder who claimed

DECREE—Construction—Mesne Profits.

appropriation first towards *interest* and then towards the decretal sum.

Held: that the decree-holder was entitled to executing the decree was for the benefit of the interest and the clause as to decree-holder. The acceptance of part-payment did not amount to waiver of the right to interest. (*Jwala Prasad and Ross, JJ.*). T. BARCLAY *v.* MT. DHANDEI.

71 I.C. 937=4 Pat. L.T. 112=1923 P.H.C.C. 194=A.I.R. 1923 Pat. 322 (a).

—Construction—Mesne profits.

———Mesne profits allowed but period not mentioned—Plaint not expressly restricting prayer for profits up-to-date of suit—Profits must be deemed to be allowed up-to-date of delivery of possession. 8 Cal. 178 (P.C.), *Rel. on.* (*Cuming and Page, JJ.*). PROMODE NATH ROY *v.* SECY. OF STATE.

99 I.C. 428=53 Cal. 992=31 C.W.N. 112=A.I.R. 1927 Cal. 182 (b).

—Construction—Mortgage-decree.

—Where mortgagors have a specific and defined share in the mortgaged property and it is clear that they mortgaged no more than their proportionate share in the property, the auction-purchaser at the sale in execution of the mortgage-decree cannot be held to be entitled to retain in possession such shares in the mortgaged property as were clearly exempted from the scope of the suit and consequently from the scope of the decree on which alone their title rests, merely by reason of the fact that decree was ambiguous and the auction-purchaser had entered into possession of the whole property as result of the sale: 16 Cal. 173 (P.C.), *Ref.* (*Wazir Hasan, C.J. and Raza, J.*). SARABJIT SINGH *v.* FARAHATULLAH KHAN. **7 O.W.N. 594=A.I.R. 1930 Oudh 366 (a).**

———*Decree based on award—Amount made a charge on property and made realisable by sale—Necessity for attachment.*

A private award was given by which certain properties were charged with the amount due to one of the parties and it was also provided that the amount might be realised by sale of properties charged and if the amount realised by the sale was not sufficient the balance should be realised from the other properties and the person of the opposite party. A decree was passed in terms of this award.

Held: that this decree should be deemed to be a mortgage-decree and that, even if it were a decree against the property charged, still no attachment was necessary before bringing the properties to sale. (*Addison, J.*). MAHOMED ABDULLA *v.* JAMIAT RAI. **121 I. C. 369.**

———*Plaintiff declared entitled to certain relief in certain contingency—Question of limitation with regard to the relief ordinarily remains open till plaintiff applies for relief.*

Where liberty is given to the plaintiffs in a decree for sale of mortgaged properties to apply for a personal decree for the amount of the balance due to them after sale of the property it does not follow necessarily that the question of limitation in respect of a personal decree has also been considered and decided in plaintiff's favour. The question will ordinarily remain open and will be decided at the proper time, *i.e.*, when the plaintiff applies for a personal decree for the balance due to him after the sale of the mortgaged roperties. (*Dalal, J.C. and Gokaran Nath, A.J.C.*). BIBI BATUL *v.* KEDAR NATH. **88 I.C. 810=12 O.L.J. 372=A.I.R. 1925 Oudh 462 (c).**

DECREE—Construction—Partition.

———*Interest-in-kind is not usually decreed.*

It is unusual in a decree in a mortgage suit to direct that interest should be paid in kind instead of in money.

Where in a mortgage-decree the lower Court in accordance with the terms of the mortgage deeds directed the defendants to give certain amount of rice to the plaintiff.

Held: that defendants should have an opportunity of tendering the market price of the rice. (*Macleod, C.J. and Crump, J.*). SHIVRAO RAMRAO *v.* LAXMIBAI KOM **76 I. C. 638=A.I.R. 1924 Bom. 523 (b).**

———*Allowing redemption does not make a decree a mortgage-decree.*

Where the Court decreed possession to the then plaintiffs with the proviso that the defendant could redeem within four years on payment of Rs. 1,125 and it was nowhere stated in the decree that the decree-holders would enter into possession of the property in the capacity of mortgagees.

Held: the mere fact that it was provided in the decree that the judgment-debtor would be entitled to redeem within four years does not necessarily lead to the inference that the mortgage had not determined and was still subsisting. (*Martineau and Moti Sagar, JJ.*). KOKAN *v.* SOHAN. **76 I. C. 272=A.I.R. 1924 Lah. 696.**

———*Possession deliverable on plaintiff depositing Rs.* 55 *in any* Chaitra *month—Time does not begin to run until deposit is made—Limitation Act, Art.* 181.

A decree was passed in August 1886 in a suit between the parties in which a consent decree was taken in the following words. 'The plaintiff do pay to the defendants Rs. 55 in respect of the debt on mortgage in Chaitra of any year and the plaintiff do obtain possession of the lands in suit considering the same to have been redeemed. The plaintiff is not entitled to take possession of the lands in dispute in any other month except Chaitra.' The plaintiff was now seeking to execute the decree and was met by contention that execution was barred.

Held: that the relationship of mortgagor and mortgagee still continued to exist between the parties. It was really a preliminary decree. 48 Bom. 334, 477, *Cons*; 23 Bom. 592, *Diss.* Under S. 181 until he paid the money he was not entitled to possession and until possession was asked for and refused he had no right to apply to the Court. (*Macleod, C. J. and Crump, J.*). HANMANT *v.* SHIDU SAMBHU. **72 I. C. 556=25 B. L. R. 358=47 Bom. 692=A.I.R. 1923 Bom. 300.**

—Construction—Partition.

Suit—Compromise decree defining shares—Fresh suit for partition along with other property is not barred.

In a partition suit a compromise decree was passed defining the shares of the parties in certain properties and the decree reserved liberty to the parties "to apply to the Court as occasions arose". On a fresh suit for partition of the said properties along with some other property;

Held: that the liberty reserved would not enable the plaintiff to apply for partition of the properties when there was no order in the decree itself for such partition. "The liberty to apply" did not empower the Court to deal with matters outside the scope of the order. (*Chatterjea and Pearson, JJ.*). HANSESWAR PAL *v.* BEPIN BEHARY PAL. **A.I.R. 1922 Cal. 197.**

———*Whether rules relating to forms of decree should not be consulted*; (*doubted*).

DECREE—Construction—Personal Liability.

———*Civil P. C., O.* 34, *R.* 5—*Question as to personal liability for costs is one of construction of decree.*

The question whether in a mortgage-suit, the costs are to be paid by judgment-debtor personally must always be regarded as one of construction of the decree and of the intention of the Court to be gathered from the terms of the decree. If a decree on a proper construction should be held to have made the costs payable personally by the defendants, apart altogether from the securities or the sale of them, there is not and could not be any rule or principle of law saying that such a decree could not be executed according to its tenor.

Where a Court after being informed of satisfaction having been entered up of the original decree, deliberately amended the decree and made an order against a party for the payment of costs without there being any reference whatever to the mortgage securities:

Held: that the obvious intention of the Court was that the amount must be paid personally and a construction which would have the effect of importing into the decree a reference which was not there, to the mortgage security or the sale of it, would be unreasonable. (*Srinivasa Ayyangar, J.*). RAMASWAMI NAICKER *v.* CHINNATHAYAMMAL. **109 I. C. 63=A. I. R. 1928 Mad. 604.**

———*Mother to receive Rs.* 500 *to be contributed by her two sons—Amount to be realized from certain named properties—Sons are personally liable.*

Where a decree provided that K would be entitled to receive Rs. 250 p.m. from G. (K's son) out of the H estate and Rs. 250 p.m. from R. (K's second son) out of the rent of certain buildings "independent of both the proprietors."

Held: that the two sons were to be personally liable for making the contribution. The words "independent of both the proprietors" did not absolve the sons from their personal liability. (*Coldstream, J.*). RAJ KUMARI *v.* GURBAKSH SINGH. **99 I. C. 1006=A. I. R. 1927 Lah. 179.**

———*T.P.Act, S.*68—*Mortgage-decree—Construction.*

One of the reliefs in a mortgage suit was to make the amount under the mortgage bond a charge upon the surplus of the sale proceeds of one of the mortgaged properties sold. At the end of the relief claimed, it was asked that the balance of the decretal amount should be realised from the property and the person of the defendant or defendants. The Court passed a decree under Section 68 as under: "The suit for Rs. 5,877-10-0 with proportionate costs to be decreed in terms of relief five of the claim. He is further declared to have a charge on the surplus sale proceeds which is in deposit in the Collectorate" and refused a mortgage-decree.

Held: that the decree did not include a direction that the balance of the decretal amount could be recovered from the defendants personally and from their personal property by implication, as they were purchasers of the mortgaged property and under the decree were not expressly made liable. The decree granted only that portion of relief No. 5 which related to the creation of the charge on the surplus sale proceeds regarding the amount due under the mortgage-deed. (*Jwala Prasad and Foster, JJ.*). KISHUNDEO SINGH *v.* JAGLAL SAHU. **78 I. C. 774= 5 P. L. T. 603=A. I. R. 1925 Pat. 291.**

———Putni Mahal—*Decree for rent—Purchaser of* putnidar's *right and title after decree, is* ***not*** *personally liable.*

DECREE—Construction—Reference to Judgment and Pleadings.

Where a person purchased the right, title and interest of the *putnidar* of a *putni mahal* after a decree for rent had been passed against the *putnidar*.

Held: the purchaser is not personally liable for the decree if the property passes out of his hands to a third party before the institution of the execution proceedings. For rent accruing due prior to the transfer, a transferee of a tenure is not personally liable. (*Das and Ross, JJ.*). INDER CHAND BETHRA *v.* SURENDRA NARAIN SING. **66 I. C. 711=1922 P.H.C.C. 137= 3 Pat. L. T. 318=1 Pat. 449= A. I. R. 1922 Pat. 162.**

—Construction — Reference to Judgment and Pleadings.

———*Executing Court cannot go behind decree and read words though appearing in judgment but not incorporated into it.*

It is not competent to the executing Court to go behind a decree or to read into it certain words which appear in the judgment but which have not been incorporated in it. Where the wording of the decree is clear, it cannot be interpreted in the light of the reasoning of the Judge in the judgment or phraseology used in the judgment. (*Tek Chand, J.*). DEVI DAS *v.* MT. ROPAN BAI. **A.I.R. 1930 Lah. 589.**

———*Two constructions possible—Construction consistent with judgment must be accepted.*

Whenever it is possible to construe a decree in two ways, one way consistent with the judgment and the other inconsistent with it, it is the duty of the Court to construe it in a way consistent with the judgment. (*Ramesam and Cornish, JJ.*). F. H. WILSON *v.* NATH MULL. **31 M.L.W. 339= A.I.R. 1930 Mad. 458.**

—In regard to construction of judgments a good deal depends on the particular circumstances of the case. 13 C.W.N. 1031, *Ref.* (*Fawcett and Mirza, JJ.*). SECY. OF STATE *v.* YELLO RAMACHANDRA. **111 I. C. 268= 52 Bom. 369=30 Bom. L.R. 581= A.I.R. 1928 Bom. 215.**

———*Wording not clear—Pleadings may be looked to.*

It is legitimate to refer to the pleadings in a case in order to construe the decree that has been passed in the suit, more especially when the wordings of the decree are not very clear. (*Beasley and Ananthakrishna Aiyar, JJ.*). SANKUNNY *v.* KRISHNA. **107 I.C. 499=51 Mad. 320=27 M.L.W. 93= A.I.R. 1928 Mad. 465= 54 M.L.J. 682.**

—A Court construing the decree may look at the term of the plaint itself. (*Cuming and Page, JJ.*). PROMODE NATH ROY *v.* SECY. OF STATE. **99 I.C. 428=53 Cal. 992=31 C.W N. 112= A.I.R. 1927 Cal. 182.**

———*Decree ambiguous—Court can look to judgment and pleadings to ascertain its meaning.*

Where a decree is in its terms ambiguous, it is competent to the Court executing it to refer to the judgment and the pleadings in the suit in which the decree was passed to ascertain its precise meaning: 18 All. 344, *Foll.* (*Shadi Lal, C.J. and Broadway, J.*). NOOR HUSSAIN SHAH *v.* HUSSAIN BIBI. **102 I.C. 5=8 Lah. 318= 28 P.L.R. 439=A.I.R. 1927 Lah. 476.**

———*Clear and unambiguous decree need not be interpreted.*

DECREE—Construction—Rules of.

It is not necessary to interpret a decree in the light of the pleading and the judgment when it is not ambiguous and is clear in its terms. (*Jwala Prasad and Foster, JJ.*). KISHUNDEO SINGH *v.* JAGLAL SAHU. **78 I.C. 774= 5 P.L.T. 603=A. I.R. 1925 Pat. 291.**

—Construction—Rules of.

—Applications under clause "liberty to apply" in a decree can only be made for the purpose of carrying out the terms of the decree and the working of it but not to vary the decree. (*Rangnekar, J.*). FATMABAI *v* SHERIFF DEWAJI-CANJEE. **108 I.C. 510=30 Bom. L.R. 137= A.I.R. 1928 Bom. 102.**

———*Whether rules relating to forms of decree should not be consulted: (doubted).*

The process of calling to aid the rules relating to the form of decrees to be passed for the purpose of construing the decree is a process open to question. (*Srinivasa Ayyangar, J.*). RAMASWAMI *v.* CHINNATHAYAMMAL. **109 I. C. 63= A. I. R. 1928 Mad. 604 (b).**

———*Rate of exchange to be calculated as on the date of maturity.*

Where a decree for the value of eight bills of exchange stated in the dollar currency of the United States, and in Sterling, was passed.

Held: that the decretal amount in rupees is to be calculated in accordance with the rate of exchange prevailing on the respective dates when the bills matured for payment, *i. e.*, when the cause of action arose whether the cause of action is for a debt or for damages, and whether it sounds in contract or in tort; and not with the rate of exchange prevailing at the date when the decree was passed. (*Page, J.*). MULLER MACLEAN *v.* S. M. ATAULA AND Co. **81 I. C. 561=51 Cal. 320= A. I. R. 1924 Cal. 778.**

—Where terms of the decree are clear and known wrong interpretation even for a long time will not modify the terms. A.I.R. 1922 P. C. 383, *Dist.* (*Dalal, J.C. and Wazir Hasan, A. J. C.*). BISHUNATH SARAN SINGH *v.* SITLA BAKHSH SINGH. **79 I. C. 784= 10 O. L. J. 315=A. I. R. 1924 Oudh 69.**

———*Decree for possession of land includes decree for possession of superstructures also.*

The suit was for ejectment of the defendant from certain land on which there were some huts. The huts were found by the lower Courts to belong to the plaintiff. There was no reference to the huts in the plaint but the decree was as follows. "The suit being decreed with costs and interests, the plaintiff will get *khas* possession of the disputed land on ejecting the defendant therefrom, as prayed. The defendant himself must remove all his personal properties from the disputed land within one month. In default the plaintiff will have to remove the same with the help of the Court and he will get *khas* possession of the said land."

Held: that the decree directing *khas* possession by ejecting the defendant, would necessarily give the plaintiff a right to *khas* possession as against the defendant in respect of the huts also. (*Chatterjee and Cuming, JJ.*). JNANENDRA NATH MOOKERJEE *v.* BRAHMAPADA PRAMANICK. **79 I. C. 191=A. I. R. 1923 Cal. 704.**

—A decree like any other document is open to construction. But the remedy by construction is only appropriate if the language is ambiguous. If the language is plain and clear the proper remedy for a variance between decree and judgment is to apply for amendment. Any construction must be, if possible to make it conform to the judgment. (*N. R. Chatterjea and Richardson, JJ.*). MAHA RAJ KUMAR SHOSHI KANTA ACHARJI CHOWDHURI *v.* RAJA SARAT CHANDRA ROY CHOWDHURI. **77 I. C. 167=35 C. L. J. 339.**

DECREE—Construction—Miscellaneous.

—Construction—Settlement Court.

———*Construction of decree in suit relating to portion of same land should be followed in suit relating to other.*

A's (defendant's) predecessor-in-interest obtained a settlement decree against the predecessors-in-interest of *B* (plaintiff). The lands which were subject-matter of the decree were subsequently divided into two portions in a village partition. In a suit against *A* with regard to one portion of the land which was not in the possession of the plaintiff, the construction of the settlement decree was the matter in dispute and the decree was interpreted in a certain manner.

Held: that in another suit against *A* with regard to the other portion, the settlement decree should be construed in the same way as it was construed in the previous litigation. The fact that the plaintiffs in the latter suit were different from plaintiffs in the previous suit could make no difference when the points in issue are common to both the cases. The judgment deciding that previous suit should be followed where the Court does not think it necessary to reconsider it. (*Raza and Wazir Hassan, JJ.*). SHUJAAT HAIDER *v.* MT. HABIBUNNISSA. **6 O.W.N. 818= 10 L.R.A. Rev. 368=A.I.R. 1929 Oudh 528.**

—Construction—Vagueness.

———*Claim decreed against one defendant—Decree containing words "the other defendants should be exempted" amounts to dismissal of suit against them.*

Where the Court decreeing the claim for money against defendant 1 ordered that "the other defendants should be exempted":

Held: that the word 'exempted" used by the Court was an ambiguous word and its use was unfortunate yet the effect of the order was to dismiss the suit as against these defendants: 16 A. L. J. 752, *Foll.*; A.I.R. 1926 All. 475, *Dist.* (*Sulaiman and Kendall, JJ.*). SACHITANAND TEVARI *v.* RADHAPAT PATHAK. **116 I.C. 86=26 A.L.J. 524= A.I.R. 1928 All. 234.**

—If the wording of a decree be ambiguous such construction should be put on the same as would make the decree in accordance with law. (*Beasley and Ananthakrishna Aiyar, JJ.*). SANKUNNY *v.* KRISHNA. **107 I.C. 499=51 Mad. 320= 27 M.L.W. 93=A.I.R. 1928 Mad. 465= 54 M.L.J. 682.**

—When a decree is silent on a point it could be supplemented by the law applicable to the case. (*Beasley and Ananthakrishna Aiyar, JJ.*). SANKUNNI *v.* KRISHNA. **107 I.C. 499=51 Mad. 320= 27 M.L.W. 93=A.I.R. 1928 Mad. 465= 54 M.L.J. 682.**

—If a judgment or order is ambiguous it must be so interpreted as to be in conformity with the provisions of law. (*Iqbal Ahmed, J.*). KALLU *v.* LOKMAD DAS. **102 I.C. 273=A.I.R. 1927 All. 507.**

—Where the judgment admits of two meanings, it is wrong to construe it in a way which violates both law and equity. (*Chevis, J.*). UTTAM CHAND *v.* BALLA MAL. **60 I.C. 345 (Lah.).**

—Construction—Miscellaneous.

———*Mahomedan widow suing for dower—A claim for setting aside husband's alienation also included for recovering dower from alienated properties—Decree*

DECREE—Construction—Miscellaneous.

declaring alienated properties to be of the husband and entitling widow to recover decretal money from the properties—Charge was held to be created. 95 I. C. 367; A.I.R. 1926 Pat. 404; 7 P.L.T. 664, *Reversed.*

A Mahomedan widow, after her husband's death, sued to enforce her dower claim. She claimed by her plaint that alienations made by her husband were invalid and that she was entitled to recover her dower debt from the properties so alienated. A decree was passed to the effect that the properties entered in schedule to the plaint be treated to be the properties of the deceased husband from which the widow was entitled to recover the decretal money. In execution of this decree it was contended that no charge was created on the properties of the husband.

Held: that the decree created a charge upon the properties: 95 I. C. 367; A. I. R. 1926 Pat. 404 7 P. L. T. 664, *Reversed.* (*Sir George Lowndes*). SAIYAD QASIM HUSAIN *v.* HABIBUR RAHMAN.

117 I.C. 10=8 Pat. 926=56 I.A. 254=1929 A.L.J. 777=31 Bom. L.R. 879=38 C.W.N. 926=30 M.L.W. 198=6 O.W.N. 613=50 C.L.J. 187=1929 M.W.N. 673=10 P.L.T. 851=A.I.R. 1929 P.C. 174=57 M.L.J. 361.

—Where a decree was obtained to the effect that the defendant should allow the free flow of water over the site in dispute and do no act that would hinder the free flow of water into the tank and abstain from doing any act that would pollute the water that enters the tank:

Held: that the decree was for an injunction. (*Addison, J.*). GULAB SINGH *v.* MAHMUD KHAN.

118 I.C. 399=30 P.L.R. 323=A.I.R. 1929 Lah. 437.

—Where the clauses in a decree gave the plaintiff a right to occupy the flats, until her death, for her residence and provided that in cases where the plaintiff was compelled against her wish to vacate the said flats, the defendants should pay to her Rs. 500 in lieu of her right to reside in the property.

Held: what was contemplated was that in case the plaintiff was compelled to vacate against her wish she should be given Rs. 500 in lieu of maintenance and the defendants could not sell the said property whenever they liked, free of the plaintiff's right to reside therein and ask the plaintiff to go out of the property. (*Rangnekar, J.*). FATMABAI *v.* SHERIFF DEWAJI CANJEE. **108 I.C. 510=30 Bom. L.R. 137=A.I.R. 1928 Bom. 102.**

—Date of.

———*Civ. Pro. Code, O. 21, R. 2 (2)—Date of decree relates back to the date of judgment—Certification of payment can be made before decree is reduced to writing formally.*

Date of the decree is not the date on which the decree is reduced to writing and signed by the Court but the date on which the Court delivers its judgment and expresses what the decree is. In other words, when a person has the judgment of the Court in his favour it may be said that he then obtains his decree, and that the decree, when subsequently drawn up, relates back to that time. Hence an application under the rule is maintainable before the decree is formally drawn up. (*Pearson and Graham, JJ.*). GIRIBALA DASI *v.* BISWAMBHAR HALDAR. **82 I.C. 746=40 C.L.J. 87=A.I.R. 1924 Cal. 1064.**

———*Amended decree starts new limitation only with respect to parties affected by the amendment—Decree—Limitation—Appeal.*

DECREE—Executability.

Where the amendment of the decree or the alteration made in it did not affect the appealing defendant and the defendant was not made a party in the review proceeding.

Held: time began to run against defendant from the date of the original unamended decree.

If a party who is not affected by subsequent proceedings wants to appeal against the decree the period must be computed from the date when the judgment is pronounced or the decree signed. (28 All. 240; 34 All. 282; 44 Cal. 1011, *Dist.*). (*Suhrawardy, J.*). SATYA RANJAN DAS *v.* KSHITISH CHANDRA PAL. **78 I.C 525=A.I.R. 1924 Cal. 898.**

—Effect of.

———*Decree of appellate Court in one suit does not annul that of another suit.*

The decree of an appellate Court in one suit cannot be held to have the legal effect of annulling or altering *ipso facto* a decree made by a subordinate Court, in another suit: 40 Mad. 299, *Not foll.*; 10 M.I.A. 203, *Expl.*; 3 Cal. 30 (F. B.) and 1 Pat. L. J. 43, *Rel. on.* (*B. B. Ghose and Panton, JJ.*). ASHUTOSH NANDI *v.* KUNDUL KAMINI **33 C. W. N. 908=A.I.R. 1929 Cal. 814.**

———*Setting aside—Decree passed with jurisdiction is not void.*

A decree passed with jurisdiction, however tainted it may be with fraud, is not void; for a plaintiff will not succeed in obtaining any relief before he, if the decree passed against him was by a competent Court, gets it vacated: 13 C.L.J. 404 and 20 C. W. N. 659, *Appl.* (*Suhrawardy and Duval, JJ.*). FAZLU-UDDIN *v.* KHETRA. **90 I. C. 866=30 C.W.N. 59=A.I.R. 1926 Cal. 167.**

———*Decree does not create title except in few cases.*

Per *Devadoss, J.*:—Except in few cases where decrees themselves are a source of title, the decrees of Civil Courts cannot confer a title to immovable property which a person did not possess and therefore when the plaintiff had no title at all to the plaint property, the mere fact that a Civil Court considered or held that he had title would not confer an interest which he did not possess before. (*Spencer and Devadoss, JJ.*). GOPALA IYENGAR *v.* MUMMACHI REDDIAR. **74 I. C. 416=17 M.L.W. 254=A.I.R. 1923 Mad. 392.**

———*Injunction against some of several defendants does not affect other defendants.*

Injunction granted only against some of several defendants does not affect the other defendants. (*Martineau, J.*). MALUKA *v.* SUNDER SINGH. **59 I.C. 594=25 P.L.R. 1921=A.I.R. 1921 Lah. 376.**

—Executability.

———*Suit by illegitimate son against widow of zamindar—Decree for half-share in separate estate of zamindar and in outstandings due to zamindar—Decree-holder trying to proceed against the other half-share of zamindar for outstandings—Decree-holder held entitled to proceed against property of zamindar and half-share of zamindar.*

A zamindar died leaving a widow, a daughter, daughter's son, an undivided co-parcener, a concubine and an illegitimate son by her. The widow entered into possession of zamindari. The co-parcener brought a suit to recover the zamindari but under a compromise decree the widow was allowed to enjoy the estate during her lifetime. In 1902 the illegitimate son filed a suit against the widow wherein the Court decreed that he was entitled to half a share in the separate estate and partition of

DECREE—Executability.

the same, and also awarded half the amount of the outstandings due to zamindar. During the pendency of appeal the widow died and the daughter's son was brought on record as the legal representative. In execution proceedings the illegitimate son claimed, as part of separate estate, property consisting of jewels belonging personally to zamindar and to proceed against the other half for the outstandings.

Held: that the final decree of the High Court certainly gave to the illegitimate son a half share of such jewels as formed the separate property of the zamindar.

Held also: that as the decree-holder sought to execute his decree against items of jewels which the widow never asserted to be hers as *streedhanam* but which he claimed to be hers, there was certainly some burden of proof on the decree-holder but at the same time the reversioner also should show that they formed part of the zamindar's estate.

Held further: that the decree-holder was entitled to proceed in execution of his decree against all the items found to belong to zamindar and only a half share in the items belonging to zamindar as separate property but not against the other half which belonged to the reversioner. (*Ramesam and Odgers, JJ.*). NAGAPPA *v.* KARUPPAYYEE AMMAL.
120 I.C. 379=A.I.R. 1930 Mad. 344.

———*Civil P. C., S.* 152—*Suit for partnership accounts compromised deciding S entitled to three annas share, but agreeing to another member to manage business—Decree ordering in terms of compromise, S to be entitled to that share—S not appealing against decree, nor applying for its review—S seeking execution of decree and praying alternately to amend decree if it be not in terms of compromise—Decree was in terms of compromise, merely declaratory and incapable of execution—Even if it were not in terms of compromise, it could not be amended, so as to make it capable of execution, as time for same had passed by.*

Under a compromise terminating a suit for partnership accounts, a person, *S*, was held to be entitled to a three annas share in the partnership and it was further agreed that another sharer should transact all the business of the firm, balance the accounts and render them when asked. In the decree that followed it was ordered and declared in terms of compromise that *S* was entitled to three-annas share in the property belonging to the firm. *S* sought to execute the decree praying that he should be put in joint possession of his share and if the decree were considered as not embodying terms of contract it should be amended under S. 152. No appeal against the decree was filed, nor any application for review made within time:

Held: that the decree was only declaratory and was also in accordance with the terms of the compromise. It could not, therefore, be executed as sought for.

Held further: that even supposing that the decree was faulty as not being according to terms of the compromise, it could not now be amended, as time for such amendment as to make it capable of execution had passed by: 21 C. W. N. 835; A. I. R. 1928 Nag. 173; A. I. R. 1927 P.C. 204 and A.I.R. 1922 Oudh 150, *Dist.* (*Findlay, J. C. and Prideaux, A. J. C.*). MT. DHANNABAI JOHRI *v.* KESHRICHAND JOHRI.
115 I.C. 161=A.I.R. 1929 Nag. 34.

———*Suit on a promissory note by deceased maker—Decree against a legal representative—His liability is limited to assets of deceased—Another heir impleaded but subsequently exonerated—Exonerated person suing for the estate—Decree for delivery in his favour—Execution of decree as against property in his hands is not allowable.*

In a suit on a promissory note a decree was passed that "the first defendant do pay the decree amount from the estate of the deceased." Subsequent to the decree, the defendant 3 thereon originally impleaded as one of the heirs of the legal estate of the deceased but subsequently exonerated from the suit which was dismissed as against him, sued for recovery of possession of the estate of the deceased and on 1st December, 1923, obtained a decree for delivery of the estate. Two days prior to the delivery an assignee of the promissory note decree attached part of the estate in execution and the objection to attachment was overruled by both the Courts below.

Held: that the promissory note decree was not a decree against the estate but against the defendant 1 therein, limited in liability to meet the decree amount out of the estate and not executable against the petitioner who had obtained a decree for its delivery or against the property which was declared not to be the property of defendant 1 but the property of the petitioner: 33 Mad. 75, *Foll.*; 33 Mad. 6; A.I.R. 1926 Mad. 487 and 26 Mad. 230, *Dist.* (*Wallace, J.*). NARASIMAIAH *v.* JAWANTHARAJ SOWCAR.
101 I. C. 110=A. I. R. 1928 Mad. 159=52 M. L. J. 299.

———*Decree can be partly directory and partly declaratory* (*Cornish, J.*).

The question whether a decree framing a scheme for a charitable trust is executable or not must depend on the language and on the scope of the decree or of that particular part of the decree in respect of which the question arises. From the nature of the case such a decree may in part be declaratory and in part directory. It may provide a specific procedure for carrying out particular provisions of the scheme, and yet leave other provisions of the scheme enforceable by execution. The rule that when once the Court has passed a decree framing a scheme the decree becomes non-executable, cannot be a rule of general application. 24 Bom. 45 and 28 Mad. 319, *Foll.* (*Ramesam and Cornish, JJ.*). THAYARAJASWAMI *v.* BALAYEE AMMAL.
107 I. C. 136=39 M. L. T. 579=27 M. L. W. 32=A. I. R. 1928 Mad. 61.

———*Civil P. C., O.* 34, *R.* 5—*Compromise decree—No final decree made—Decree is executable.*

Strictly speaking, O. 34, R. 5 has no application to a compromise decree and, therefore, in the case of a compromise decree where the parties agree that the decretal amount should be realized in a particular way, the Court has full jurisdiction to carry out the intentions of the parties even if there is no final decree: 34 Cal. 886; A.I.R. 1922 All. 383, *Rel. on.* (*Waller and Madhavan Nair, JJ.*). KUNHAMMAD HAJEE *v.* CHATHOTH PARKUM KOZHUVAMMAL.
106 I. C. 395=A. I. R. 1928 Mad. 38.

———*Decree against assets of deceased person cannot be executed against his legal representatives not joined in suit.*

A decree obtained against the estate of a deceased person by joining some of the legal representatives only cannot be executed against such representatives who were not joined in the suit: 33 Mad. 75 and 32 Cal. 226 (P.C.), *Rel. on*; A. I. R. 1924 Mad. 130, *Dist.* (*Curgenven, J.*). (GURAPATI) GANGARAJU *v.* PENDYALA SOMANNA.
98 I.C. 613=A.I.R. 1927 Mad. 179.

DECREE—Executability.

———*No liability fixed upon any party—No decree can be prepared.*

A decree is prepared only when some liability is fixed upon a party; when no liability is fixed no decree can be prepared and in fact in some cases in the Civil Court no decree is prepared. (*Jwala Prasad and Kulwant Sahay, JJ.*). BHUNESHWARI KUER *v.* SUKHDEO SINGH. **85 I. C. 566= 6 P.L.T. 419=A.I.R. 1925 Pat. 505.**

———*Decree for judicial separation and permanent alimony is rendered void by subsequent co-habitation.*

A decree for judicial separation and for permanent alimony granted to a wife is annulled by subsequent co-habitation of the parties and does not revive on subsequent separation. *Haddon* v. *Haddon*, (1887) 18 Q. B. D. 778, *Foll.* There cannot be any such thing as a conditional resumption of co-habitation. Either the wife accepts her decree for judicial separation and lives apart from her husband under it or she does not accept it. There cannot be any intermediate stage between acceptance of the judicial separation and its non-acceptance. (*Beasley, J.*). ELLEN MA NOO *v.* WILLIAM PO THIT. **83 I.C. 566=2 Rang. 163= A.I.R. 1924 Rang. 314.**

———*Reciprocal reliefs—Decree was held not to be inexecutable.*

A decree provided "that the plaintiff's claim be and is hereby decreed for cancellation of the bond in suit but the defendant shall have the right to recover Rs. 5,000 from the plaintiff's property."

Held: that the latter portion of the decree was not a mere declaratory decree incapable of execution and that the defendant could execute it. (*Kanhaiya Lal, J.C.*). JHANDA SINGH *v.* MD. ANWARKHAN. **77 I.C. 776= A. I. R. 1923 Oudh 160.**

—Execution.

—An attachment is not necessary for bringing the property to sale in the case of a decree which creates a charge on the property. (*Addison, J.*). MAHOMED ABDULLA *v.* JAMIAT RAI. **121 I. C. 369.**

—Decree-holder dying while decree in actual execution—His sons need not freshly apply for execution but can continue after substitution of their names—Civil P. C., S. 47: A. I. R. 1928 All. 299, *Ref.*; A. I. R. 1927 All. 165 (F.B.), *Expl.* (*Mukerji and Bennet, JJ.*). NIADER *v.* KHAZAN. **A.I.R. 1930 All. 604 (1) (a).**

———*Anterior agreement that decree shall not be executed cannot be set up as bar—But suit may be brought to restrain execution contrary to agreement—Civil P. C., O. 21, R. 2.*

An anterior agreement that a decree shall be allowed to be passed but shall not be executed cannot be set up as a bar to execution. But such an agreement is not opposed to public policy and suit can be brought to restrain execution contrary to the agreement. An injunction restraining execution until a breach of obligation under the agreement has occurred is the correct form of relief to ask for and not a declaration that the decree is unenforceable: 29 Cal. 810 and 31 Cal. 179, *Ref.* (*Rankin, C. J. and Mukerji, J.*). PANCHANANDA *v.* BROJENDRA KUMAR. **34 C.W.N. 150= A.I.R. 1930 Cal. 356.**

———*Decree barred by limitation—Subsequent execution proceedings—Judgment-debtor can take objection on ground of limitation if execution proceedings pending and Court is bound to give effect to it only if*

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point not concluded by previous proceedings—Limitation Act, S. 3.

It is only when the point of limitation is concluded by proceedings in a previous execution that the judgment-debtor is not allowed to take the objection of limitation in a subsequent execution of the decree. But so long as an execution application is pending the judgment-debtor can show at any stage that the application is barred, and the Court will have no option but to dismiss the application under S. 3, Lim. Act. (1920) P.H.C.C. 109, *Foll.*; 8 Cal. 51 (P.C.) and A.I.R 1921 *P.C.* 23, *Ref.* (*Courtney-Terrell, C. J. and James, J.*). ATUL KRISHNA *v.* BRINDABAN. **9 Pat. 306= A.I.R. 1930 Pat. 330.**

———*Executing Court can consider rights of parties under consent decree unless such consideration is tantamount to trying case over again.*

Court executing a consent decree has jurisdiction to consider whether a party to it has by his own action forfeited his rights under it, unless the consideration of the question involves in substance trying the case over again; 26 Bom. 707, *Dist.* (*Wort and Kulwant Sahay, JJ.*). SASADHAR GANGULY *v.* RAGAB SINGH. **A.I.R. 1930 Pat. 234 (b).**

———*Mortgage-decree directing certain items to be sold last—Other items exonerated by decree-holder on accepting payment of a certain sum less than the actual price—Decree cannot be executed as against the items to be sold last.*

In a suit on a mortgage of six items of properties, the decree directed that items 2 and 5 belonging to a puisne mortgagee should be sold last as per agreement come to between the parties. Another puisne mortgagee of items 3 to 6, in execution of a decree on his mortgage, purchased items 3 to 6 and by arrangement with the prior mortgagee-decree-holder deposited into Court a certain sum of money as the rateable amount due from those properties in respect of the prior mortgage. This amount was drawn out by the prior mortgagee-decree-holder and those items were exonerated from the decree. On an application to execute the decree as against item 2:

Held: that the decree-holder having exonerated items 3 to 6 on payment of a sum not representing their full value and the sale price of those items not having been exclusively devoted to the satisfaction of the decrees, the conditions precedent for the sale of item 2 had not been complied with and consequently the said item could not be proceeded against in execution. (*Curgenven, J.*). VAYYA GOUNDAR *v.* CHINNA BOMMA GOUNDAR. **101 I.C. 132=A.I.R. 1927 Mad. 669.**

———*Executing Court cannot question validity of decree—Remedy is by separate suit.*

It is not permissible for an executing Court to go into the question of the validity of the decree, and the only remedy in such a case should be the bringing of a separate suit. (*Ashworth, J.*). SURAJ DIN *v.* KHUSHAL GHOSE. **93 I.C. 32=13 O.L.J. 510.**

———*Decree for dower passed—Executing Court cannot direct in execution payment of decree proportionate to shares of different heirs.*

Although the proposition that the estate of a deceased Muhammadan devolves upon his heir or heirs from the moment of his death and that the proportionate interests of the heirs, if more than one, come into separate existence from that moment is correct, yet when a decree for dower is passed the Court executing the decree is not entitled to go behind the decree and to direct the

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release of a portion of the estate on payment of a proportionate share of the debt : A.I.R. 1924 All. 690, *Dissented from.* (*Mullick and Kulwant Sahay, JJ.*). BIBI HAFSA *v.* KANIZ FATMA. **96 I.C. 3= 7 P.L.T. 798=1926 P.H.C.C. 9= A.I.R. 1926 Pat. 411.**

———*Executing Court cannot go behind decree.*

It is not competent for executing Court to go behind the decree and rely on a collateral judgment against the decree even though the judgment is of a superior Court. (*Jackson, J.*). PARTHASARADHI APPA RAO *v.* MUHAMMAD ABDUL WAHEB. **82 I. C. 434= A. I. R. 1925 Mad. 270.**

———*Starting point is decree of final Court.*

The entire suit which was one for contribution was based upon an *ekrarnama* or certain dealings which the plaintiffs alleged were binding upon three sets of defendants as members of a joint Mitakshara family. The foundation of the liability of the defendants was common, though the extent of their liability might have been different, and in the appeal by one set of defendants from the decree by the trial Court the foundation of the plaintiff's claim was involved. The appellate Court (High Court) dismissed the suit relying upon O. 41, R. 33. The Privy Council restored the decree of the trial Court when it was actually time-barred against the non-appealing two sets of defendants. On application by plaintiff for execution of the Privy Council decree,'

Held : that the order of the Privy Council restoring the decree was final between the parties and the mistake if any in reviving a barred decree could only be rectified by the Privy Council.

Held : further that the decree of the trial Court could not be executed against the non-appealing defendants until the decree became final on appeal to the first appellate Court which however dismissed the suit itself. The starting point for execution therefore began only when the decree was revived by the order in the Privy Council. (*Jwala Prasad and Kulwant Sahay, JJ.*). SOMAR SINGH *v.* MT. PREMDEI KUER. **79 I. C. 794= 3 Pat. 327=5 P. L. T. 21=1924 P. H. C. C. 105= A. I. R. 1925 Pat. 40.**

———*Any party can execute.*

After decree it is open to any party to a suit to whose interest it is that further proceedings be taken, to initiate the supplementary proceedings ; but in the ordinary case it is the plaintiff who moves. (*Lord Phillimore*). LACHMI NARAYAN *v.* BALMUKUND MARWARI. **81 I.C. 747=5 P.L.T. 623= 35 M.L.T. 143=5 L.R.P.C. 171=20 M.L.W. 491= 4 Pat. 61=51 I.A. 321=22 A.L.J. 990= 26 Bom. L.R. 1129=40 C.L.J. 439= 29 C.W.N. 391=1924 M.W.N. 707= A.I.R. 1924 P.C. 198=47 M.L.J. 441.**

—The Court executing the decree must take the decree as it stands and has no power to go behind it or entertain an objection to the legality of the decree. The terms of S. 74 of the Contract Act are not applicable to a decree. (*Daniels and Dalal, JJ.*). RAGHUNAND PRASAD *v.* GHULAM ALAUDDIN. **79 I.C. 916=46 All. 571=22 A.L.J. 464= 5 L.R.A. Civ. 356=A.I.R. 1924 All. 689.**

———*Any party can apply for execution.*

There is no foundation for the principle that only the successful appellant can execute the order, unless such restrictions can be inferred from the actual language of the decree or order itself. 17 M. 82 ; 25 M. 426, *Dist.* (*Oldfield and Devadoss, JJ.*). BALUSAMI IYER *v.* VENKATASWAMI NAICKEN. **75 I. C. 219=32 M. L. T. 249= A. I. R. 1924 Mad. 95 (b).**

DECREE—Ex-parte.

———*Parties—Purchasers of mortgaged properties are proper parties.*

Purchasers of one of several mortgaged properties are representatives of judgment-debtor mortgagor and are proper parties in execution of mortgage decree against the particular property though they were not parties to the mortgage suit. (*Das and Adami, JJ.*). DHAROHAR SINGH *v.* RAM PRASAD NARAIN SAHAI. **72 I. C. 862= 1 Pat. L. R. 139=A. I. R. 1924 Pat. 367.**

———*Assets of deceased in the hands of defendants—Inalienable property—Defendants object to execution against such property.*

Where a decree is passed against such assets of the deceased vendor as had come into the hands of his representatives (defendants), if an attempt is made to execute the decree against inalienable property the defendant will be at liberty to object to such execution. (*Stuart, J.*). KALI DIN *v.* MADHO. **77 I. C. 862=A. I. R. 1923 All. 169.**

—In executing a decree the executing Court must be within the four corners of the decree itself. (*N. R. Chatterjea and Richardson, JJ.*). MAHARAJ KUMAR SOSHI KANTA ACHARJI CHOWDHURI *v.* RAJA SARAT CHANDRA ROY CHOWDHURI. **77 I.C. 167=35 C.L.J. 339.**

———*Civil P. C., O. 21, R. 15—Exact contents of decree must be proved before execution can be ordered.*

It is necessary to prove the exact contents of the decree, which is alleged to have been passed, before ordering execution. (*MacColl, A.J.C.*). MAUNG CHIT U *v.* MAUNG THA KU. **77 I.C. 258=4 U.B.R. 135= A.I.R. 1923 Rang. 113.**

———*Transfer of Property Act, S. 70—Accession after mortgage-decree for sale is passed—Accession cannot be sold for the benefit of the mortgagee—Decree—Execution.*

Executing Court has to sell the property specified in the decree to be sold for the satisfaction of the decree obtained by the mortgagee. Therefore where a *mukarraridar* mortgages his *mukarrar*-right and the mortgagee obtains a decree on the mortgage for sale of the mortgaged property, the decree-holder cannot in execution of the decree sell the *brahmottar* right which had been subsequently acquired by the mortgagor in the property. 5 Cal. 198 (P. C.), *Ref.* (*Jwala Prasad and Ross, JJ.*). HARADHAN CHAKERVERTY *v.* HARGOBIND DUTTA. **63 I.C. 552=2 P.L.T. 665=6 P.L.J.347= A.I.R. 1921 Pat. 188.**

———*Civil P. C., S. 37—In general, appellate decree is the one to be executed—Execution—Finality of.*

In general, the rule must be that the Appellate Court's decree, if properly drawn, is the sole decree to be executed in the case but there may be cases in which that general and ordinary rule cannot and should not be invariably enforced, and in particular circumstances it may be incumbent upon to the Courts to permit execution of the decree of the original Court. 14 M.I.A. 465; 6 Beng. L.R. 52; 13 Cal. 13; 11 All. 267 F.B.; 39 Cal. 925; 39 Bom. 175 *Foll.* (*Robinson, C.J. and Duckworth, J.*). S.C. DAS GUPTA *v.* THE BURMA RAILWAYS CO., LTD. **11 L.B.R. 163=A.I.R. 1921 L. B. 37 (d).**

—Ex-parte.

———*Setting aside—Fraud—Non-service of summons proved—Court can go into merits of original claim.*

In proceedings to set aside an *ex parte* decree on the ground of fraudulent suppression of summons, if the Court comes to the conclusion that the summons was not in fact served upon the defendant, it is at liberty to examine merits of the claim on which the *ex parte* decree was passed: A.I.R. 1923 Pat. 327, *Rel. on.* (*Ross and Fazl Ali, JJ.*). GOBINDJEE MADHAVJEE *v.* C.J. SMITH.

113 I.C. 698=A.I.R. 1928 Pat. 568.

———Ex parte *decree set aside—Plaintiff in original suit can have his suit re-heard.*

The setting aside of the *ex parte* decree on the ground of fraud entitles the plaintiff in the original suit to have his suit re-heard. It may be that in order to determine the question as to whether fraud had been perpetrated, the Court may go into the question as to whether there was any foundation for the suit; but this question could be gone into only incidentally for the purpose of coming to a finding on the proper issue in the case, namely, that of fraud A.I.R. 1924 Pat. 758; 2 Cal. 184 (P.C.), *Appl.*; A.I.R. 1923 Pat. 327, *Expl.* and *Dist.* (*Kulwant Sahay, J.*). LALJI THATHERA *v.* GANGA THATHERA. **104 I.C. 137=9 P.L.T. 7= A.I.R. 1927 Pat. 396.**

———*Setting aside—Defendant applying for setting aside* ex parte *Small Cause Court decree on the ground of fraud—Application dismissed for failure to comply with conditions imposed by Court—Separate suit for setting aside decree on the same ground is barred—Rangoon Small Cause Courts Act, Sch. I, R.* 78.

Where the defendant against whom an *ex parte* decree is passed has already moved the Small Cause Court for the purpose of setting aside the *ex parte* decree on the ground that summons was not tendered or served on him and has been given an opportunity of establishing his case and he by non-compliance with the condition imposed by the Small Cause Court failed to get an adjudication on that point in that Court it is not open to him to bring a separate suit for setting aside the decree on the same allegations. (*Chari, J.*). M. A. MAISTRY *v.* ABDUL AZIZ RAHAMAN.

101 I.C. 434=5 Rang. 46= A.I.R. 1927 Rang. 130.

———Ex parte *decree based on false claim or perjured evidence cannot be set aside without fraud.*

An *ex parte* decree cannot be re-opened except on the ground of fraud as an extrinsic collateral fact vitiating the proceedings in which the decree was obtained and it is not sufficient to allege that it was obtained on a false claim. Even if an *ex parte* decree is obtained on perjured evidence, it cannot be set aside on that ground. 43 Mad. 381, *Appl.* (*Abdul Raoof and Addison, JJ.*). COMMERCIAL SYNDICATE *v.* CO-OPERATIVE BANK. **92 I. C. 322= 6 Lah. 512=A.I.R. 1926 Lah. 96.**

———*Fraud—Absence of service is not sufficient ground—Suppression of service and false claim to defendant's knowledge must be proved.*

A n *ex parte* decree cannot be vacated on the ground of fraud unless it is proved that there was a fraudulent suppression of summons or that the claim of the plaintiff was false to his knowledge. Mere non-service is not a sufficient ground for a suit to set aside a decree. A.I.R. 1922 Patna 291 and 62 I.C. 594, *Rel. on.* (*Moti Sagar, J.*). MD. DIN *v.* BERRY & CO. **89 I.C. 736=A.I.R. 1926 Lah. 86.**

———*Setting aside, suit for—Plea that decree was based on fraudulent claim cannot be raised.*

If the suit has been decreed after contest, or if the suit has been decreed *ex parte* and it is established that summonses were served on the defendants, in a suit to set aside the decree, a plea that the claim on which the decree was based was fraudulent cannot be raised. (*Greaves and Mukerji, JJ.*). NALINI KANTA MUKERJI *v.* HARI NIKARI.

86 I.C.779=29 C.W.N. 325=41 C.L.J. 281= A.I.R. 1925 Cal. 663.

———*Civil P. C., O.* 9, *R.* 13—*Dismissal of application under O.* 9, *R.* 13 *which alleged fraudulent information by applicant's Mukhtar in collusion with plaintiff bars a suit.*

Where an application to set aside *ex parte* decree on the ground of wrong information about the date by the applicant's mukhtar was dismissed.

Held, no suit will lie to set aside the decree on the ground of fraud in that the Mukhtar in collusion with the plaintiff wrongly informed him of the date since that matter was already decided on the application though the information given by the Mukhtar was fraudulent. (*Dawson-Miller, C J. and Mullick, J.*). MAHABIR PRASAD CHOUDHRY *v.* CHHEDI SINGH. **81 I.C. 1035=1924 P.H.C.C. 155= A.I.R. 1924 Pat. 769.**

———*Fraud—When plaintiff was present in the previous suit he must prove fraud in relation to proceeding in the previous suit but where he was absent and suit had no foundation, suppression of summons may be presumed to be deliberate.*

Where there was appearance by the plaintiff in the former suit, but in which the plaintiff nevertheless contended that the decree in the former suit was obtained by fraud:

Held, that clearly if summons was served on the plaintiff in the former suit it could not be urged by him that there was initially an attempt to prevent him from making his defence. Consequently the endeavour to induce the Court to examine the propriety of the previous judgment must fail unless the Court is satisfied that there was some fraud in relation to the proceedings of the suit. This principle has no bearing on the case in which there was an attempt to prevent the plaintiff from making his defence. The failure to serve summons on a defendant may be accidental or deliberate; and where the Court finds as a fact, that there was no foundation for the suit itself, it is open to the Court to hold that the suppression of summons was deliberate with the object of snatching a decree from the Court in the absence of the defendant. (*Das and Macpherson, JJ.*). JANKI KUER *v.* THAKUR RAI. **75 I.C. 343=1923 P.H.C.C. 336= 5 P.L.T. 37=A.I.R. 1924 Pat. 241.**

———*Civil P. C., S.* 96 *and O.* 9, *R.* 13—*In appeal from* ex parte *decree, question of service of summons cannot be considered which can be considered only under O.* 9.

In an appeal from an *ex parte* decree, the only question with which the appellate Court is ordinarily concerned is whether the evidence on the record is sufficient to support that decree, and that the question of due service of summons is the subject-matter not of an appeal from the decree but of the special proceeding under O. 9. (39 All. 143 and 27 Cal. 738, *Foll.* (*Young, Offg. C. J. and Carr, J.*). RAJ CHANDRA DHAR *v.* MESSRS. K. D. O. C. RAY.

79 I.C. 506=2 Bur. L.J. 282= 2 Rang. 108=A.I.R. 1924 Rang. 137.

———*Fraud alleged must be extraneous to the points already decided—Non-service of process is not such an extraneous fraud.*

Plaintiff brought a suit to set aside the decree passed against him in Small Cause Court, Rangoon

DECREE—Ex-parte

on the ground that the decree which was an *ex parte* decree was obtained by means of false evidence and also because the summons in the said suit was never tendered to him and the affidavits of the identifier and that of the process server as to the service of the summons on the plaintiff were false:

Held: that the fraud necessary to set aside a decree upon the ground of fraud must be fraud extraneous to everything adjudicated upon by the Court and not any fraud already dealt with by the Court, that this fraud was not so extraneous and therefore the suit was not maintainable.

It is not open to another Court to entertain a suit to set aside a decree when the sole point is whether the Court was wrong in believing the evidence called before it. This is not a case of fraud extraneous to the trial. (*Beasley, J.*). K. E. MUSTHAN *v.* BABU MOHENDRA NATH SINGH.

76 I.C. 794=1 Rang. 500=A.I.R. 1924 Rang. 119.

———*Setting aside—Fraud—No suppression of summons—Plaint making incomplete statement of law—No fraud is constituted thereby.*

———In a suit to set aside decree *ex parte* on the ground of fraud, when there is no finding that there was fraudulent suppression of the summons at the instance of the defendant (who was a plaintiff in the orginal case) even though the summons was not served on the plaintiffs (defendants in the original case) the decree cannot be set aside. An incomplete statement of a proposition of law in the plaint does not constitute a fraud on the part of the plaintiff. (*C. C. Ghose and Panton, JJ.*). MAHADEB PROSAD KANARIA *v.* MAHABIR PROSAD.

76 I.C. 767=A.I.R. 1923 Cal. 569.

—The present plaintiffs who were defendants in the former suit were prevented by contrivance of the plaintiffs in that suit from placing their case before the Court and the Court was misled into making a decree in favour of the plaintiffs.

Held: that the decree was a fraudulent one and there was no question of obtaining a decree by perjury. (*Chatterjee and Pearson, JJ.*). THE INDIAN PROVIDENT CO., LTD. *v.* GOVINDA CHANDRA DAS. **65 I.C. 318=27 C.W.N. 359=A.I.R. 1923 Cal. 425.**

———*Court finding in later suit that summons was not served on defendant in former suit—No fraud is established thereby—Fraud—Civil P. C., S.* 11.

The main allegation in this suit was that the defendant I did not receive summons in the previous suit and that the *ex parte* decree was got fraudulently behind his back. The evidence discussed by the Judge was only the evidence of the service of summons. The finding was non-service.

Held: that is not evidence of fraud and the dogmatic statement that the previous decree was obtained fraudulently does not amount to a proper finding that the decree has no effect because of fraud. If there is nothing to indicate that the Court which tried the first suit had not satisfied itself of the service of summons it must be presumed that the Court was satisfied before the decree was made. (*Ross, J.*). HARNARAIN PANDEY *v.* NANDA KESHWAR PANDE. **71 I.C.573=1 Pat. L.R. 127=A.I.R. 1923 Pat. 406.**

—A suit to set aside an *ex parte* decree on the ground of fraud cannot succeed unless it is proved that there was fraudulent suppression of summons or that the claim of the defendants was false to their knowledge. (*Teunon and Newbould, JJ.*). PANNALAL KUTHARI *v.* TARA KANTA KARMAKAR. **63 I.C. 778 (Cal.).**

DECREE—Finality of—Consent decree.

—An *ex parte* decree is final till it is set aside by the first Court or the Appellate Court decree. (*Le Rossignol, J.*). ABBAS KHAN *v.* NURKHAN. **60 I.C. 496.**

———*Civil P.C., S.* 11—*Fraud is ground for setting aside decree but question can be* res judicata—*Decree, setting aside.*

Although a decree can be set aside on the ground of fraud, if the question has already been agitated between the same parties and decided by a Court of competent jurisdiction the matter is *res judicata* and cannot again be re-opened between the same parties in a subsequent suit. 29 Cal. 395 (P.C.), *Dist.* (*Dawson Miller, C.J and Ross, J.*). JANGAL CHAUDHRY *v.* LALJIT PASBAN. **60 I.C. 124=6 P.L.J. 1=1921 P.H.C.C. 3=A.I.R. 1921 Pat. 12.**

—Finality of—Amendments.

Amendment by striking off a wrong representative's name in execution proceedings is not amendment of the decree nor does it affect the limitation with respect to other parties. (*Richardson and Page, JJ.*). NARAIN DAS DUTT *v.* BANKU BEHARI CHATTOPADHAYA. **78 I.C. 1001=A.I.R. 1925 Cal. 213 (a).**

—Finality of—Consent decree.

———*Decree is binding until set aside and cannot be ignored like conveyance—Consent decree or decree on award is equally binding.*

In a case of conveyance or an instrument no one is bound to sue to rescind a void conveyance or instrument although he may, if so advised, do so. But where there is a tribunal having jurisdiction and there are parties over whom that jurisdiction is exercised and the Court has issued its decree, it is not open to anybody to treat that decree as a nullity. On the contrary it must be taken, until it is set aside by due course of law, to be valid being in effect the command of the sovereign power which regulates the relation of the parties to the litigation and to the others. This rule applies even to decrees passed with consent or on award. (*Kennedy, J. C. and Raymond, A.J.C.*). PEVANBHAI *v.* THAOOMAL PANJOOMAL. **88 I C. 744=A.I.R. 1926 Sind 15.**

———*Consent decree is not to be varied except by consent.*

A consent decree cannot be varied except by consent. 16 Bom. L. R. 668, *Foll.* (*Baker, J.C.*). GANGARAM *v.* GANPATRAO. **88 I.C. 135=A.I.R. 1925 Nag. 361.**

———*Compromise decree cannot be challenged on the ground of discovery of fresh evidence.*

A compromise once embodied in a decree is merged in the decree and it cannot be challenged in review on the ground that fresh evidence has been discovered, unless such discovery before judgment could not reasonably be expected. (*Le Rossignol, J.*). GHULAM NABI *v.* BASHESHAR MAL. **74 I. C. 603=4 Lah. L. J. 298=A.I. R. 1922 Lah. 407.**

———*If once passed fresh action to set it aside is necessary.*

If a compromise decree has once been passed and entered, a fresh action is usually necessary to have the compromise set aside. Although before that is done, there is power for the Court to refuse to put its seal on what has been done under some misapprehension as to the true state of affairs. (*Heaton, A. C. J. and Marten, J.*). JAMSHEDJI NAOROJI *v.* SORABJI NAOROJI. **85 I. C. 504=25 Bom. L. R. 1137=A. I. R. 1921 Bom. 414.**

DECREE—Finality of—Effect of.

—Finality of—Effect of.

———*Once a decree is passed the suit cannot be dismissed unless the decree is reversed on appeal—Any party can apply to have it enforced.*

After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties on the making of the decree, acquire rights or incur liabilities which are fixed, unless or until the decree is varied or set aside. After a decree, any party can apply to have it enforced. A. I. R. 1924 P. C. 198, *Foll.* (*Mukerji, J.*). NILKAMAL *v.* KAMAKSHYA CHARAN.

109 I. C. 67=A. I. R. 1928 Cal. 539.

—A decree of the Civil Court stands unchallenged unless by appeal or otherwise it is set aside. But a decree does not go beyond the limits to which it is confined by the question which is in dispute and is thereby decided and by the words in which that matter is decided. (*Ross and Wort, JJ.*). LAL GOVIND NATH *v.* LAL MAHESAR NATH.

118 I. C. 135=7 Pat. 388=10 P. L. T. 854=A. I. R. 1928 Pat. 244.

—Finality of—Ex parte decree.

—An *ex parte* decree is just as binding as any other until it is set aside. (*Wallace, J.*). THIRUVENGADAM MAMMAD *v.* CHATHAMKARA AMMAD.

114 I. C. 230=A. I. R. 1929 Mad. 89.

—Finality of—Fraudulent decree.

———*No re-hearing is allowed at the instance of decree-holder.*

If a decree obtained by decree-holder is a fraudulent decree the decree-holders are not entitled to have the suit re-heard. (*Das and Bucknill, JJ.*). DAMODAR PRASAD *v.* RAM SARUP KUMAR.

71 I. C. 843=4 Pat. L. T. 102=1923 P. H. C. C. 137=1 P. L. R. 252=A. I. R. 1923 Pat. 327.

—Finality of—Leave to appeal.

———*Review order challenged and set aside—Original order open to appeal.*

On 3rd November, 1917, an appeal was accepted and the suit as instituted was dismissed by the order of a Division Bench. An application for leave to appeal to the Privy Council was duly presented within time and on the same day an application for review was made. This latter application was accepted and eventually the original order passed on the 3rd November, 1917, was reversed and the suit was decreed in full. From this order passed in review an appeal was presented to the Privy Council, who held that the review was not competent, and that the order of the 3rd November, 1917, be restored.

Held: that the application for leave to appeal to Privy Council by the applicant for review was still alive and had merely been in a state or suspended animation during this long period and therefore leave would be granted to have the case heard on merits by Privy Council. (*Harrison and Zafar Ali, JJ.*). NEKI RAM *v.* CHAJJU RAM.

77 I.C. 869=4 Lah. 445=A.I.R. 1924 Lah. 225.

—Finality of—Period of filing appeal.

———*Decree becomes final after period of appeal.*

Even where there is no appeal, a decree becomes final after the period allowed for appeal: 50 All. 68, *Foll.* (*Dalal, J.*). HEMENDRA NATH *v.* TULSHI SINGH. **A.I.R. 1930 All. 413.**

———*Appealable decree becomes final when period of appeal therefrom has expired.*

An appealable decree can only become final when the time allowed for filing an appeal against that decree has expired without an appeal being filed. Till then the decree is capable

DECREE—Finality of—Suit on.

of being challenged by an appeal, and, therefore, during that period it cannot be said that the decree has become final, or, in other words, has become unassailable: 1 All. 293 and 3 All. 134, *Diss. from*: (1881) A.W.N. 165; 1 All. 132; 7 All. 107; 5 A.L.J. 136 and A.I.R. 1925 All. 291, *Foll.* (*Iqbal Ahmad and Kendall, JJ.*). SANOMAN SINGH *v.* RAJA RAM.

103 I.C. 457=25 A.L.J. 809=A.I.R. 1927 All. 848.

—Finality of—Powers of Court.

———*Order without jurisdiction, can't be treated as nullity by the same Court.*

An order without jurisdiction passed in a suit which the Court had jurisdiction to entertain and try, cannot be treated as a nullity by the same Court in subsequent proceedings. (*Kumaraswami Sastri, J.*). ABDUL WAHAB *v.* ROKIA BIBI SAHIBA.

73 I.C. 903=A.I.R. 1924 Mad. 406.

———*Civil Court decree—Criminal Court cannot question.*

Whether a Civil Court decree was properly passed or not is matter with which the Criminal Court is not concerned. The decrees stand and until they are set aside they must be treated as good decrees. (*Ross, J.*). TUFANI LAL *v.* MT. BIBI UMATUL RASSOOL. **5 P. L. T. 535=1924 P. H. C. C. 244=A. I. R. 1924 Pat. 765.**

—Finality of—Presumption of correctness.

A person challenging the correctness of a decree must prove that it was without jurisdiction. (*Ross and Wort, JJ.*). CHOTA NAGPUR BANKING ASSOCIATION *v.* RAMAKHYA NARAIN SINGH.

109 I. C. 306=7 Pat. 341=A. I. R. 1928 Pat. 431.

—Finality of—Right of suit.

———*Suit to recover money recovered under subsisting decree does not lie.*

It is clear and settled law that money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or action under which it was recovered remains in force, but this rule of law rests upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by same ulterior proceeding. If it has been reversed or superseded, the money recovered under it ought certainly to be refunded, and is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment under which money was originally recovered has been reversed or superseded. (*Lord Carson*). NAGANNA *v.* VENKATAPAYYA.

76 I. C. 594=21 A. L. J. 726=1923 M. W. N. 554=46 Mad. 895=50 I. A. 301=28 C. W. N. 568=25 Bom. L. R. 1290=18 M. L. W. 913=33 M. L. T. 262=39 C. L. J. 312=A. I. R. 1923 P. C. 167=45 M. L. J. 657.

—Finality of—Suit on.

———*Decree not acted upon for long time—Suit based on the decree—Court should grant relief on the basis of decree.*

Plaintiff obtained an *ex parte* decree for confirmation of possession over certain land but did not execute it. After the lapse of some years he brought another suit for confirmation or in the alternative for possession of the same land and relied upon the previous decree. The lower Courts refused to give effect to the decree on the ground that it was not acted upon and that the plaintiff could not rely upon it after such a long time.

DECREE—Finality of—Suit on.

They went into the question of title and dismissed the claim. On second appeal:

Held: that the previous decree could not cease to have effect unless it was set aside, that the lower Courts were in error in going into the question of title again and that the plaintiff's suit should have been decreed on the production of the decree, especially when the defence was found to be baseless. (*Ross, J.*). JHUMAK SINGH *v.* MAHINDRA SINGH. **71 I. C. 560= A. I. R. 1924 Pat. 165.**

———*Civil P. C., S. 47—Execution of decree barred —Suit upon decree cannot be brought.*

Where in a pre-emption suit according to a compromise decree, plaintiff is to obtain possession of property if he pays a certain amount within a particular time but in case of default the suit is to stand dismissed, the plaintiff pays the required amount within the specified time but does not obtain possession either through Court or privately, and after the lapse of the period of limitation for the execution of the decree files a fresh suit for the possession of the property, such suit should be held to be barred under the provisions of Section 47 of the Civil P. C. Case-law discussed. 14 A. L. J. 102, *Diss. from.* (*Sulaiman and Gokul Prasad, JJ.*). RAMANAND *v.* JAI RAM.

59 I. C. 632=43 All. 170=A. I. R. 1921 All. 369.

—Finality of—Unnecessary finding.

———*Issue wrongly framed and decided is binding.*

Where the third mortgagee sued second mortgagee and claimed priority by subrogation due to discharging first mortgage and second mortgagee simply asserted his mortgagee rights and pleaded for discharge but an issue as to second mortgage being genuine was wrongly framed and decided against him while the decree exempted expressly only the rights of other defendants.

Held: the decree destroyed the rights of the second mortgagee though plaintiff failed to prove priority by subrogation and the decree only purported to pass the right of the mortgagor on date of third mortgage but this destruction of rights applied only to property with respect to which second mortgagee specifically asserted his rights and not other property though covered by the same second mortgage. (*Spencer and Venkat Subba Rao, JJ.*). P. SAMI GURUKAL *v.* THIRU PATHIYA PILLAI. **72 I.C. 798= 18 M.L.W. 288=A.I.R. 1924 Mad. 193.**

—Finality of—Wrong decree.

———*Decree wrong but not challenged by the party concerned—Cannot be challenged for him by any one else.*

Nanhe and Teja were brothers who together formed a joint family. They owned an ancestral house. On the 4th February, 1908, Nanhe mortgaged the whole house to Tika Ram. Tika Ram sued on his mortgage and got a preliminary decree for sale in 1912. Before Tika Ram could get an order for sale under O. 34, R. 5, Teja the other brother brought a suit to avoid the mortgage on the ground that Nanhe as a member of an undivided joint Hindu family could not make a valid mortgage of the ancestral house without his consent and in the absence of legal necessity and for a declaration that the house could not be sold under the mortgage decree. The suit was decreed on January 4th, 1913. Thereupon Tika Ram abandoned his rights under the mortgage and asked the Court then seized of the execution proceedings to pass a decree under O. 34, R. 6 and that was done. The effect of that

DECREE—Form of.

was to give Tika Ram a simple money-decree against Nanhe. Nanhe was a party to these proceedings, but he did not contest the application nor did he appeal from the order passed. In execution of that decree the right, title and interest of Nanhe in the house in suit was put up for sale and was purchased by Tika Ram who then brought a suit for partition for half the house on the allegation that Nanhe's right, title and interest in the whole house amounted to half. Teja having failed to set aside the sale in the execution department filed a counter-suit for declaration that the execution sale in favour of Tika was invalid and that he (Tika Ram) was not entitled to partition the house.

Held: that the Court passed an order which it should not have passed having regard to the provisions of the Code. But it was seized of the execution of the case and it did pass that decree. Whether right or wrong that decree not having been challenged by Nanhe, the party concerned and any one who stands in his shoes as Tika Ram does in this case, cannot go behind it. Tika Ram although in the inception his title was impeachable, has now acquired an absolute title which is good against all the world and therefore good against Teja. (25 Bom. 337 (P.C.), *Foll.*; 18 A.L.J. 628, *Dist.*). (*Walsh and Ryves, JJ.*). TEJA *v.* TIKA RAM. **77 I.C. 37=46 All. 32=21 A.L.J. 754= 4 L.R.A. Civ. 522=A.I.R. 1924 All. 225.**

—A wrong suit followed by a wrong decree does not bar a correct suit. (*Ramesam and Jackson, JJ.*). AMMAKANNU AYI *v.* MURUGAYYA ODAYAR. **83 I.C. 324=20 M.L.W 207=1924 M.W.N. 623= 47 Mad. 850=A.I.R. 1924 Mad. 716= 47 M.L.J. 85.**

—Form of.

———*Judgment in subsequent suit setting aside decree in previous suit so far as interest of plaintiff in subsequent suit was concerned — Proper form of decree is merely to declare that decree in previous suit is not binding on plaintiff.*

Where in a subsequent suit the judgment purports to set aside the decree in a previous suit so far as the interest of the plaintiff is concerned the proper form of the decree is merely to declare that the decree in the previous suit is set aside as not binding on the plaintiff. It is not further necessary to state that the prior suit would be re-opened and gone into on the merits: 2 Cal. 184 (P.C.); 35 All. 487 (P. C.); 28 All. 585 (P.C.) and 36 Mad. 295 (P.C.), *Rel. on.* (*Anantakrishna Ayyar, J.*). PULLAMMA GARU *v.* SATYANARAYANA. **A.I.R. 1930 Mad. 740.**

———*Suit by two sons to recover possession of joint family field sold by father—Finding that part only of consideration for sale binding on sons—Decree should be passed directing delivery of possession of whole field by vendee on payment of 2-3rd consideration found proved for necessity and should contain declaration that vendee has acquired 1-3rd share of father and is entitled to obtain possession thereof in suit for partition.*

If in a suit brought by two sons to recover possession of the ancestral joint family field sold by the father, it is found that a part only of consideration, being an antecedent debt not incurred for any immoral purpose, is for legal necessity and that the other part not being for any legal purpose is not binding on sons, the decree should be passed to the effect that on payment by sons to vendee of a sum representing their 2/3rd share and not the

DECREE—Form of.

entire part of consideration found proved for necessity within a certain time, the vendee shall deliver possession of the entire field and the decree should also contain a declaration that vendee has acquired 1-3rd share and interest of father and is entitled to obtain possession thereof in a suit for partition : A.I.R. 1929 Nag. 60, *Rel. on*; A.I.R. 1924 Nag. 109, *Ref.* (*Subhedar, A. J. C.*). SURAJMAL *v.* BAPURAO. **121 I.C. 43= A.I.R. 1929 Nag. 311.**

———Giving of money-decree for immovable property is wrong. (*Chari, J.*). MAUNG THU *v.* MAUNG SHWE HLA. **A.I.R. 1929 Rang. 272.**

———*Damages—There is no preliminary decree in suits for damages.*

A preliminary decree which is followed by a final decree is unheard of in suits for breach of contract claiming damages. (*Fforde and Agha Haidar, JJ.*). BEGG SUTHERLAND & CO. *v.* BAHADUR CHAND. **110 I.C. 177=A.I.R. 1928 Lah. 841.**

———*Decree should be drafted in elastic form so as to make substantial justice to all parties to the litigation.*

Agha Haidar, J.—Decrees, as a rule, should not be drawn up on the model of a steel-frame and it is always desirable that the Court, under its inherent powers and in order to give full effect to its decision, should frame its decree in such an elastic form as would define the respective rights and liabilities of the several parties to the suit and thus to do substantial justice between all those who are concerned with the result of litigation. (*Shadilal, C. J., Broadway, Tek Chand, Jai Lal and Aga Haidar, JJ.*). SANT SINGH *v.* GULAB SINGH. **114 I.C. 417=10 Lah. 7=11 L.L.J. 317= 30 P.L.R. 453=A.I.R. 1928 Lah. 572 (F.B.).**

———Where the plaintiff paid Rs. 100 to the defendant on a contract to sell him cotton which the defendant was alleged to have broken and thereby caused him a loss of Rs. 100 and it was held that the plaintiff broke the contract, thereby causing the defendant a loss of Rs. 40 and the plaintiff's suit was dismissed but that dismissal gave the defendant not Rs. 40 but Rs. 140 as damages.

Held : that the decree should have been for the payment to the plaintiff of Rs. 60. A. I. R. 1925 Nag. 109, *Foll.* (*Hallifax, A. J. C.*). RAMPRATAP KHANDEWAL *v.* GOVIND BARI. **107 I.C. 524.**

———*Separate cause of action against each defendant —Joint decree cannot be passed.*

Per Page, J.—It is not competent for the Court to pass a joint decree against two defendants with respect to each of whom there is a different cause of action. (*Cuming and Page, JJ.*). PARESH CHANDRA SEN *v.* JOGENDRA NATH ROY.

97 I.C. 955=27 Cr.L.J. 1195=A.I.R. 1927 Cal. 93.

———*Preliminary decree should not be passed in suit for damages.*

In suits for damages for failure to take delivery of goods ordered, no preliminary decree should be passed. (*Broadway and Fforde, JJ.*). DURGA DATT-JAGAN NATH DELHI *v.* R.J. WOOD AND CO. OF DELHI. **93 I.C. 1012=A. I. R. 1926 Lah. 337.**

—In a suit for accounts a decree can, if necessary, be given in favour of the defendant on payment of the necessary Court-fees. 7 A. L. J. 543, *Foll.* (*Daniels and Neave, JJ.*). RAM CHARAN *v.* BULAQI. **83 I.C. 880=22 A.L.J. 783=5 L.R.A. Civ. 563= 46 All. 858=A.I.R. 1924 All. 854.**

———*Relief by way of possession not claimed—Decree for possession cannot be given—Practice—Appellate Court.*

DECREE—Form of.

In a suit, in which no relief for possession has ever been asked, a formal decree directing the plaintiffs to be restored to possession whether conditional or otherwise, cannot and ought not to be passed.

Per Walsh, J. :—There is no reason when an appellate Court is seized of the whole matter why it should hold itself prevented from making such orders as are necessary to terminate the controversy and to do justice between the parties, and why it is not competent to High Court in appeal to decree that possession to the sons which they have wrongfully been deprived of subject to their doing equity by discharging the antecedent debt which alone could support the transaction. (*Piggott and Walsh, JJ.*). GOVIND DASS *v.* RAM CHARAN LONIA. **68 I. C. 307=A. I. R. 1923 All. 235.**

———*Relief not asked for—C. P. C., O. 7, R. 7— But facts pleaded in plaint which would cover the relief—Court can grant the relief though not prayed for—Practice.*

Where the plaintiff landlord in a suit for royalty and arrears of rent against tenant claimed a decree for ejectment and immediate possession and also for money due and set out in the plaint facts which showed that he was entitled to another relief also, namely, sale of the lease-hold property;

Held: that a decree for sale of the lease-hold property, though not specifically asked for, was within the scope of the suit as framed. The facts which sustain the relief granted are pleaded and not traversed and though there was no prayer for general relief, the Court can always give general or other relief as it may think just. (*Dawson-Miller, C.J. and Foster, J.*). SATYATARAN CHOUDHRY *v.* JYOTI PRASAD SINHA DEO. **76 I. C. 940= 1923 P.H.C.C. 153=5 P.L.T. 330= A.I.R. 1923 Pat. 386.**

———*Relief cannot be given on basis not raised by pleadings or issues.*

Where no question of the losses being calculated at the rate fixed by the *panchayat* arose on the pleadings.

Held : a decree for an amount calculated at the rate is irregular. (*Martineau, J.*). FIRM SHIB LAL *v.* FIRM HARI RAM CHHADAMI. **67 I.C. 959=5 P.W.R. 1923= A.I.R. 1922 Lah. 408.**

———*Suit by minor to cancel bond taken from him —Decree, form of.*

In plaintiff's suit for cancellation of bond on the ground of minority it was decreed.

"That the plaintiff's claim be and is hereby decreed, but the defendant shall have the right to recover Rs. 5,000 from the plaintiff's property".

Held : the decree though unusual could not be changed. If an order was made that the plaintiff must pay to the defendant Rs. 5,000 otherwise the suit will stand dismissed, the result might be that the plaintiff's suit would be dismissed, but if the defendant attempted to recover his money he would be met by a *res judicata* that the plaintiff is a minor and his suit would fail. (*Simpson, A.J.C.*). MUHAMMAD ANWAR KHAN *v.* JHANDA SINGH. **69 I.C. 888=9 O.L.J. 404=25 O. C. 237= A.I.R. 1922 Oudh 271.**

———*Decree must be confined to subject-matter of suit.*

A decree which goes beyond the subject-mattter of the suit is unjustified by law and must be set aside. (*Le Rossignol, J.*). BHOWANI MAL *v.* SARDAR KHAN. **3 L.L.J. 424=A.I.R. 1921 Lah. 159.**

DECREE—Form of.

———*Conditional decree can be passed.*

Courts of Justice are at full liberty to pass conditional decrees to suit the exigencies of each particular case. 8 All. 149, *Ref.* (*Wazir Hasan, A.J.C.*). AMIR ALI *v.* IQBAL ALI.

61 I.C. 312=24 O.C. 22=8 O.L.J. 287=A.I.R. 1921 Oudh 112.

———*Suit for possession—Mesne profits granted—Decree is not inconsistent with relief asked for.*

Where the decree is perfectly clear and there is no doubt about its meaning, it is unnecessary to look at the pleadings in relation to it. *Robinson* v. *Duleep Singh*, (1879) 11 Ch. D. 798, *Dist.*

Relief of mesne profits is not inconsistent with the prayer for possession in plaint, except so far as there is a statement in the plaint that a separate action would be brought. (*Das and Ross, JJ.*). SURAJ PRASAD PANDE *v.* SOMRA MAHTO.

68 I.C. 903=2 P.L.T. 648=A.I.R. 1921 Pat. 430.

———*Decree of lower Court affirmed.*

An appellate decree should embody so much of the decree of the lower Court as is intended to affirm, and this should avoid the necessity of reference to the decree of the Trial Court. (*Rigg, J.*). LALL DWARKADAS *v.* BURMA RAILWAYS CO. **62 I. C. 299=10 L. B. R. 280=13 Bur. L. T. 173.**

—Fraud.

———Remedy against fraudulent decree lies by way of injunction to restrain party from executing decree. (*Kinkhede, A. J. C.*). SULTANALI *v.* BALAJI.

80 I.C. 59=A.I.R. 1924 Nag. 413.

—Every Court can treat as nullity a judgment which is or can be shown to be obtained by clear and manifest fraud. (*Twomey, C.J. and Robinson, J.*). MAUNG KYAWKKIN *v.* AMINUL HAQ.

62 I. C. 53=10 L.B.R. 253=13 Bur. L.T. 198.

—Minor.

———*Decree against—Guardian not vigilant of minor's interests—Decree is not binding on the minor.*

Where the guardian *ad litem* of the minor against whom a decree is passed has been guilty of gross negligence and laches in conducting the suit on behalf of the minor the decree so passed can be set aside : 1 Lah. 27 and A. I. R. 1925 Lah. 116, *Ref. to.* (*Zafar Ali, J.*). FAZAL DIN *v.* MUHAMMAD SHAFI. **108 I.C. 63=A.I.R. 1928 Lah. 674.**

—The question of there being no decree against the minors, because of want of their proper representation in suit, can be raised at any time, even in execution. (*Devadoss, J.*). SAMI CHETTIAR *v.* SESHA IYER & CO. **113 I.C. 663=A.I.R. 1928 Mad. 1057.**

———*Major wrongly treated as minor—No acquiescence—Decree is not binding on him.*

A major against whom a decree has been obtained in a suit wherein he was erroneously described as a minor represented by a guardian where he has not acquiesced in the proceedings, is not bound by the decree. (*Curgenven, J.*). PATI NAGAMMA *v.* PULAPA VEERASAMI. **98 I.C. 869=A.I.R. 1927 Mad. 217.**

———*Omission to rely on a previous judgment for pleading* res judicata, *is not gross negligence of the guardian vitiating the decree against the minor.*

Where both the lower Courts found negligence merely from the fact that a previous judgment between the parties was not relied upon by the Court of Wards which represented the minor for the purpose of tracing the plea of *res judicata*.

DECREE—Setting aside—Compromise Decree.

Held: that there was no gross negligence such as would be sufficient to vitiate the decision against the minor. (*Devadoss, JJ.*). S. ANANDA RAO *v.* VENKATADRI APPA RAO. **85 I.C. 812=1925 M.W.N. 75=A.I.R. 1925 Mad. 258=47 M.L.J. 700.**

———*Civ. Pro. Code, O. 32, R. 3—Decree against unrepresented minor-defendant, is nullity though prejudice not alleged.*

A minor who was unrepresented in the suit by any guardian cannot be held to be bound by the decree passed againt him although he neither alleges nor proves that the decree passed against him is unjust or to his prejudice and though he regarded himself as major throughout the whole proceeding. 17 C.W.N. 549, *Appr.* Case-law discussed. (*Mukerji and Dalal, JJ.*). MT. CHAMBI *v.* TARA CHAND. **82 I.C. 516=46 All. 744=22 A.L.J. 665=5 L.R.A. Civ. 502=A.I.R. 1924 All. 892.**

—Where the guardian of a minor defendant is guilty of negligence, the decree passed against the minor is not, on that account, a nullity. It is only voidable at the instance of the minor, and a sale in execution of such a decree is perfectly valid. (*Martineau, J.*) KIRPA SINGH *v.* MULA SINGH. **63 I.C. 970. (Lah.)**

—Setting aside.

Collusive Decree.
Compromise Decree.
Effect of.
Fraud.
Grounds.
Minor.
Mistake.
Procedure.
Right to sue.

—Setting aside—Collusive decree.

———*Collusion outside Court to get decree on false evidence—Doubtful if* 41 M. 743 *applies.*

Quaere.—Whether 41 M. 743 applies to the case, namely, of two defendants in a suit by surety conspiring outside the Court but going into the Court and both giving false evidence there with the intention that the defendant party of those two should have a decree made against him which it was known he could not satisfy, with a view to make the surety pay an amount which was not really due by anybody. (*Schwabe, C.J. and Wallace, J.*). PARAMESWARA *v.* V. MAHEDEVI. **72 I.C. 982=1922 M.W.N. 841=A.I R. 1923 Mad. 272.**

—Setting aside—Compromise decree.

———*Fraud—One defendant not joining in compromise—Plaintiff not informing the fact to Court—No fraud is committed.*

Omission on the part of the plaintiff to inform the Court that one of the defendants has not joined in the compromise does not constitute fraud so as to justify the setting aside of the decree. (*Scott Smith and Martineau, JJ.*). PANNA LAL *v.* BALWANT. **87 I. C. 250=7 L. L. J. 205=26 P. L. R. 196=A. I. R. 1925 Lah. 431.**

———*Plaintiff knowing all facts and consenting to decree—No fraud exists.*

If the plaintiff knew all the facts and in spite of that allowed a decree to be passed against him by consent, it cannot be said that he had in any way been defrauded. (*Abdul Raoof, J.*). BHAGAT SINGH *v.* NIKKA. **88 I. C. 572=7 L. L. J. 68=26 P. L. R. 445=A. I. R. 1925 Lah. 357.**

—Where under a *bona fide* mistake, the counsel in a case entered into a compromise, and before the

DECREE—Setting aside—Compromise decree.

decree was drawn up they wanted to withdraw their consent, the Court will allow it and rehear the matter. If the decree is signed, a fresh action is usually necessary to set it aside. (*Heaton, A. C. J. and Marten, J.*). JAMSHEDJI NAOROJI *v.* SORABJI NAOROJI. **85 I. C. 504= 25 Bom. L.R. 1137=A.I.R. 1921 Bom. 414.**

—There are exceptions to the general rule that a decree by consent can only be varied by consent of parties. (*Madgavkar, A. J. C.*). RAMJI HANSRAJ *v.* H. J. CHINAI. **82 I. C. 73=19 S. L. R. 281= A. I. R. 1925 Sind 40.**

———*Setting aside restores parties to their original rights and Court can proceed with original suit.*

The effect of setting aside the compromise was to remit both parties to their original rights and hence where consent decree is set aside Court can proceed with the original suit. (*Das and Ross, JJ.*). ASHRAFILAL MAHTA *v.* SURAJMAYA MISHRANI. **82 I. C. 181=1924 P. H. C. C. 253=6 P. L. T. 150= A. I. R. 1924 Pat. 758.**

—Setting aside—Effect of.

———*Parties are relegated to position before decree.*

The effect of the cancellation of a decree is that the parties are relegated to the position they occupied before the decree was passed. (*Sen, J.*). RAM SARAP KALWAR *v.* MAHABIR KALWAR. **A.I.R. 1928 All. 685.**

———*On decree being set aside plaintiff in original suit can require that suit to be proceeded with.*

When a decree passed against several defendants some of whom are minors is set aside as against the minors in a separate suit brought by them, the parties are restored to the position which they occupied on the date of the decree and that plaintiff in the original suit can apply to the Court to proceed with that suit. (*Suhrawardy, J.*). ICHHAMOYI PAL *v.* PEARYA MOHAN SHAH. **78 I.C. 427= A.I.R. 1925 Cal. 512.**

—Setting aside—Fraud—Burden of Proof.

———*Onus is on party alleging fraud to show that there was no foundation for the suit.*

The test as to whether a suit lies to set aside a decree is whether there was fraud practised in relation to the proceedings in Court by which the defendant in the original suit was prevented from placing his case before the Court. In order to establish that there was fraud in relation to the proceedings of the suit, judgment-debtor would have to show that there was no foundation for that suit at all. There is no onus upon the decree-holders to establish the validity of the decree obtained by them. (*Das and Bucknill, JJ.*). DAMODAR PRASAD *v.* RAM SARUP KUMAR. **71 I.C. 843= 4 Pat. L.T. 102=1923 P.H.C.C. 137= 1 P.L.R. 252=A.I.R. 1923 Pat. 327.**

—In a suit to set aside a decree on the ground of fraud, the plaintiff must prove that the fraud was extraneous to the decree. (*Jwala Prasad, J.*). JAGARNATH PRASAD *v.* BAHURANI. **62 I.C. 594 (P.)**

———*Court being mistaken in its decision—Whether good ground.*

If the Court is mistaken in its decision and was not misled by the defendant there is no *fraud* practised on the Court so as to enable the plaintiff to have the decree set aside. Rule applied to a case of service of summons. (*Rupchand, A.J.C.*). FIRM OF GHULLAMALLY AND SONS *v.* FIRM OF GAMMETER. **24 S.L.R. 232.**

———*Court misled regarding service of summons—Remedy—Civil P. C., O. 9, R. 13.*

DECREE—Setting aside—Fraud—Nature of Proof.

Any and every act of the defendant which misleads the Court does not afford a cause of action to the plaintiff to found a separate suit for having a decree declared void. Thus if in the previous case the Court was misled into holding that the service of the summons by registered post was good service it would not by itself be sufficient to found a separate action on the ground of fraud. The only remedy given to a party under such circumstances is to apply to the Court which passed the previous decree to set aside the *ex parte* decree under O. 9, R. 13, C.P.C. (*Rupchand, A.J.C.*). FIRM OF M. GHULLAMALLY & SONS *v.* FIRM OF GAMMETER. **24 S.L.R. 232.**

—Setting aside—Fraud—Discretion.

———*Relief as to, is discretionary—Plaintiff must prove himself to be free from fault throughout.*

The power of a Court to set aside a judgment on the ground of fraud is discretionary and the party who wants a judgment to be vacated must show reasons why he did not assert and enforce his rights at the proper time. He must explain the whole course of his conduct throughout the previous litigation and must free himself from all imputation: 38 Mad. 203, *Rel. on.* (*Tekchand and Agha Haidar, JJ.*). DUNICHAND *v.* MOTA SINGH. **103 I.C. 759=A.I.R. 1927 Lah. 602.**

—Setting aside—Fraud—Duty of Court.

———*Court must exercise its jurisdiction with care—Fraud must be such as prevented the plaintiff from placing his case before Court.*

A decree, whether it be a consent decree, or an *ex parte* decree, or a decree passed after contest, is liable to be vacated on account of fraud. But the Court must exercise the jurisdiction to vacate the decree with care and reserve. The fraud entitling a Court to vacate a decree must be such a one that, as a result of the fraud, the defendant in the first suit was prevented from placing his case before the Court. (*Chari, J.*). MAISTRY *v.* ABDUL AZIZ RAHMAN. **101 I.C. 434=5 Rang. 46= A.I.R. 1927 Rang. 130.**

—Setting aside—Fraud—False Evidence.

———*False evidence does not invalidate decree unless other party is prejudiced.*

False evidence in a suit would not amount to fraud vitiating a decree unless the effect of that false evidence was to prevent the other party from putting his case before the Court. 21 C. 612, *Foll.* (*Pratt, J.*). GOKULDAS PITAMBER *v.* ODHAIJI GIGABHAI. **77 I.C. 206=25 Bom. L. R. 893= A.I.R. 1924 Bom. 100.**

—A decree obtained by false evidence cannot be set aside by a suit. (*Dawson Miller, C.J. and Ross, J.*). (RAI) BRIJ RAI KRISHNA *v.* CHATHA SINGH. **76 I.C. 136=4 P.L.T. 35=A.I.R. 1923 Pat. 226.**

———*Suit to set aside, on ground that defendant gave perjured evidence does not lie.*

So far as plaintiff relied on perjured evidence the suit is not maintainable. The alleged fraud having been in effect adjudicated upon, an attempt to re-open the case cannot be allowed. (*Pratt, J.*). ARLANDU *v.* C. T. A. A. L. SITHAMBARAM. **74 I. C. 278=1 Bur. L. J. 129= A. I. R. 1923 Rang. 82.**

—Setting aside—Fraud—Nature of proof.

———*Actual positive fraud must be proved—Constructive fraud is not sufficient.*

In order to obtain a reversal of the judgment given in a former case it is not sufficient for the

DECREE—Setting aside—Fraud—Non-Service.

plaintiffs to prove constructive fraud, but they must prove actual positive fraud, a meditated and intentional contrivance to keep the parties, and the Court in ignorance of the real facts of the case and the obtaining of that decree by that contrivance: 41 Cal. 990 and 4 O. L. J. 520, *Foll.* (*Martineau, J.*). BISHEN SINGH *v.* WASAWA SINGH. **92 I. C. 317= A. I. R. 1926 Lah. 177.**

—Setting aside—Fraud—Non-service.

———*Non-service to be fraudulent must be in pursuance of fraudulent intent—Claim unfounded in law is fraudulent if made for a fraudulent purpose.*

The mere fact that notice was not served is not necessarily a fraud. If, on the other hand, it is shown that there was any deliberate suppression of notice particularly in order to give effect to any fraudulent scheme then such suppression of notice would be clearly fraud. Further it is not necessarily fraud on the part of any person to put forward a claim which is in fact unfounded in law. A person may make a claim to which he is not entitled and his conduct is not fraudulent merely on that ground. It must be found that there were circumstances which establish that the claim if there be one, was made with knowledge and for a fraudulent purpose. (*Woodroffe and Suhrawardy, JJ.*). JOGESH CHANDRA GHOSE *v.* PROSANNA KUMAR TALUKDAR. **71 I. C. 962= A. I. R. 1924 Cal. 395.**

———*Absence of service by itself does not indicate fraud but absence of foundation for suit or presence of fair defence indicate fraud.*

Although the Court will not regard an allegation that there was a failure on the part of the plaintiff to serve processes on the defendant as an allegation of fraud, the case will assume a different aspect if there are allegations in the plaint which suggest that there was no foundation at all for the suit or that there was a fair defence to the suit. Such allegations, if established will instantly raise the presumption that the failure on the part of the plaintiff to serve processes on the defendant or to take steps to have a guardian appointed for the minor, was deliberate and was part of a carefully planned campaign to snatch a decree in the absence of the defendants. 5 A. C. 697; 15 Cal. 533; *Foll.* (*Das and Adami, JJ.*). PANDE SATDEO NARAIN *v.* RAMAYAN TEWARI. **71 I. C. 705=2 Pat. 335= 4 P. L. T. 147=A. I. R. 1923 Pat. 242.**

—Setting aside—Fraud—Plea of.

———*Fraud must be particularised—Civil P. C., O. 6, R. 4.*

Where a suit is instituted to set aside a decree on the ground of fraud, it is obligatory and imperative on the plaintiff to prove that the decree was obtained by fraud practised upon the Court. General allegations of fraud are insufficient and the plaintiff must particularise the facts upon which fraud is founded: 15 Cal. 533 (P. C.), *Rel. on.* (*Sen and Niamatullah, JJ.*). JIWAN SINGH *v.* KUAR REOTI SINGH. **123 I. C. 759=11 L.R.A. Rev. 121= 1930 A.L.J. 469=A. I. R. 1930 All. 427.**

———*It must be definitely alleged.*

By whatever procedure it is sought to overthrow a judgment on the ground of fraud, the fraud must be definitely alleged and its particulars unequivocally stated. (*Lord Buckmaster*). TOM BOEVEY BARRETT *v.* AFRICAN PRODUCTS LTD. **110 I.C. 299=29 M.L.W. 72= A. I.R. 1928 P.C. 261.**

DECREE—Setting aside—Fraud—Probate.

———*Exact fraud must be made out.*

Reilly, J.—It is a very serious thing for a party to a decree to come to Court in a latter suit and try to free himself from the decree on the ground of fraud. If he wishes to do so, he should be required to specify the exact fraud of which he complains and to make out that fraud. (*Kumaraswamy Sastri and Reilly, JJ.*). KRISHNASWAMY *v.* MUTHULAKSHMI. **112 I.C. 762= 1928 M.W.N. 609=A.I.R. 1928 Mad. 1097.**

———*Plea must be specifically raised—Civil P. C., O. 6, R. 4.*

If it is sought to set aside a decree on the ground of fraud the allegation of fraud must be clear, definite and specific. 41 Cal. 990, *Ref.* (*Daniels, J.*). RADHA KRISHUN SHUKUL *v.* NOKH LAL. **74 I.C. 964=21 A.L.J. 488= 4 L.R.A. Civ. 481=A.I.R. 1923 All. 566.**

—Setting aside—Fraud—Powers of Court.

———Ex parte *decree—Suppression of service of summons proved—Court can enquire whether the claim in the original suit was true or false.*

In a suit to set aside an *ex parte* decree on the ground of fraud, it is open to the Court to consider the question as to whether the claim of the plaintiff in the previous suit was a true or a false claim. The plaintiffs in the latter suit have in the first place to show that there was no service of summons, then to show that the non-service of the summons was due to a fraud practised by the plaintiff in the previous suit with the object of keeping the defendant in that suit in ignorance of the suit and of preventing him from placing his case before the Court.

After non-service of the summons is proved it is open to the Court to go into the question as regards the merits of the previous suit with the object of finding as to whether, fraud was actually perpetrated, and as to whether, if opportunity had been given to the defendant he could have produced evidence which might have led the Court to come to a different decision: 18 C.W.N. 447, *Rel. on*; 16 C.W.N. 1002, *Expl.*; A.I.R. 1923 Pat. 327 and A.I.R. 1924 Pat. 241, *Ref.* (*Kulwant Sahay and Allanson JJ.*). RAM CHANDRA PRASAD *v.* FIRM PARBHU LAL RAMARATAN. **101 I.C. 718= 6 Pat. 438=8 P.L.T. 193= A.I.R. 1927 Pat. 183.**

———*Suit to set aside decree on the ground of fraud—In the absence of finding as to fraud the merits of the case cannot be gone into.*

Where the main contention in the suit to set aside a decree was that the decree had been obtained by fraud and fraud had not been established.

Held: that in the absence of any such finding as to fraud the Court cannot go into the merits of the case. (*Pearson and Graham, JJ.*). KAYEM BISWAS *v.* BAHADUR KHAN. **89 I.C. 744=42 C.L.J. 22= 30 C.W.N. 41=A.I.R. 1925 Cal. 1258.**

—Setting aside—Fraud—Probate.

———*Judgment obtained by fraud can be set aside against those who practised fraud except grant of probate as a will must be good or bad against all world.*

A judgment which has been obtained by fraud either in the Court, or of one or more of the parties can be impeached by means of an action, and can be set aside against those who procured it by fraud. There is, however, at least one exception to this rule, for although in most cases a judgment obtained by fraud can be set aside only as against the person who committed or produced or procured

DECREE—Setting aside—Fraud—Separate suit.

the fraud, this limitation does not apply to an action to set aside a judgment granting probate or a will in as much as a will must be either good or bad against all the world. (*Mookerjee and Rankin, JJ.*). BIRESWAR GHOSH *v.* PANCHCOURI GHOSH.
74 I.C. 975=37 C.L.J. 143=27 C.W.N. 587=A.I.R. 1923 Cal. 538.

—Setting aside—Fraud—Separate suit.

———*Decree obtained by practising gross fraud on Court—Suit to set aside such decree is maintainable.*

Where a suit to set aside a former decree is not founded upon a mere allegation that the decree was wrong or incorrect or obtained by perjured evidence but upon allegations which, if true, would amount to a gross fraud practised in relation to the proceedings in Court.

Held: that upon such allegations a decree may always be challenged. (*Mukerji and Graham, JJ.*). ABDUL BARI *v.* AMIRJAN. **100 I.C. 603=A.I.R. 1927 Cal. 940.**

———*Suit to set aside consent decree on the ground of fraud on party is maintainable.*

Although a Court has inherent power to correct its own proceedings when it is satisfied that in passing a particular order it was misled by one of the parties, a suit is the proper remedy where the case is one of fraud on the party: A.I.R. 1926 Pat. 483, *Dist.* (*Das and Adami, JJ.*). GANGANAND SINGH *v.* RAMESHWAR SINGH BAHADUR.
102 I.C. 449=6 Pat. 388=8 P.L.T. 730=A.I.R. 1927 Pat. 271.

———*Decree obtained by fraud can be set aside by separate suit.*

Where a decree has been obtained by a fraud practised on another, by which that other has been prevented from placing his case before the tribunal which was called upon to adjudicate upon it, the decree is not binding on him and may be set aside in a separate suit: 21 Cal. 612, *Foll.*; 16 C. W. N. 1002, *Dist.* (*Findlay, O.J.C.*). KESHO RAO GANPAT RAO *v.* PANDURANG. **95 I.C. 348 (Nag.).**

———*Fraud must be extraneous to matters adjudicated upon.*

A suit will not lie to set aside a decree obtained by fraud unless the fraud is extraneous to the suit and all matters and questions which have already been adjudicated upon at the trial of the suit. (*Godfrey, J.*). SD. ABDULLAH RAHMAN *v.* SYED ALABI. **86 I.C. 537=4 Bur. L.J. 18=3 Rang. 65=A.I.R. 1925 Rang. 200.**

—Setting aside—Fraud—What is.

———*Fraud must be defined on the face of decree—Irregularity or over-statement of claim is not fraud.*

The fraud which should be established, before a decree passed by a Court of competent jurisdiction could be set aside in a separate action, must be fraud which can be explained and defined upon the face of a decree and mere irregularity, or the insisting upon rights which upon a due investigation of those rights, might be found to be over-stated or over-estimated, is not the kind of fraud which will authorize the Court to set aside a solemn decision which has assumed the form of a decree. *Patch* v. *Ward*, (1896) L.R. 3 Ch. 203, *Rel. on.* (*Tekchand and Agha Haidar, JJ.*). DUNICHAND *v.* MOTA SINGH. **103 I.C. 759=A.I.R. 1927 Lah. 602.**

———*Deposit after preliminary decree on hypothecation bond—Revised preliminary decree after re-hearing—Sale in execution of final decree on revised decree—Deposit not considered—No fraud is established justifying suit for setting aside decree.*

DECREE—Setting aside—Grounds.

Where in a suit on a hypothecation-bond, a preliminary decree is passed and the judgment-debtor deposited the full decree amount but the suit is reheard and a revised preliminary decree is passed subsequently which is confirmed on appeal and a final decree is obtained in execution of which the mortgaged properties are sold for an amount less than the decretal amount and decree-holder attached the deposited amount for the balance.

Held: that the conduct of the decree-holder in not taking into consideration the deposited amount while executing the decree, does not amount to legal fraud justifying a suit for setting aside the decree. (*Spencer, J.*). RAMA GOUNDAN *v.* VELAPPA GOUNDAN. **97 I.C. 989=24 M.L.W. 520=1926 M.W.N. 662=A.I.R. 1926 Mad. 1069.**

———*Words in printed forms of execution application, used, while applying, in a sense different from usual meaning—No fraud is committed.*

Where in an application for execution, the applicant put the words 'Amount due' under the decree by striking the words 'Amount decreed' in the 7th column and indicated a sum not actually decreed but which was arrived at by calculating according to the manner indicated in the decree for such calculations, and also used in the 5th column the word 'adjustment' not in the strict legal sense but loosely, indicating that the adjustments were merely calculations made by the applicant himself.

Held: that no fraud was practised on the Court and the orders of the Court passed on such application were not liable to be set aside on the ground of fraud. (*Robinson, C.J. Young and Brown, JJ.*). CHOKALINGAM CHETTY *v.* RAMAN CHETTY.
84 I.C. 824=2 Rang. 537=A.I.R. 1925 Rang. 155 (b) F.B.

—Where the pleader allows the essential points in a case to be overlooked the decree cannot be vacated for fraud though the pleader may be liable for misconduct. (*Newbould, J.*). KIRAN CHANDRA *v.* BONO BEHARIDUTTA. **59 I.C. 752 (Cal.).**

—Setting aside—Grounds.

———*Decree though found to be erroneous in view of later decisions cannot be set aside.*

The mere fact that decree was passed in a previous litigation which in view of more recent judicial pronouncement was erroneous is no ground for setting aside that decree. (*Jai Lal and Agha Haidar, JJ.*). UMAR DIN *v.* MIRZAMAN.
31 P. L. R. 123=A. I. R. 1930 Lah. 654.

———*Fraud—Suppression of important evidence or reliance on perjured evidence to obtain a decree cannot be the basis of subsequent suit brought for declaration that previous judgment is null and void.*

The mere fact that a party has suppressed important evidence or has relied upon perjured evidence in the case and has therefore obtained a decree in his favour cannot be the basis of a subsequent suit which can be brought for a declaration that the previous judgment was null and void and of no legal effect: 29 Mad. 179, held overruled by 41 Mad. 743. (*Shadi Lal, C. J. and Agha Haidar, J.*). SHER BAHADUR *v.* MD. AMIN. **116 I. C. 330=11 L. L. J. 207=A. I. R. 1929 Lah. 569.**

———*Suit does not lie to set aside a decree on the ground of its being wrong—Appeal is the remedy.*

A party to a decree is not entitled to maintain a suit to have the decree set aside on the ground that it was wrong. His remedy is to have it set right in appeal: 41 Cal. 990 and 43 Cal. 217, *Rel. on.* (*Tekchand, J.*). AMAR SINGH *v.* CHHAJJU MUL. **108 I. C. 55=A. I. R. 1928 Lah. 766 (b).**

DECREE—Setting aside—Grounds.

—The decree in the Small Cause suit can be set aside only on account of fraud or collusion: 41 Mad. 743, *Rel. on.* (*Ramesam, J.*). RAMAN MENON *v.* MADHAVA MENON. **98 I. C. 176= A. I. R. 1927 Mad. 96.**

———*Perjured evidence given in the case—This alone is not sufficient cause.*

The mere fact that perjured evidence has been given in the case is not sufficient cause for bringing a suit to have the *ex parte* decree in that case set aside. (*Rutledge, C. J. and Brown, J.*). M. A. MAISTRY *v.* ABDUL AZIZ RAHMAN. **104 I. C. 313= 5 Rang. 471=6 Bur. L. J. 148= A. I. R. 1927 Rang. 281.**

———*A decree cannot be set aside merely on the ground that it was obtained by perjured evidence.*

Where a decree has been obtained by means of evidence challenged by the other side and duly weighed by the Court before acceptance the decree cannot be set aside merely on the ground that such evidence can be proved to be false.

The jurisdiction to impugn a previous decree for fraud is to be exercised with care and reserve and the fraud must be established by proof before the propriety of the prior decree can be considered by the Court. There is an important distinction between *ex parte* decrees and contested decrees and a very heavy burden will be upon the party endeavouring to set aside a contested decree of a Court: 41 Cal. 990; 38 Mad. 203; 41 Mad. 743; 8 S. L. R. 81 and 10 Ch. D. 327, *Foll.* (*De Souza, A. J. C.*). MAHOMED YUSIF *v.* NURJAN. **104 I.C. 805= A.I.R. 1927 Sind 257.**

———*Fraud cannot be alleged if suit decreed on contest or if summons was duly served on defendant in the case of* ex parte *decree.*

It is not open to a party to raise pleas of fraud and production of false evidence in a suit to set aside a decree passed in a suit decreed on contest or if the suit had been decreed *ex parte* and it was established that summonses had been served on the defendants: A.I.R. 1925 Cal. 663, *Foll.*; 33 Cal. 936 and 18 C. W. N. 447, *Dist.* (*Greaves and Cuming, JJ.*). BAIKUNTHA CHANDRA *v.* PRAHLAD CHANDRA. **88 I.C. 583=30 C.W.N. 560= A. I. R. 1926 Cal. 426.**

———*Transaction tainted with fraud is voidable and not void—Decree obtained by fraud must be set aside only on the ground of want of jurisdiction.*

A transaction tainted with fraud is voidable and not void. A decree obtained by fraud, collusion or any other unlawful means is a pronouncement in Court of justice, and it cannot be treated as a waste paper. The only objection that can be made to a decree as being void or a nullity must be on ground that it was passed without jurisdiction or that the Court which passed it had no territorial or pecuniary jurisdiction over the subject-matter of the suit. (*Suhrawardy and Duval, JJ.*). FAZLUDDIN *v.* KHETRA. **90 I.C. 866=30 C. W. N. 59= A.I.R. 1926 Cal. 167.**

———*No absence of jurisdiction and fraud—Decree cannot be set aside by separate suit.*

There is a distinction between a void and a voidable judgment, an irregular judgment being a voidable and not a void judgment. Where the Court has jurisdiction, but in the exercise of the jurisdiction the Court has acted illegally or with material irregularity, but where there has been no fraud, the judgment is voidable and it can be vacated in an appropriate proceeding either by the Court which rendered it or under the Code by the

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appellate Court either in appeal or revision. But no separate suit can be brought to set aside the decree.

Where a final decree was attacked as having been passed without any application by the plaintiff, but where no fraud existed.

Held: that a separate suit to set aside the decree did not lie: 2 Pat. 335, *Foll.*; 41 Cal. 990; *Ref.* (*Baker, J.C.*). SITARAM *v.* LAXMANRAO. **87 I.C. 820=A.I.R. 1926 Nag. 152.**

———*Suit does not lie to set aside a decree as erroneous.*

A decree cannot be challenged, on the ground of its being erroneous, by a fresh suit. (*Walmsley and B.B. Ghose, JJ.*). JAGANNATH MARWARI *v.* KALACHAND BANERJEE. **86 I.C. 1042=41 C.L.J. 290=29 C.W.N. 771= A.I.R. 1925 Cal. 785.**

———*Suit for—Plaintiff's case being false to his knowledge is no ground.*

To sustain an action to set aside a decree on the ground that it was obtained by fraud, the fraud must be extrinsic to the proceedings before the Judge. It must be in the conduct of the suit, by keeping the plaintiff out of Court, by practising a fraud on him, or by not serving a notice upon him, or by a false declaration, inducing the Court to believe that notice has been served and proceed with the suit *ex parte*, or by some other act by which the defendant is prevented from placing his case before the Court, as fully as he would do, but for the act of the plaintiff. The fact that plaintiff in the previous suit brought a suit false to his knowledge cannot sustain a suit for setting aside the decree obtained by him. (*Devadoss, J.*). SUBBANNA *v.* K. D. BAYAMMA. **86 I.C. 498= 21 M.L.W. 300=A. I.R. 1925 Mad. 640.**

—Judgment based on evidence recorded in another suit at the request of one party but in teeth of the opposition of the other party is liable to be set aside. (*Ramesam and Reilly, JJ.*). PERIGI VENKOBACHARLU *v.* SANJI RADHABAYAMMA. **85 I.C. 912=35 M.L.T. 101= A.I.R. 1925 Mad. 230 (1)=47 M.L.J. 640.**

———*Suit for—On the ground that it was obtained by false evidence does not lie.*

In the absence of evidence in support of collusion and fraud, no suit can be brought for the refund of money by setting aside or ignoring the decree on the ground that the suit in which decree was passed was false and was supported by false evidence. (*Rafique and Lindsay, JJ.*). SHEO PRASAD *v.* SRI PAUL. **66 I. C. 81=20 A. L. J 254= A.I.R. 1922 All. 167.**

———*Perjury and suppression of facts during trial, will not vitiate judgments.*

Perjury in the course of seeking to prove facts and suppression of evidence in a case during its conduct are not fraud of a nature that will vitiate a judgment. (*Coutts Trotter and Ramesam, JJ.*). M. BALAKRISHNA MUDALIAR *v.* A. SWAMINATHA MUDALIAR. **69 I.C. 12=16 M.L.W. 132= 1922 M.W.N. 463=A.I.R. 1922 Mad. 404.**

———*Small Cause decree — False suit — Falsity known to plaintiff—Decree obtained by perjured evidence—Decree should be set aside.*

A Small Cause Court decree is final in the sense that no appeal lies against it; but it cannot on that ground be urged that it may not be set aside by separate suit on the ground of fraud.

Where not only the decree was obtained by perjured evidence but the suit or claim was a false

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suit or claim and the falsity of the claim was known to the party putting forward the claim.

Held: that the decree should be set aside. 24 C.W.N. 133, *Ref.* (*Teunon and Newbould, JJ.*). RAJANI KANTA DAS *v.* PURNA CHANDRA KUNDU. **63 I.C. 712=48 Cal. 298= A. I. R. 1921 Cal. 298.**

———*Suit for decree being obtained by perjured evidence is no ground.*

A suit to set aside an *ex parte* decree, not on the ground that the plaintiff was prevented by any fraud on the part of the defendant from placing his case before the Court, but on the ground that the defendant procured the decree by putting forward perjured evidence in his favour, is not maintainable. 5 P. L. J. 259, *Foll.* (*Dawson Miller, C. J. and Ross, J.*). JANGAL CHOUDHRY *v.* LALJIT PASBAN. **60 I. C. 124=6 P. L. J. 1= 1921 P. H. C. C. 3=A. I.R. 1921 Pat. 12.**

—Setting aside—Minor.

Failure to raise a doubtful plea in the suit by the guardian *ad litem* does not amount to gross negligence on his part and the minor cannot set aside the decree on that ground. (*Srinivasa Ayyangar and Cornish, JJ.*). VENKATARAMANI *v.* SUBRAMANIA. **108 I. C. 639= A. I. R. 1928 Mad. 945.**

—Where minor is represented by a duly appointed guardian, the decree is not *ab initio* void and Art. 12, Limitation Act, will apply to set it aside. (*Findlay, O. J. C.*). SADASHEO *v.* KARIM. **92 I. C. 241=A. I. R. 1926 Nag. 267.**

———*Fraud—Minor is equally bound by a decree as a major—Decree against minor properly represented —Fraud or collusion is the only ground for setting aside.*

An infant is bound by judgment as much as if he was of full age, unless gross laches or fraud and collusion appear in the *prochein ami.* In India the procedure in cases of gross laches is to apply for a review or, if the decree was *ex parte* to get the *ex parte* decree set aside. If it be sought to set aside a decree obtained against an infant, properly made a party and properly represented in the case, and if it be sought to do this by a separate suit, then the plaintiff in such a suit can succeed only upon proof of fraud or collusion. (*Ross and Macpherson, JJ.*). RAJGOPAL ACHARJYA *v.* UPENDRA ACHARJYA. **96 I. C. 437=5 Pat. 768= A. I. R. 1926 Pat. 528.**

———*Guardian and Ward—Decree passed against minor defendant owing to vakil's inability to explain witnesses's absence and to obtain adjournment, due to guardian's absence, must be set aside.*

The guardian *ad litem* of a minor was absent at the hearing; consequently the vakil for the guardian was unable to explain the circumstances under which the witnesses to whom *subpoenas* were taken out were not present in Court. Consequently the adjournment applied for was refused and a decree was passed by the Court against the minor defendant:

Held: that there was gross negligence on the part of the minor's guardian and that the decree must be annulled. 45 Mad. 425, *Ref. to.* (*Devadoss, J.*). DADA SAHIB *v.* GAJRAJ SINGH. **85 I.C. 258= 20 M.L.W. 854=A.I.R. 1925 Mad. 204= 47 M.L.J. 928.**

———*Decree must be set aside.*

Where the lower Court found as a fact that the plaintiff was a minor at the date of the institution of the previous suit:

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Held: that the High Court had no alternative but to give a declaration to the effect that the decree was a nullity so far as the plaintiff was concerned, whether or not as a fact the plaintiff had any interest in the property. (*Das, J.*). ALI HUSSAIN *v.* FAGUNI RAI. **86 I.C. 856= 3 Pat. L.R. 16=A.I.R. 1925 Pat. 367.**

———*Plaintiff inducing defendant's guardian to suppress evidence and getting a decree—Decree cannot be set aside.*

Where *A* filed a suit against *B* and induced the latter's guardian to suppress material evidence and thus got a decree in his favour.

Held: that this is not such a fraud as would entitle *B* to file a suit to set aside the decree for fraud. (*Macleod, C. J. and Crump, J.*). SHRINIVAS SARJE RAO *v.* NARAYAN RAO NAVLOJI RAO. **76 I.C. 551=A.I.R. 1923 Bom. 379.**

———*Civil P. C., O.* 32, *R.* 4 (4)—*Court Guardian got appointed on false affidavit—Decree is not binding on minor—Decree—Setting aside—Minor.*

The appointment of the Court guardian on a false affidavit that there was no proper relation of the minor to act as next friend is vitiated by fraud and is of no legal effect. The decree in such a suit and the subsequent sale are therefore not binding on the minor. (*Krishnan and Ramesam, JJ.*). (PUPOOTH) RIRICHAND *alias* RAMANUNNI KURUP *v.* VAYISRAVANTH MANAKKAL RAMAN. **74 I.C. 309=17 M.L.W. 558=32 M.L.T. 107= 1923 M.W.N. 301=A.I.R. 1923 Mad. 553 =44 M.L.J. 515.**

—Setting aside—Mistake.

———*Mistake of trying Court—Decree cannot be set aside.*

A decree once obtained can only be set aside on the ground of fraud. It cannot be set aside on the ground of mistake where the mistake was not the mistake of the plaintiff nor of the defendant but the mistake of the Munsif who tried the suit: 43 Cal. 217, *Foll.* (*Harrison and Jai Lal, JJ.*). MUNICIPAL COMMITTEE, AMRITSAR *v.* HARNAM DAS. **110 I.C. 628=9 Lah. 35=29 P.L.R. 316= A.I.R. 1928 Lah. 178.**

———*Mistake not in the decree, but in a document on which judgment is based—Suit to rectify mistake does not lie.*

Where a decree has been procured by some grave mistake so as to vitiate the whole character of the decree, and to permit its execution would amount to an abuse, the Court has power to rectify the error or mistake upon which the decree is founded in an independent suit; but where a mistake has been made, not in the judgment or decree, but in a document forming part of the evidence on which the judgment is based, a suit to rectify does not lie. (*Martineau, J.*). BISHEN SINGH *v.* WASAVA SINGH. **92 I.C. 317=A.I.R. 1926 Lah. 177.**

———*Judgment of a competent Court cannot subsequently be assailed for mistake.*

A judgment passed by a competent Court having jurisdiction cannot be assailed in a subsequent suit on any ground of mistake. (*Newbould and Ghose, JJ.*). SYED ABU MAHOMED BARAKAT ALI *v.* ABDUL RAHIM. **80 I.C. 44= A. I. R. 1925 Cal. 187.**

———*Consent decree can be set aside on ground of mutual mistake—Party cannot retain benefit of compromise in part and repudiate the remainder.*

A consent decree cannot have greater validity than the compromise itself and can therefore be set aside on the ground of mistake, fraud, etc. But a mistake on the part of one party only not caused,

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or actively assisted by the other cannot invalidate the decree. A party cannot retain the benefit of a compromise in part and repudiate it as to the remainder. (*Mukherjee and Chotzner, JJ.*). MAJOR A.V. REILY *v.* RAJKUMARI. **74 I.C. 770= 36 C.L.J. 245=A.I.R. 1922 Cal. 493.**

—Setting aside—Procedure.

———*Civil P. C., S.* 11—*Subsisting judgment set up as* res judicata—*It can be impeached on ground of fraud and collusion in the same suit.*

When a subsisting judgment order or decree is set by one party as a bar to the claim of other party, it is not necessary for the other party to bring a separate suit to have the same set aside, but it is open to him in the same suit in which it is sought to be used against him to show that it was obtained by fraud or collusion: A.I.R. 1926 Cal. 167, *Dist.*; 27 Cal. 11; 26 Cal. 591; 21 C.W.N. 594; 24 All. 242; 28 Bom. 639, *Ref.* (*Mukherji, J.*). JAMIR-ADDIN *v* KHADEJANESSA BIBI. **114 I.C. 407= A.I.R. 1929 Cal. 685.**

———*Evidence Act, S.* 44—*Time to set aside a decree expiring—Validity of the decree can be challenged in defence on the ground of fraud.*

Although a defendant cannot bring a suit on the ground of limitation to set aside a decree, he can still in defence contend when the decree has been proved by the plaintiff, that it had been obtained by fraud, and it is not necessary for him to bring a suit to set it aside: A.I.R. 1921 Bom. 257, *Appr.* (*Cuming and Mukherji, JJ.*). BHOLA NATH BOSE *v.* MT. NAGENDRA BALA. **110 I.C. 571= A.I.R. 1928 Cal. 810.**

———*Appellate decree being executed by lower Court —Executing Court from other materials finding that certain matters were not put before the appellate Court and so modifying the decree as the appellate Court would have passed if the matters were put before it—Executing Court's act was without jurisdiction—Proper course was review—Civil P. C., O.* 47, *R.* 1.

The decree of the High Court ran thus: "It is ordered and decreed that the plaintiff do get *khas* possession against the tenant defendants, and it is further ordered and decreed that the plaintiff do realize mesne profits for three years prior to the institution of the suit, the amount to be determined in execution proceedings." The Judge upon other materials placed before him in execution proceedings found that the plaintiff had entered into a compromise with certain persons regarding certain lands and he came to the conclusion that as the compromise was not brought to the notice of the High Court, the High Court had made the decree as stated above.

Held: that no doubt, if the compromise had been brought to the notice of the High Court, the decree might have been made otherwise. But the Subordinate Judge had acted absolutely without jurisdiction in modifying the decree of the High Court in the way he thought that the High Court should have made its decree. If the defendant judgment-debtors had suffered in any way by reason of anything which the plaintiff had done and which was not brought to the notice of the High Court when the case was heard, the proper way was to have the decree amended either by way of review or by some other legal proceeding. The defendants not having done that, could not ask the Subordinate Judge to amend the decree of the High Court in the manner which the Subordinate Judge thought just and to execute the decree in that way. There was not ambiguity in the decree and the clear duty of the executing Court was to execute the decree as it stood. (*B.B. Ghose and Bose, JJ.*). KHATEMANNESSA BIBI *v.* UPENDRA CHANDRA. **115 I.C. 591=A.I.R. 1928 Cal. 804.**

DECREE—Setting aside—Right to sue.

———*Civil P. C., O.* 47, *R.* 1—*Decree passed against A in a suit by R on the admission of claim made by A's general agent*—Mukhtyarnama *conferring no such power on agent—Remedy open to A is by separate suit and not review of judgment.*

In a suit by *R* against *A* a decree was passed against *A* on the basis of an admission of the claim made by *A*'s general agent. Thereupon *A* brought a suit to get the decree set aside alleging that *Mukhtyarnama* executed by *A* did not confer any power on his agent to admit any claim or make any compromise.

Held: that *A* could not seek the remedy by way of review of judgment and the proper remedy for him was by instituting a regular suit for the purpose inasmuch as the decree did not contain merely a mistake or an error apparent on the face of the record but one involving a delicate question whether the general agent of *A* had authority under the *mukhtyarnama* executed in his favour to admit the claim: *Huddersfield Banking Co., Ltd.* v. *Henry Lister & Son, Ltd.*, (1895) 2 Ch. 273; 10 C.W.N. 529; 13 C.W.N. 1197; 14 C.W.N. 451 and 34 All. 143, *Discussed* and *Rel. on*; 38 All. 7; 41 Mad. 743 and 23 O.C. 342; *Dist.* (*Gokaran Nath Misra and Nanavutty, JJ.*). BHAGWAN DUTT *v.* RAM DUTT. **113 I.C. 483=5 O.W.N. 812= 4 Luck. 76=A.I.R. 1928 Oudh 418.**

———*Fraud—Independent suit is not necessary.*

A party to a suit can show that a decree obtained by the opposite party against him in another suit was obtained by fraud, and it is not necessary for him to bring an independent suit for setting it aside: 27 Cal. 11, *Foll.* (*N. R. Chatterjee and Panton, JJ.*). PRYAG KUMARI DEBI *v.* SIVA PRASAD SINGH. **93 I.C. 385=42 C.L.J. 280=A.I.R. 1926 Cal. 1.**

———*Remedies to set aside voidable decree are review of suit—Article* 120 *applies—Time runs from decree.*

A decree which is voidable can only be set aside by a regular suit or by bringing an application for review to the Court that passed the decree. The period prescribed is given by Article 120; where a decree is voidable it is voidable from the very date on which it is passed and consequently limitation for a suit to set aside such a decree upon the ground that it is voidable begins to run from the date of the decree itself. (*Lindsay and Kanhaiya Lal, JJ.*). MUST. PHULWANTI KUNWAR *v.* INESHAR DAS. **83 I.C. 782=46 All. 575=22 A.L.J. 521= 5 L.R.A. Civ. 785=A.I.R. 1924 All. 625.**

—The proper and convenient course to set aside a decree is to go to the Court that granted the decree and to get it set aside by that Court. (*Das and Macpherson, JJ.*). THE BANARES BANK LIMITED *v.* SURENDRA NARAIN SINGH. **75 I.C. 469= A.I.R. 1924 Pat. 831.**

———*Fictitious decree need not be set aside.*

Execution sale founded on a fiction is really of no value and not binding on any one and does not require to be set aside. (*Greaves and Cuming, JJ.*). SASHI KUMAR SARKHEL *v.* CHANDRA KUMAR SAMADDAL. **68 I.C. 322=35 C.L.J. 348= A.I.R. 1923 Cal. 204.**

—Setting aside—Right to sue.

———*Person not party cannot invite Court to vacate consent decree.*

It is not competent to person to invite a Court to vacate a consent decree to which he is no party; all that he can do is to get a declaration that this

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decree did not affect his right: 22 C.L.J. 383, *Foll.* (*Cuming and Graham, JJ.*). BISWAMBAR BISWAS *v.* NILAMBAR MURARI. **33 C.W.N. 997= A.I.R. 1930 Cal. 263.**

———*Declaration that property in possession of party to mortgage suit should be saved from burden of mortgage decree cannot be obtained by the party who remains absent, and decree is not tainted by fraud.*

Where a mortgagee obtains a decree for sale of the property mortgaged and another person who is in possession of the property having purchased it in a money decree is made defendant and chooses to remain absent the latter cannot obtain a declaration that the property in his possession should be saved from the burden of the decree, while it stands and is not tainted by collusion or fraud. (*Dalal, J.*). TERBENI MISSIR *v.* BABU MANGAL CHAND. **A.I.R. 1929 All. 889.**

———Guilty party will not be permitted to defeat a judgment by showing that, in obtaining it he had practised an imposition on the Court. (*Wazir Hasan and Pullan, A. J. Cs.*). BANSI DHAR *v.* AJUDHIA PRASAD. **82 I.C. 333=27 O.C. 175= 11 O.L.J. 619=A.I.R. 1925 Oudh 120.**

———*Decree against firm cannot be set aside on ground of fraud by person, not a member of the firm.*

A person cannot sue to set aside a decree against a firm on the ground that he was not a member of the firm and that the decree was obtained against the firm by fraud and collusion. (*Harrison, J.*). JAWAHAR SINGH *v.* N. D. SASOON & CO. **75 I.C. 165=A.I.R. 1923 Lah. 290.**

—Validity of.

———*Decree against dead person is nullity.*

Decree against a person who is actually dead on the date when the decree was passed is a nullity and void: 13 All. 53 (P. C.) and 40 All. 423, *Foll.* (*Sulaiman and Niamatullah, JJ.*). JADU NANDAN RAM *v.* PARSOTAM GINNING CO., LTD. **1930 A.L.J. 941=A.I.R.1930 All. 636.**

———*On death of guardian* ad litem *or next friend pending suit or appeal another not substituted and suit decreed—Decree not nullity and executing Court cannot interfere in execution.*

The mere fact that the guardian *ad litem* or next friend of a minor during the proceeding in a suit died and had not been replaced by another till the final decision does not make the decree null and void, the omission is at the most an irregularity which does not form a ground for the executing Court to interfere in execution. (*Case-law discusssd*). (*Madgavkar, J.*). SHIDAPPA IRAPPA *v.* RERAPPA SOMAPPA. **31 Bom.L.R. 1254= 54 Bom. 96=A. I. R. 1930 Bom. 141.**

———*Decree based on award invalid against some—Decree also not separable—Award and decree are invalid in entirety.*

Where a decree based on an award cannot be passed against any one of the defendants and it is not possible to separate it, the award and the decree must both be held to be invalid in their entirety. (*Tek Chand, J.*). AHMED *v.* SARDARA. **114 I. C. 712=A. I. R. 1929 Lah. 171.**

———*Mortgagee abandoning his claim against one mortgagor—His name retained on record and decree passed against him also—Decree is not binding on that mortgagor.*

A voluntary and unqualified abandonment by a mortgagee of his claim against one of the mortgagors operates as unqualified dismissal of his suit so far as that mortgagor's interest is concerned although his name is retained on the record and the decree is passed as against him also. The

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mortgage should be deemed to have been wiped out of existence as against that mortgagor's interest. (*Kinkhede, A. J. C.*). UTTAMCHANDA *v.* SHALIGRAM. **117 I. C. 285= A. I. R. 1929 Nag. 79.**

———Filing of an appeal from preliminary decree after the passing of final decree cannot possibly have the effect of nullifying the final decree: A. I. R. 1926 All. 291, *Not foll.* (*Sulaiman and Banerji, JJ.*). CHHANGA *v.* TIRHI. **107 I. C. 581= 26 A. L. J. 87=A. I. R. 1928 All. 192.**

———*Acceptance of resignation of the old trustee by the Devasthan Committee—Decree passed before taking charge by the new trustees—New trustees not brought on record—Decree passed by a competent Court is not rendered a nullity—Civil P. C., O. 22, R. 10.*

The mere fact of the appointment of new trustees by the temple committee even though the new trustees did not take over charge of the office of trusteeship does not render a nullity the decree and judgment passed by the Court of competent jurisdiction against the Devasthan. The mere resignation by a trustee being accepted does not tend the whole proceeding to the same position as in the case of the death of a party: A. I. R. 1921 Cal. 422; 5 Pat. L. J. 314, *Foll.* (*Srinivasa Aiyangar and Reilly, JJ.*). VISWANATHASWAMI DEVASTHANAM *v.* KOODALINGA NADAN. **108 I.C. 401= 1927 M. W. N. 743=A. I. R. 1928 Mad. 246.**

———*Evidence Act, S. 44—Collusive decree binds parties thereto and their representatives—It is not nullity.*

A collusive decree binds the parties thereto and is not a nullity. It is also binding on the representatives of the parties.

No doubt a decree can be avoided on the ground of fraud or collusion under S. 44 of the Evidence Act, but there is a great difference between fraud and collusion. A party who has been made the victim of a fraud can obviously avoid a decree on the ground that he has discovered the fraud subsequent to the decree which could not have been made a point of defence in the former litigation. On the other hand, the fact of collusion is a matter which must have been well-known to both the parties and is a point which could and might have been raised before the decree was passed on the last occasion. A third party can undoubtedly avoid a decree on the ground that it has been obtained collusively, but a party to a collusive decree cannot avoid it on that ground: 11 Bom. 708; 20 Mad. 333; 31 Mad. 485 and 18 Mad. 378, *Rel. on.* (*Sulaiman, J.*). SAHEB RAI *v.* BEHARI RAI. **101 I. C. 765= A. I. R. 1927 All. 494.**

———*Preliminary decree passed* ex parte—*Notice to other party is necessary before it is made final.*

Where a preliminary decree is passed *ex parte*, notice ought to be issued to the other side before the final decree is passed. (*Walsh, A. C. J. and Bannerji, J.*). RAMCHANDRA BANSAL *v.* LACHMAN. **100 I.C. 18= 49 All. 396=25 A.L.J 296= A.I.R. 1927 All. 329.**

—A decree against a dead person is a nullity. (*Dalip Singh, J.*). LACHHAMAN SINGH *v.* MT. CHATTAR KAUR. **103 I.C. 767=A.I.R. 1927 Lah. 663.**

—An error in law does not invalidate the judgment until it is set aside by superior Court. (*Ross and Wort, JJ.*). ACHUDANAND SINGH *v.* GAYANCHAND MAHTON. **102 I.C. 768=8 P.L.T. 673= A.I.R. 1927 Pat. 313.**

———*High Court ordering stay of suit—Stay order not communicated to trial Court—Decree is valid.*

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Where the High Court passed an order staying the suit in the lower Court, but before the order could be communicated to it, it passed a decree in that suit.

Held: that the decree must be treated as validly passed: 41 Mad. 151, *Foll.*; 33 Cal. 927, *Not foll.* (*Kinkhede, A.J.C.*). UDARAM MANGIRAM *v.* LAXMAN MARWARI. **104 I.C. 470= 10 N.L.J. 45=A.I.R. 1927 Nag. 241.**

———*Necessary parties not on record—Decree passed in ignorance of the fact is void against them and wholly void if interests are inseparable*—(*Obiter*).

No decree is binding on a party if he was a necessary party to the suit and he was not on record: and if his interest is inseparable from those of other judgment-debtors under the decree, the decree as a whole would be void: A. I. R. 1925 All. 141; 17 All. 478; 32 All. 301 and 38 Mad. 682, *Rel. on.* (*Wallace, J.*). VESU *v.* T. V. KANNAMMA. **97 I. C. 551=1926 M.W.N. 763= A. I. R. 1926 Mad. 991=51 M.L.J. 282.**

———*Suit on a pro-note by deceased against a wrong person not in possession of deceased's estate—Decree against such person is not binding on real heir.*

Where in a suit on a pro-note by the deceased the decree is against the person in possession of the deceased's estate it is binding on the real heir but where there is no such possession, however *bona fide* the suit, the decree is not binding on the real heir. However honest or *bona fide* a person's belief may be in bringing such a suit, the danger of allowing it to bind the real heir lies in this consideration, namely, that however false or unjust the suit may be, where the defendant is neither in possession nor an heir, there is really nobody interested in defending the suit: 36 M.L.J. 106; 26 Mad. 230 and 11 Mad. 408, *Foll.* (*Case-law considered*). (*Ramesam, J.*). MALAPPA *v.* N. G. KARE GOWD. **93 I.C. 625=1926 M.W.N. 174= A. I. R. 1926 Mad. 487=50 M.L.J. 442.**

———Decree against a dead person is a nullity. 4 P. L. J. 240 (F. B.), *Foll. (Das and Adami, JJ.).* KESHO PRASAD SINGH *v.* SHAMNANDUN RAI. **94 I.C. 28=5 Pat. 233=7 P.L.T. 628= 1926 P.H.C.C. 81=A.I.R. 1926 Pat. 504.**

———*Decree is valid until set aside.*

Every order or judgment however erroneous carries with it an initial presumption of validity until and unless it is set aside or declared to be of no effect. (*Pearson and Graham, JJ.*). SHRINATH CHATTERJEE *v.* KEDAR NATH RAI. **82 I.C. 255=A.I.R. 1925 Cal. 276.**

———*Civil P. C., O. 41, R. 1—Decree not prepared by trial Court—Appeal heard and decided—Decision is nullity.*

Plaintiff's suit was dismissed by the trial Court but no decree was prepared. Plaintiff appealed to the District Judge who accepted the appeal and granted the plaintiff a decree.

Held: that the proper course for the District Judge to have adopted was to grant an adjournment to enable the plaintiff to get a decree prepared and therefore the decree granted by him was a nullity. 66 P. R. 1919; 19 P. R. 1919, *Foll. (Harrison, J.).* SHER MUHAMMAD *v.* MUHAMMAD KHAN. **69 I.C. 558=A.I.R. 1924 Lah. 352.**

———*Defendants in ejectment suit recorded as occupancy tenant in record-of-rights—Decree is not without jurisdiction.*

The fact that defendants in ejectment suits are entered in the record-of-rights as occupancy tenants is not a sufficient reason for holding that the decrees in these suits were without jurisdiction or were wrong in law. (*Ross, J.*). TUFANI LAL *v.* MT. BIBI UMATUL RASOOL. **5 P.L.T. 535= 1924 P.H.C.C. 244=A.I.R. 1924 Pat.765.**

DEED—Consideration.

———*Instalment decree providing for attachment even without default is* ultra vires.

Where an instalment decree provided that if two instalments were in arrears the decree could be executed for the whole amount and further that "the immovable property of the defendant may be got attached and kept".

Held: that if this means that the defendant's property should be attached before default had been made in the payment of the instalments it is *ultra vires* of the Court, to make such a decree. (*Macleod, C.J. and Coyajee, J.*). GANPATI BHATTA UMAMAHESHWARBHATTA *v.* DEVAPPA SHANKARA NARAYAN HARIK. **76 I.C. 895=46 Bom. 942= 24 Bom. L.R. 442=A.I.R. 1923 Bom. 30.**

DEDICATION.

See (1) HINDU LAW—RELIGIOUS ENDOWMENTS.
(2) MAHOMEDAN LAW—WAQF.

DEED.

Consideration.
Construction.
Execution.
Material Alteration.
Recitals.
Rights of Parties to.
Setting aside—*See* SP. REL. ACT, S. 41.
Validity.

—Consideration.

———*Land let out 60 years before institution of suit and built upon—20 years after terms of tenancy altered—There is no presumption that there was no consideration for altered agreement.*

Where land has been let out about 60 years back and built upon by the tenant, if subsequently new terms were obtained for the tenancy the fact that these terms were obtained about 40 years before institution of the suit does not raise any presumption that there was no consideration for altered agreement. (*Mukherji and Bennet, JJ.*). CHUTTAN TELI *v.* RAZIA KHATUN. **A. I. R. 1930 All. 510.**

———*Price less than 20 times income is inadequate in Bengal.*

In Bengal any price less than 20 times of the income would be inadequate. (*Chakravarthi, J.*). BAIKUNTHA NATH *v.* ADHAR CHANDRA. **92 I.C. 727=A.I.R. 1926 Cal. 653.**

———*Consideration admitted by defendant—Repayments should be proved by defendant.*

The consideration of the bond being admitted and certain repayments alleged, the burden of proof is on the defendant to prove other repayments. (*Baker, J.C.*). MANIK RAO *v.* NURHUSSAN. **88 I.C. 254=A.I.R. 1925 Nag. 376.**

———*Execution admitted by executant—Passing of consideration as against strangers must be proved by executee.*

In an action to enforce a mortgage security where there is no contest by the mortgagor, and execution is admitted by or proved against him, the onus lies upon defendant to prove that the recital as to payment of consideration for the deed which he executed is untrue. Where however a stranger to the transaction is a party and the claim is contested by him and he denies execution and also asserts that there was no consideration for the mortgage the onus is upon the mortgagee

DEED—Consideration.

to prove his case. 17 C.L.J. 173, *Ref.*; 13 C.P.L.R. 1, *Dissented from.* (*Kinkhede, A.J.C.*). BALIRAM *v.* KAMALIA.

78 I.C. 330=A.I.R. 1924 Nag. 367.

———*Sale to discharge previous incumbrance on property sold—Transfer is supported by consideration—T. P. Act, S.* 54.

A sale purported to be for a sum of Rs. 1,200. It was recited in the sale-deed that a sum of Rs. 550 was being left with the purchaser to redeem a prior mortgage and the balance of Rs. 650 was to be paid before the registering officer. It was found that the money was handed over to the vendor before the registering officer but that after it had been so made over it was returned again to the purchaser. It was argued that there was no sale at all inasmuch as the vendor got nothing. It was however found that the market value of the property sold was not more than Rs. 500:

Held: that if by this transfer the vendor was getting rid of the liability to pay a sum of Rs. 550 it cannot be said that there was no consideration for the transfer. (*Lindsay and Sulaiman, JJ.*). ALAMA CHAND *v.* CHHAJJU.

74 I.C. 339=45 All. 559=A.I.R. 1923 All. 530.

———*Partial failure—Deed operates to the extent of sum actually advanced.*

The validity of a bond is not affected by the fact that the consideration recited was not paid in full; the bond is operative to the extent of the sum actually advanced. (*Mookerjee and Buckland, JJ.*). KRISHNA KISOR *v.* NAGENDRABALA.

66 I.C. 694=34 C.L.J. 33=25 C.W.N. 942=A.I.R. 1921 Cal. 435.

—Construction.

Absolute or Limited Estate.
Absolute or Limited Interest.
Adoption Deed.
Ambiguity.
Ancient Documents.
Bond.
Conflicting Recitals.
Ejusdem Generis.
English Rules.
Evidence of Conduct.
Family Arrangement or Settlement.
Grant.
Hire Purchase.
Instalment Bond.
Intention of Parties.
Law applicable.
Lease or License.
Marriage Settlement.
Mortgage or charge.
Mortgage or Lease.
Mortgage or Simple Bond.
Partition Deed.
Personal Liability.
Powers of Court.
Principles of.
Recitals.
Release.
Religious Endowment.
Sale or Contract of Sale.
Sale or Gift.
Sale or Lease.
Sale or Mortgage.
Surety Bond.
Surrounding circumstances.
Two Documents.
Will and Authority to adopt.

DEED—Construction—Absolute or Limited Interest.

Will or Gift.
Will or Settlement.
Will or Transfer.
Words.
Miscellaneous.

—Construction—Absolute or Limited Estate.

—A Hindu, by a settlement deed, gave his wife a right to enjoy a house along with him during his lifetime and after his death to enjoy the house till the end of her life-time and provided that thereafter the house should be taken by his heirs absolutely.

Held that he intended to confer a life-estate on his wife in his house and that the gift of the remainder in favour of his own heirs was legal and valid. *Sundaram Chetty, J.*). VARALAKSHMI AMMAL *v.* VENKAMMAL. **122 I.C. 348.**

———*Gift to female—Clear words conferring absolute estate and transferring possession—Provision inserted that the female was to enjoy with her male issues—Gift confers absolute estate.*

Where a deed of gift in favour of a lady begins and ends by saying that it is "executed in favour of M," and there are no words as such limiting her estate, and it contains recitals to the effect that possession had been transferred to her and that she was to pay the *kist*.

Held: that these unmistakably point to the grant of an absolute estate in favour of M.

Held, further, that a provision about enjoyment along with male issue in the deed of gift may be rejected at most as an idle attempt to derogate from the grant and does not affect the absolute estate created by the deed. (*Madhavan Nair, J.*). NAGARAJA AYYAR *v.* NATESA AIYAR.

85 I.C. 993=A.I.R. 1925 Mad. 1013.

—A Muhammadan by a deed of settlement gave certain properties to his sons "to be enjoyed with all rights absolute." Later on the document stated that the sons "shall not subject the properties to mortgages.....or other alienations and that both of them shall live with the income derived from the same every year and thus maintain themselves. After them their descendants shall enjoy the same with the right of alienations as they pleased."

Held: that the sons took an absolute estate and that the direction against alienation was only in the nature of a pious wish that the sons should hand down the properties to their children unimpaired. (*Spencer and Devadoss, JJ.*). ABDUL RAHIMAN *v.* UTHUMANSA ROWTHER. **85 I.C. 945=A.I.R. 1925 Mad. 997.**

———Naslan bad naslan prima facie *import intention to convey an absolute estate.*

The words *naslan bad naslan* have acquired a technical import in legal vocabulary. If there were nothing else to control that import the use of those words would generally be understood to have been made with an intention to convey an absolute estate. 14 Cal. 296 (P. C.), *Ref.* (*Wazir Hasan, A.J.C.*). LACHHMAN DAS *v.* BHAGWANT RAM. **65 I. C. 707=8 O.L.J. 481=A.I.R. 1921 Oudh 240.**

—Construction—Absolute or Limited Interest.

———*Original bequest for life subsequently increased by deed of gift—In absence of evidence proving departure from previous intention and conferring absolute estate, estate does not become heritable.*

Where the original intention of the donor is to bequeath by will a life-estate in certain property and he subsequently increases the grant by means

DEED—Construction—Absolute or Limited Interest.

of a deed of gift, in default of definite evidence to the effect, that at the time of the deed of gift the donor had departed from his previous intention and decided not only to make an immediate gift of property considerably larger than that bequeathed under the will, but at the same time to confer an absolute title in place of a life-interest, grant will not *per se* create heritable estate: 23 All. 194 (P.C.), *Rel. on*; 3 O. L. J. 354 and 11 Cal. 121, *Ref.*; 8 All. 39; A. I. R. 1926 Oudh 561, *Expl.* (*Raza and Pullan, JJ.*). HAFIZ ALI *v.* RANI INDAR KUAR. **7 O.W.N. 511=A.I.R. 1930 Oudh 215.**

———*Person granting patni talukdari patta to his daughter—She, her sons, sons' sons, and her daughters to continue to possess as malik—But her other heirs not to have any right—Absolute estate was granted to daughter—Direction regarding succession was not limited to what happened at her death but was for indefinite period of time, and it being against law of succession was void—Daughter was entitled to deal with it as she liked.*

A person executed a patni talukdari patta of his taluk in favour of his daughter. She and her sons born of her womb and sons born of their loins in succession and the daughters of her womb were to continue to possess the same and were to be *malik* in possession by right of miras talukdari. But except for these her other heirs such as her daughters' descendants or her husband were to have no right to it.

Held: that the donor in this case desired to grant an estate of inheritance but directed that the succession should take place in a specified manner. It was not limited to what should happen at her death but gave directions for an indefinite period of time or, in other words, he intended to alter the rule of succession. The provisions restricting succession, therefore, were void, and the daughter was entitled to deal with the property as she liked. 9 M. I. A. 123, *Not foll.*; I. A. Sup. Vol. 47 at 65; 6 M. I. A. 526 and 38 Cal. 603 (P.C.), *Rel. on.* (*B. B. Ghose and Bose, JJ.*). SARAJUBALA DEBI *v.* JYOTIRMOYEE DEBI. **112 I. C. 113=A. I. R. 1929 Cal. 166.**

———*Words* naslan bad naslan *and* batan bad batan *denote absolute estate in gifted property.*

Where the donor states that the donee is to possess rights in the gifted property *naslan bad naslan* and *batan bad batan* (generation after generation) and that he and his heirs and successors shall have no right left in the gifted property, then or in future, the donee gets an absolute estate. The words *naslan bad naslan* and *batan bad batan* have always been held as words denoting an absolute estate unless the document is full of contradictions which take away the literal meaning of these expressions: 14 Cal. 296 (P.C.); A. I. R. 1922 Oudh 42 and A. I. R. 1926 Oudh 561, *Ref.* (*Wazir Hasan, J.*). BINDHA DIN TEWARI *v.* RAM HARAKH DUBEY. **121 I. C. 95=6 O. W. N. 722=A. I. R. 1929 Oudh 415.**

———*Gift of full proprietary rights by husband to his wife—Wife to hold property generation after generation—No connexion of any one with the property—Deed transfers full proprietary rights.*

When, on a deed of gift, the husband transfers the property to his wife as a special gift describing it as the property in his exclusive proprietary right, and says that he transfers all the rights held by him to her, that she is to hold it generation after generation, that neither himself nor his own heir is ever to make a claim against her, and that no one except her is to have any connexion with the property, the only construction to be placed upon the deed is that it transferred full proprietary rights. (*Stuart, C. J. and Raza, J.*). JAGMOHAN SINGH *v.* SRI NATH. **107 I. C. 866=3 Luck. 302=5 O. W. N. 1=A. I. R. 1928 Oudh 203.**

———*A Hindu's will devising his entire property to his wife with powers of alienation in case of necessity was held not to curtail her powers to legal necessity, the reference to necessity being held as only the ordinary aversion of an owner to alienate save when necessary.*

Where the will devising the whole of the property to the testator's wife stated, "I fully empower B (wife) to deal with my property if it becomes necessary to do so in any manner she may deem proper, by way of effecting a mortgage, sale, charity, etc."

Held: (*Per Fawcett, J.*):—The words "if it becomes necessary to do so" cannot properly be read as restricting the widow's power of alienation to legal necessity under Hindu Law. They are intended to bar alienations for which there are no reasonable grounds and are based on the ordinary aversion of an owner to alienate unless it is necessary to do so. (*Coyajee and Fawcett, JJ.*). BAI SURAJ *v.* JAJIBHAI BHAVSANG. **86 I. C. 196=A. I. R. 1925 Bom. 38 (c).**

———*Gift with conditions takes away the absolute character of the disposition.*

Where in the primary clause of a gift deed the words following the gift were "and all rights appertaining thereto with the following conditions."

Held: that the expression fundamentally affected the construction of the deed as a whole, that the deed did not confer the *maliki* rights without conditions, nor did it confer on the donee those rights of property and alienation which a bare disposition in favour of a person denominated as *malik* would have involved. (*Lord Shaw*). ASHRAFI SINGH *v* BIDYA PRASAD NARAYAN SINGH. **80 I. C. 826=26 Bom. L. R. 776=20 M. L. W. 425=5 L. R. P. C. 136=1924 M. W. N. 819=35 M. L. T. 135=6 P. L. T. 77=A. I. R. 1924 P. C. 191=47 M. L. J. 585 (P.C.).**

———*An estate equivalent to one in fee simple, approaches absolute ownership.*

Strict proof is necessary of any right in derogation of Sovereign's right to assess land at discretion.

An estate equivalent to an estate in fee simple is one approaching as near as possible to an estate of absolute ownership.

To describe an estate as "nearly equal to a freehold" when it is really a leasehold amounts to mere puffing. But one equivalent to that estate is on a different footing. (4 Bom. H.C.R. 1, *Foll.*).

Strict proof must be given of any right set up in derogation of the inherent right of the Sovereign to assess the land at his discretion; and the fact that a very small rent has been paid for many years, does not show that the Government has forfeited its right to enhance the assessment in respect of such land. (*Fawcett, J.*). RAHIMTULLA *v.* HASAN ALI. **85 I. C. 1038=25 Bom. L. R. 1192=A. I. R. 1924 Bom. 212.**

———"*Malik*" *implies absolute estate—Deed in favour of females—No special rule.*

Deeds in favour of females must be interpreted in the same way as any other deed. The words

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"Malik" and "Malkiyat" in a formal document imply an absolute estate unless there is something in the context to qualify it. Where the husband in a deed purporting to be a sale-deed in favour of his wife in consideration of her dower clearly stated that he had given proprietary possession to her and also that she had the full power of a proprietor to alienate the house sold:

Held that the husband's intention was to confer an absolute estate upon the wife. (*Scott-Smith, J.*). MT. MAHOMMADI *v.* KARAM BAKHSH.

72 I.C. 977=A. I. R. 1924 Lah. 347.

———*Maintenance deed—Hindu Law.*

Words "with absolute rights etc" in maintenance deed are not to be construed in a different manner from similar words in other documents. (*Venkatasubba Rao, J.*). NARAYANASWAMY DEVARAYAR *v.* THANGAVELU PADAYACHI. **82 I.C. 67= 1924 M.W.N. 571=A.I.R 1924 Mad. 800.**

———*Deed simply transferring right of management but not in any way transferring ownership does not prevent transfer of ownership.*

Where a deed simply transfers the right of management but does not in any way transfer the ownership of property and other circumstances indicate an intention not to transfer alienation of the property by the executant of the deed subsequent to its execution is valid. (*Kinkhede, A.J.C.*). MOTILAL RAMLAL *v.* RENI.

78 I.C. 711=A.I.R. 1924 Nag. 348.

———*Total relinquishment of rights was inferred from the use of words like 'for ever'—Grant held as heritable though no express words used.*

A service grant to one B, by proprietor of Bettiah Raj contained the following passage:—"Hence because of that good work it is ordered that whatever trees have been planted by his ancestor and also if he plants any; the share of the Raj in them is given up. Hence this *parwana* is written to all forbidding you in any way to interfere with the trees standing on the *nakdi* holdings of the said B for ever."

Held: that, considering the context and the other provisions in the document and the evidence relating to subsequent conduct of the parties, the intention was that the landlord should relinquish his right to the trees both present and future. Even if a document should contain word such as "always," or "for ever" or similar words, if the grant is clearly the grant of a life-interest only the mere use of such words will not have the effect of extending the grant beyond the lifetime of the grantee. But it is equally true if there are no words of limitation in a grant then, even if there are no specific words of inheritance, it may still be a grant in perpetuity. 23 A. 324; (P.C.); 23 C. 838 (P.C.); 14 M.I.A. 247, *Ref.* (*Dawson-Miller C.J. and Mullick, J.*). MAHARAJ RAI *v.* MAHARANI JANKI KUER. **75 I.C. 1031=A.I.R. 1924 Pat. 655.**

———"*To X and his male heirs*"—*X gets an absolute estate.*

Where a deed of settlement executed by a Parsee Lady gave certain properties to "X and his male heirs absolutely in equal shares."

Held: *Per Shah, Ag. C.J.*—That the use of the words "absolutely in equal shares" negative the idea of any limitation upon the estate given and that the use of the words "male heirs" does not import any limitation either under the English or the Indian law.

Held: *Per Marten, J.*—The words "his heirs" or "his male heirs" are regarded in English law as words of limitation and not of purchase. They are not taken as conferring any estate on the heir but simply as showing or marking out the estate the ancestor takes. Further a gift to a man and his male heirs and not to the "male heirs of his body" is an attempt to create an estate unknown to the law and consequently the English law rejects the word 'male' and construes the gift as one to a man and his heirs *simpliciter* (*i.e.*) as a gift in fee simple. Even if the estate created is in tail or in tail male under the English law, such an estate is unknown to the Indian law and cannot be imported into India where the land settled is situate and which must therefore devolve according to the *lex loci*. (*Shah, Ag. C. J. and Marten, J.*). DADABHAI FRAMJI CAMA *v.* COWASJI DORABJI PANDAY. **77 I.C. 83= 24 Bom. L.R. 1111=47 Bom. 349= A.I.R. 1923 Bom. 177.**

———*Words and Phrases—You and your heirs—Absolute estate to grantee—His heirs hold it as ancestral property.*

A Sanad provided "the above estate has been conferred upon you and your heirs for ever."

Held: this does not mean that every subsequent heir of the grantee held the property independently of his personal law with full powers of transfer. You and your heirs is the usual expression for conferring an absolute estate on the grantee. 4 C. 23, P. C.; 24 C. 834, P.C.; 33 C. 947, *Ref.* (*Simpson and Dalal, A.J.Cs.*). RAM RATAN *v.* GANGA BAKSH. **71 I.C. 581=26 O.C. 245= 10 O.L.J. 193=A.I.R. 1923 Oudh 265.**

———*Grant as 'Malik' to wife but saying that she should utilise income and that property is to go to son if born—Grant is only that of life-estate.*

A deed declared that neither the declarant nor his heirs or representatives will have any right or title of claim against the said Musammat or her heirs and legal representatives in respect of the properties. But the succeeding clause made specific reference to the income as that which the lady was to utilize and there was the further clause that if a child should be born the property should belong to that child.

Held: these two clauses seem inconsistent with the construction of the deed as conferring an absolute estate and to indicate what the real intention of the grantor was and construing the deed as a whole it conferred a life-interest only. (*Coutts and Ross, JJ.*). SARABJIT PANDE *v.* RAJ KUMAR PANDE. **69 I.C. 957=1922 P.H.C.C. 74= A.I.R. 1923 Pat. 87.**

—A deed for maintenance presumably creates only life-interest. (*Daniels and Dalal, A.J.Cs.*). HAFIZ-UN-NISA *v.* JAWAHIR SINGH. **66 I.C. 24= 24 O.C. 374=A.I.R. 1921 Oudh 209.**

———*Gift in favour of wife as 'malik' but restrictive clauses used—Gift was held to be only of a Hindu woman's estate.*

In a deed of gift by a husband to his wife, the properties were granted to the wife as 'Malik'. Any alienation made during the lifetime of the donor was to be by his permission. After his death, she could transfer to certain specified persons and to a limited extent. She was also given authority to execute a will in favour of certain specified persons. There was a provision also for the devolution of the properties left undisposed of at the donee's death.

Held: that a Court must look to all the clauses of the deed and give effect to all the clauses ignor-

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ing none as redundant or contradictory and that on a construction of the deed of gift, the intention of the donor was to provide for the donee and also for the ultimate devolution of the property. The grant in effect was grant of an ordinary Hindu woman's estate. The absence of any clause restraining the donee from granting a *mokurari* lease does not lead to the conclusion that she was empowered to grant it. *(Coutts and Ross, JJ.)*. ASHURFI SINGH *v.* BISESWAR PRATAP NARAIN SAHI.

65 I.C. 977=1 Pat. 295=1922 P.H.C.C. 70=3 Pat. L.T. 273=A.I.R. 1922 Pat. 362.

———A deed for maintenance *prima facie* imports only a life-interest. *(Daniels and Dalal, A.J. Cs.)*. MST. HAFIZ-UN-NISA *v.* JAWAHIR SINGH.

24 O.C. 374=A.I.R. 1921 Oudh 209.

———*Will in favour of widow—Full proprietary rights can be conferred by expressions so indicating—Each case will depend on its facts.*

Wherever expressions indicating the creation of a full proprietary right in favour of a widow are to be found in the will she is to be treated as the full owner. Each case has to be decided upon its own particular facts. *(Abdul Raoof, J.)*. MOHAN LAL *v.* MAYA LAL. **59 I.C. 231=3 L.L.J. 132=18 P.L.R. 1921.**

—Construction—Adoption deed.

———*"Vyavastha" does not include power of unrestricted alienation.*

An adoption deed provided "you have acquired whatever rights and authorities a natural son should have acquired had I got any, and you have from to-day become the owner of the property movable and immovable. You should stay with us and take care of us as long as we, that is, I and my wife, live. After our death you are the sole owner and should thereafter make *vahivat* as owner. In whatever manner the estate movable or immovable is managed, as long as I live, it is to be taken that you approve of it. You have no authority to object to it."

The word used for the management reserved, was "*vyavastha*" in the original.

Held: that the deed conferred on the father powers of management free from any interference on the part of the adopted son, but it did not give to the adoptive father an unrestricted power of alienation. *(Macleod, C. J. and Crump, J.)*. BALAPPA GHENAPPA *v.* AKKUBAI RAYAGOUDA. **74 I.C. 220=A.I.R. 1924 Bom. 170.**

———*No words of transfer used—Deed cannot transfer property.*

A document purporting to be an adoption deed contained the following words "you [the adopted son] alone are the full owner of my movable and immovable property".

Held: that it cannot be contended for a moment that the executant in executing the deed which was to evidence the previous adoption intended to transfer thereby all hisimmovable and movable properties unless he used in the document words of conveyance or transfer. *(Macleod, C. J. and Crump, J.)*. SHIDAPPA *v.* SANTAWA. **77 I. C. 477=A.I.R. 1923 Bom. 302.**

—Construction—Ambiguity.

———If the language of the document executed by a Hindu in which there is an express and clear intention of conferring an absolute estate is so clear as to leave no doubt in the mind of the Court, it must take effect according to its tenor. But if, on the other hand, there is an ambiguity in the language which is used, then for purposes

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of construction Courts are entitled to take into consideration the notions and wishes of Hindus with respect to the devolution of their property: 2 I. A. 7 (P.C.), *Foll.* *(Lindsay and Banerji, JJ.)*. RADHA KISHUN *v.* SITA RAM UPADHAYA. **114 I. C. 45=26 A.L.J. 172.**

—The lease deed being ambiguous, the rule, how the parties understood it, applies. A contract in one case should not be interpreted in the view taken with regard to another contract which is differently worded. *(Suhrawardy and Cuming, JJ.)*. HARA MOHAN BANIKYA CHOWDHURY *v.* HEM CHANDRA CHAKRAVARTY. **87 I. C. 758=42 C.L.J. 172=A.I.R. 1925 Cal. 1248.**

———*No ambiguity—Conduct of parties cannot be considered—Evidence Act, S. 92.*

If the meaning of a term in the original agreement is doubtful, assistance might be sought from the conduct of parties. Apart from ambiguity, the mere fact that the parties have acted on an erroneous construction of an instrument furnishes in itself no reason why the Courts should not follow the general rule that an instrument should be construed according to its natural meaning in the light of the circumstances in which it was executed. *(Richardson and Suhrawardy, JJ.)*. BHUPENDRA NARAYAN SINHA *v.* MIDNAPUR ZEMINDARI Co., LTD. **68 I. C. 937=37 C. L. J. 556=A. I. R. 1922 Cal. 300.**

———*Ambiguity in the operative part may be cleared up by reference to recitals.*

Per *Dawson-Miller, C. J.*—Where there is ambiguity in the operative part of the deed, one should look back to the recitals and be guided by what is therein contained in interpreting the ambiguity. This canon of construction, however, cannot apply in all cases where there is a doubt or difficulty in the construction of the document. If one is satisfied upon the natural construction of the operative part of the deed that certain property passes, notwithstanding that the construction may be difficult, the recitals have no binding force.

Per *Das, J.*—The recitals in a conveyance are subordinate to the operative part and that consequently, where the operative part is clear, it is treated as expressing the intention of the parties, and it prevails over any suggestion of a contrary intention afforded by the recitals; but it is well established that where the operative part is doubtful and it is impossible to say, on a mere reading of it, to which properties it refers, then the recitals can and ought to be used to explain its meaning, and that while, for the purpose of construing the operative part the whole of the instrument may be referred to, yet the recitals leading up to it are more likely to furnish the key to its true construction than the subordinate clauses of the deed. For instance, parcels of a deed described with certainty are not cut down by recitals showing that something less was intended to pass; but the recitals assist the construction of the operative part where there is an ambiguity in the operative part as to the property, affected. *(Walsh* v. *Trevanion*, (1850) 15 Q.B. 733, *Foll.)*. *(Dawson-Miller, C. J., Das and Adami, JJ.)*. BHONU LAL CHOWDHURY *v.* W. A. VINCENT. **65 I. C. 882=3 Pat. L. T. 653=A. I. R. 1922 Pat. 619 (F.B.).**

———*Ambiguous deed may be construed in the light of parties' conduct, but unambiguous deed should not be so construed.*

While the true construction of an obscurely framed document may be determined by reference

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to the conduct of parties, no such procedure is admissible when the terms of the instrument are unambiguous. No amount of acting by the parties can alter or qualify words which are plain and unambiguous. (*Mookherjee, A.C.J. and Fletcher, J.*). MIDNAPUR ZEMINDARI CO., LTD. *v.* JOGENDRA KUMAR. **62 I.C. 491=33 C.L.J. 186= A.I.R. 1921 Cal. 750.**

———*Judgment—Language doubtful—Benefit goes to judgment-debtor.*

Where the language of a judgment is doubtful the benefit of the doubt ought to go to the judgment-debtors. (*Kanhaiyalal, J. C.*). GOKARAM SINGH *v.*, MANGLI. **66 I.C. 673=8 O.L.J. 407= A.I.R. 1921 Oudh 138.**

—Construction—Ancient document.

—After lapse of considerable period, cogent evidence is required to hold that an instrument is not what it purports to be. (*Suhrawardy and Garlick, JJ.*). SISIR KUMAR MALLIK *v.* NARAN CHANDRA MALIK. **119 I.C. 803=33 C.W.N. 591= A.I.R. 1929 Cal. 548.**

———*Slip of scribe—Court is not justified in substituting proper word when deed has long remained unchallenged and has been acted upon.*

Where in a document there was a mistake of the scribe and inappropriate word had been inserted and the document remained unchallenged for half a century or so and was acted upon.

Held: that the Court was not justified in substituting the proper word in the context. (*Tek Chand and Agha Haider, JJ.*). MURID HUSSAIN *v.* JOWALA SAHAI. **120 I.C. 14= A.I.R. 1929 Lah. 648.**

———*Ambiguities—Contemporaneous usages may be looked to.*

One of the most settled rules of law for the construction of ambiguities in ancient instruments is that you may resort to contemporaneous usage to ascertain the meaning of the deed: *Attorney-General* v. *Drummond*, (1842) 1 Dr. and Wr. 353, *Rel. on.* (*Misra and Srivastava, JJ.*). MOSHUQ ALI *v.* HURUNISSA. **114 I.C. 113= A.I.R. 1929 Oudh 204.**

———*Resort may be had to contemporaneous usage in interpreting ambiguities in ancient instruments.*

One of the most settled rules of law for the construction of ambiguities in ancient instruments is that you may resort to contemporaneous usage to ascertain the meaning of the deed: *Attorney-General* v. *Drum*, 1 Dr. and War. 353, *Rel. on.* (*Wazir Hasan and Pullan, JJ.*). BENAIK DAT *v.* MOHAMMAD GHAFURKHAN. **105 I.C. 496= 4 O.W.N. 770=A.I.R. 1927 Oudh 442.**

———Should the general words of an ancient grant be uncertain, they may be fairly explained by subsequent usage. (*Lord Phillimore*). SECY. OF STATE *v.* RAJA JYOTIPRASHAD SINGH. **94 I.C. 974= 53 Cal. 533=53 I.A. 100=30 C.W.N. 745= 24 A. L. J. 761=A.I.R. 1926 P.C. 41.**

—Construction—Bond.

———In interpreting the terms of the bond the provisions of law, under which it was executed, must be considered. (*Brown, J.*). MAUNG PO AUNG *v.* MA THET PON. **5 Rang. 494= A.I.R. 1927 Rang. 316.**

———*Bond—Single bond or bond with condition.*

A single bond is a deed wherein a party acknowledges himself to be bound or indebted to another in a certain sum of money which he promises to pay. If there is appended to it a condition that upon the performance of a certain act the bond is to be void, otherwise to remain in force, it is called a bond with a condition. 2 All. 322, *Foll.* (*Mears, C.J., Piggot, Walsh, Ryves and Sulaiman, JJ.*). SHIV DAYAL *v.* MAHERBAN. **69 I.C. 981= 20 A. L.J. 819=45 All. 27=4 L.R.A. Civ. 3= A.I.R. 1923 All. 1 (F.B.).**

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—Construction—Conflicting recitals.

———*Settler's general expression cannot control unambiguous words conveying absolute estate.*

The settler's general expression of intention cannot control or qualify the very unambiguous words in which he conveys an absolute estate, and where the settler uses words which have the legal effect of granting the absolute estate and there are no consistent words of such a nature as to make it clear that the testator did not mean those words to have their ordinary legal meaning, the words used must bear their proper meaning.

Where in a deed it was stated "I hereby make the provisions, so that my properties, etc., may not pass to the control of others after my lifetime and that they may go to my lawful heirs . . . . properties in Sch. 1 hereof are to be enjoyed by myself and my wife during our lifetime; my daughter and her husband are to enjoy the aforesaid properties with absolute rights. The properties mentioned in Sch. 2 hereof are to be enjoyed by my daughter and my son-in-law from this date with absolute rights and with heritable rights in favour of son, grandson, etc."

Held: that the terms conveyed the absolute estate both in Sch. 1 and in Sch. 2 to the daughter and her husband as tenants in common. 24 Cal. 834, *App.*; 22 Mad. 357, *Dist.* (*Phillips and Ramesam, JJ.*). SANKARA NARAYANA REDDI *v.* KOPAYYA REDDI. **91 I.C. 973=23 M.L.W. 81= 1925 M.W.N. 875= A.I.R. 1926 Mad. 236.**

———*Conveyance of land—Difference between boundaries and area given—Land actually comprised within the boundaries should be treated as conveyed.*

Where a land conveyed is described by boundaries as well as by area, if there is a difference between the boundaries and the area, the land actually comprised within the boundaries will be treated to have been conveyed: 18 C.L.J. 541, *Foll.* (*Kulwant Sahay, J.*). RAGHUNANDAN THAKUR *v.* KISHENDEO NARAIN MAHTA. **98 I.C. 351= 7 P.L.T. 134=A.I.R. 1926 Pat. 257.**

———*Recital inconsistent with operative part—Latter is to prevail.*

If both the recitals and the operative part of a deed are clear and unambiguous, but they are inconsistent with each other the operative part is to be preferred. Norton on deeds, p. 181, 5 Russel, 330 and 15 Q.B. 733, *Ref.* (*Young and Brown, JJ.*). T. HUSSAN *v.* CHIN CHONG. **88 I.C. 910= 4 Bur. L.J. 31=3 Rang. 53= A.I.R. 1925 Rang. 209.**

———*Conflict between boundaries and area—Former is to prevail over latter where former is clear.*

Ordinarily when a piece of land is sold with definite boundaries, unless it is very clear from the circumstances surrounding the sale that a smaller extent than what is covered by the boundaries was intended to be sold, the rule of interpretation is that boundaries must prevail as against the measurements. (*Krishnan and Waller, JJ.*). SUBBAYYA CHAKKILIYAN *v.* MANJAM MUTHIA GOUNDAN. **78 I.C. 414=19 M.L.W. 245= 1924 M.W.N. 203=34 M.L.T. 315= A.I.R. 1924 Mad. 493=46 M.L.J. 182.**

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—Where one of the descriptions by boundaries is a false description, the lessee may be entitled to claim that the description by area must prevail over the description by boundaries. But such a claim must be asserted against the lessor and it cannot be tried in an action for ejectment against an alleged trespasser. (*Das and Macpherson, JJ.*). SHASHI BHUSAN BANERJI *v.* RAMJAS AGARWALA. **83 I.C. 205=3 Pat. 85=A.I.R. 1924 Pat. 402.**

———*Where a deed contains an adequate definition of property demised, erroneous statement as to area will not vitiate description.*

Where the operative part of a lease does not give area of demised land but expressly states that the lease is of entire land known as East Swardih and described in schedule; and where schedule gives area of demised land, yet when read with recital in lease area mentioned in schedule is by guess:

Held: such a description is not actually in conflict with description by boundaries. (*Das and Foster, JJ.*). MESSRS. LINTON MOLESWORTH & CO. *v.* JAGANNATH SUPAKAR. **77 I.C. 403=1 Pat.L.R. 377=5 P.L.T. 437=A. I. R. 1924 Pat. 226.**

———*Conflict between area and boundaries—First description being sufficiently clear second description is to be rejected otherwise second controls first.*

When the premises are sufficiently described, as by giving the particular name of close or otherwise, an erroneous additional description will be rejected as a 'false demonstration,' but if there is not this certainty in the first description as, if it is expressed in general terms and a particular description is added, the latter controls the former and limits the generality of the earlier description. (*Das and Kulwant Sahay, JJ.*). GOPAL MISSER *v.* PARTAP MANDAL. **72 I.C. 643=4 P.L.T. 652=A.I.R. 1924 Pat. 200.**

———*Conflicting recitals as to specification of property—Specification by boundaries should be preferred.*

If there is a conflict of two deeds in respect of the specification of the property, the specification indicated by the boundaries should be preferred and given effect to. (*Wazir Hasan, A.J.C.*). RAGHO PERSHAD *v.* SECRETARY OF STATE. **74 I.C. 369=9 O.L.J. 629=27 O.C. 64=A.I.R. 1923 Oudh 114.**

———*Clauses repugnant to each other—Earlier will override the later clause, but every attempt should be made to reconcile—Effect must be given to part embodying real intention—Document as a whole should be looked at.*

If there are two clauses or parts of a deed repugnant to each other, the first will be received and the latter rejected, unless there is some special reason to the contrary; but this is an expedient to which the Court very reluctantly has recourse, and never until it has exhausted every other means in its power to reconcile apparent inconsistencies, and the rule is subordinate to the general principle that the intention must be ascertained from the entire contents of the deed; for effect ought to be given to that part which is calculated to carry into effect the real intention and that part which would defeat it should be rejected. (*Mookherjee, A.C.J. and Fletcher, J.*). MIDNAPUR ZEMINDARI CO., LTD. *v.* JOGENDRA KUMAR. **62 I.C. 491=33 C.L.J. 186=A.I.R. 1921 Cal. 750.**

———If the boundaries specified in a lease can be identified the ordinary rule is that the statement of area must give away to the description of boundaries. (*Teunon and Newbould, JJ.*). SHEIK BARA KALIM *v.* RAJENDRANATH ROY. **64 I.C. 751 (Cal.).**

DEED—Construction—Ejusdem generis.

———It is a well-established rule that where the boundaries can be ascertained effect must be given to the description by boundaries irrespective of area. But if the boundaries are uncertain, then area must be considered. 41 C. 49, *Ref. (Newbould and Ghose, JJ.*). HARI MOHAN MODAK *v.* RAMESWAR DAS. **64 I.C. 737 (Cal.).**

—Construction—Ejusdem generis.

———*Deed excluding compensation in case of lands being left fallow, of floods or of drought and excluding right to abatement of rent on whatsoever account—Abatement could be claimed in case of deficiency due to compulsory acquisition.*

Where the terms in a *kabuliyat* ran as follows:—"Any loss arising from leaving the lands fallow or from floods or drought will be mine: you will not have anything to do with it nor shall I be entitled to claim abatement of the stipulated rent on any account whatsoever; any such claim will not be entertained."

Held: that abatement of rent could be claimed in the case of deficiency in area due to compulsory acquisition. The words "on any account whatsoever" must be construed *ejusdem generis* with the preceding provisions and the interpretation in this case would only be that abatement of rent would not be due in the case of losses of the same type as those specified. (*Pearson and Graham, JJ.*). GOSTA BEHARI PRAMANIK *v.* HEM CHANDRA DAS DE. **82 I.C. 315=29 C.W.N. 124=51 Cal. 1022=A.I.R. 1925 Cal. 356.**

———*Mercantile documents should not be construed on the lines of wills 'ejusdem generis' applicability of.*

It is not desirable when dealing with the construction of statutes and mercantile documents, to cite authorities on the construction of wills, because a testator is of his own bounty doing what he pleases and there is no presumption that he will not be capricious. In a mercantile document or a statute, there is a presumption that businessmen do not intend to do anything absurd which is some slight guide: but in all cases it is a question of construction.

In a mercantile document in which there was a distinct category dealing with the various types of timber which constituted the stock-in-trade of the mortgagor who was a timber trader and sawmill owner.

Held: that the words "goods, chattels and stock-in-trade" must be read *ejusdem generis* with the preceding words. (*Rutledge, J.*). A. V. JOSEPH, *In re.* **82 I.C. 702=2 Rang. 272=A.I.R. 1924 Rang. 348.**

———*Words and Phrases—"Such other things" must be construed* ejusdem generis *with words which has gone before.*

The terms of the *muchilika* were:—

The immovable and movable properties, silver, and precious stone ornaments which are partly the self-acquisition of the father and which were partly acquired by the plaintiff by having traded for about 18 years along with him and separately and the good debts leaving off the bad debts as per ledger account kept in the business carried on at present only in the name of the plaintiff and the mortgages, simple loans, shares and all such other things, which are in the possession of all the members of our family shall be valued on the whole by you the two arbitrators,

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Held: that "such other things" must be read *ejusdem generis* with the words going before, and they mean assets unconnected with the business and things like mortgages, loans and shares, which might perhaps be compendiously described as choses-in-action.

Held: *further* that the proper interpretation of "good debts.....business" is that if there is a balance of good debts over bad debts, then it is to be divided; if there is no balance, there will be nothing to be divided. That expression does not mean that the whole business was included and that, if that business ultimately turned out as a burden instead of a benefit, the net loss was to be brought in and shared between the brothers. (*Schwabe, C.J. and Ramesam, J.*). M. KUPPUSWAMI CHETTY *v.* M. SINGARAVELU CHETTY.
75 I. C. 848=18 M.L.W. 99=1923 M.W.N. 867=A.I.R. 1923 Mad. 679=45 M.L.J. 233.

———*General words in body of document—Detailed description at the foot of document—One must be read subject to the other—'Etc.' must be read* ejusdem generis *with the words which have gone before—Words and phrases.*

Where the general words, *viz.*, Village of Kovilur in the body of the document were qualified by the description given at the foot of it and there was a clear enumeration of what the village of Kovilur within the four boundaries consisted of,

Held: the words in the body of the document must be read subject to the mere precise description given which must be taken as controlling general words occurring in the earlier portion. The words "the remaining lands" or poramboke and other lands attached thereto (remaining lands) cannot be regarded as including the residential building of the zemindar. Where the words, 'etc.' follow an enumeration of specific things beginning with "all kinds of trees" having some characteristic, the words should be restricted to things of the same nature as those which have been already mentioned. In such a case the rule of *ejusdem generis* will apply and the residential building cannot be said to be *ejusdem generis*, with the things already enumerated. (*Spencer and Venkatasubba Rao, JJ.*). RAJAGOPALA *v.* THIRUPATHI. **72 I. C. 258=1923 M. W. N. 230=A. I. R. 1923 Mad. 511=44 M. L. J. 285.**

———*Landlord and Tenant*—Kabuliat *stating that tenant must not claim abatement for diluvion or any other reason—Ordinarily "any other reason" is a like reason to diluvion—But special circumstances and party's intention must be considered.*

The *kabuliat* stated "You shall never be competent to enhance the said jama on any ground nor shall we get abatement of the jama on the ground of diluvion or on any other ground."

Held: that the words "on any other ground" should be taken as referring to cases of like nature as diluvion. A person who has been deprived of possession of part of the demised premises should not be held liable for the whole rent for ever and this principle applies with greater force where the tenant is deprived of any portion of the leasehold property by any act on the part of the landlord himself. But special circumstances of the case and the intention of the parties must be taken into consideration. (*Chatterjea and Panton, JJ.*). MESBAHUDDIN AHMED CHOWDHURY *v.* ABDUL BORKAT AHAMADULLA. **65 I. C. 839=34 C. L. J. 119=A. I. R. 1921 Cal. 303.**

DEED—Construction—Evidence of Conduct.

—Construction—English rules.

———*Words—Technical meaning under English law should not be applied.*

In settling the true construction of a deed of settlement in India unless there is a special reason afforded by the deed itself to the contrary, the technical meaning given to words in English law must be disregarded. (*Lord Buckmaster*). GANPATRAO DESAI *v.* BALABHAI RAGHUNATH AGASKAR. **107 I.C. 119=52 Bom. 176=55 I.A. 74=47 C.L.J. 198=30 Bom. L. R. 282=27 M.L.W. 400=26 A.L.J. 560=32 C. W.N. 925=A.I.R. 1928 P.C. 33=54 M. L. J. 245 (P.C.).**

———*Deeds in India must be liberally construed—English canons of construction are not to be applied.*

Deeds and contracts of the people of India should be liberally construed. The strict canons of construction employed in dealing with deeds in England where conveyancing is a fine art should not be applied: 37 All. 899, *App.* (*Kincaid, J. C. and Lobo, A. J. C.*). MIR ALI NAWAZ *v.* MIR ALI ASGHAR. **97 I. C. 124=A. I. R. 1927 Sind 62.**

—The principles of Common Law with reference to joint contracts should not be applied. (*Kincaid, J.C. and Lobo, A.J.C.*). MIR ALI NAWAZ *v.* MIR ALI ASGHAR. **97 I.C. 124=A.I.R. 1927 Sind 62.**

—Construction—Evidence of conduct.

———*Authorities effecting settlement between various parties likely to cause serious trouble—For determining whether leaders entered that settlement in representative character—Attitude of those whom they were supposed to represent must be considered.*

Where the authorities effect a settlement between the various parties the disputes among which are likely to cause serious trouble, in order to determine the question whether the agreement was entered into by the leaders in a representative character, the attitude of those whom the leaders were supposed to represent must be considered. (*Boys and Bennet, JJ.*). RAM SINGH *v.* SUBHAN MOCHI. **116 I.C. 302=1929 A.L.J. 1083=A.I.R. 1929 All. 519.**

—Where the instrument is plain and unequivocal, evidence of conduct cannot be received for elucidating its terms: 30 Cal. 738 (P.C.), *Foll.* (*Venkatasubba Rao, J.*). BABU *v.* GOKULDOSS GOVARDHANDOSS. **112 I.C. 184=28 M.L.W. 824=A.I.R. 1928 Mad. 1064=55 M.L.J. 132.**

———*Evidence Act, S. 92—Evidence of conduct can be given only after other means are exhausted.*

The rule, that the conduct of the parties in respect to an instrument may be looked to in construing a document, is subject to this reservation that it can be admitted only after every other means to construe a deed have been exhausted: *Attorney-General* v. *Drummond*, (1842) 1 Dr. & War. 353, *Foll.* (*Ross and Wort, JJ.*). DEVJEE TRIKAMJEE *v.* DAYAMOY MUKHARJI. **108 I.C. 418=A.I.R. 1928 Pat. 225.**

———*Subsequent conduct can serve only as estoppel—It shows the construction put by parties on the deed.*

Though the Court is permitted to look at the surrounding circumstances, that must mean the circumstances surrounding the execution of the document and subsequent conduct can only have effect, if at all, as an estoppel. The subsequent conduct of the parties in reference to the terms of the document can only be evidence of the construc-

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tion they put upon it. (*Macleod, C. J. and Madgavkar, J.*). JAMSHEDJI *v.* SECRETARY OF STATE.
93 I.C. 184=28 Bom. L. R. 25=A.I.R. 1926 Bom. 209 (c).

———*Subsequent assertions by one party cannot affect meaning.*

Although the circumstances attending the execution of a document may be looked at to construe the contents of the document in order to ascertain the intention of the parties at the time, subsequent assertions by one of the parties with reference to that document cannot affect its meaning. (*Phillips, J.*). KALLIANI AMMAL *v.* COCHIN SIRCAR. **91 I.C. 316=22 M.L.W. 473=A.I.R. 1926 Mad. 143.**

———*Subsequent conduct of parties not relevant but prior is—One deed not to be construed in the light of another—Stray words should not override main intention.*

In construing a document the conduct of the parties subsequent to the date of the document should not be taken into consideration. Their understanding of the document should not ordinarily influence the Court one way or the other, unless it gives a clue to the meaning of any expression which is not clear. The conduct of the parties prior to the execution of the document, or at the time of the execution of the document, may be of some evidence. It is not proper that the Court should interpret one document, in the light of the recitals of another document. Stray words here and there should not be so construed as to override the main intention of the document. (*Devadoss, J.*). SENGAMALAM *v.* LOGAMBAL.
86 I.C. 8=21 M.L.W. 45=A.I.R. 1925 Mad. 471.

———*Conduct of parties is relevant to explain a deed capable of several meanings.*

The conduct of the parties to a contract reduced into writing may not vary or alter it, but their conduct may help to explain or elucidate a contract open to different meanings.

N was a trader by profession and carried on in conjunction with his wife, G a profitable business in rice. Some months after G's death, which occurred in December, 1904, N contemplated marrying again. Before the marriage was actually contracted, on the 11th May, 1905, he executed a document apparently a partnership deed which contained among other things :—

(i) All the house sites, buildings, rice, paddy, ponies, gharries, gold and money, which have been in existence up to this date, will belong to the partnership;

(ii) Either partner Ma E Yin or Ma Thaung, the daughters, will take charge of all the private properties belonging to partnership, such as jewellery, etc.

Held that the document was more a record of a division of rights and interest rather than a deed of partnership and therefore the sons and daughters by former marriage had no share in the property acquired by N along with his second wife. (*Mr. Ameer Ali, J.*). MA THAUNG *v.* MA THAN. **80 I.C 1031=51 I.A. 1=19 M.L.W. 477=51 Cal. 374=1924 M.W.N. 662=3 Bur. L.J. 333=29 C.W.N. 559=5 Rang. 175=A.I.R. 1924 P.C. 88=46 M.L.J. 618 (P.C.).**

—A deed of doubtful import is best construed by evidence of the conduct of the parties to it. Where

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an *ikrarnama* between a Hindu widow and her adopted son provided that the former should possess and enjoy certain properties for life, but that she should have no power of alienation and that the latter had the right to enter into possession after the mother's death, *held*, that the deed was merely intended to give the mother the rights of a Hindu widow in the properties, that the estate was not a life-estate and that the adopted son was not a remainder-man. (*Mitra and Casperz, JJ.*). PROMOTHA NATH *v.* DINAMANI. **65 I.C. 826=34 C.L.J. 129.**

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A suit for partition between two brothers *K* and *T* was compromised under which the share of *K* in all the joint-properties was fixed at 6 annas, and that of his brother *T* at 10 annas, the properties being left joint as before. Later on a further dispute arose between the brothers which was settled by the execution of an annuity bond which proceeded on the narrative that the two brothers were desirous of getting their movable and immovable properties partitioned between them, but that instead of partitioning them out in accordance with the compromise previously effected, *K* gave his whole share to his brother *T* and his heirs on a series of conditions. The leading provision was that a sum of Rs. 40 per month should be paid by *T* to *K* and after his death to his widow, as representing the profits of his share of the movable and immovable properties. There were other conditions namely : "If *T* or after his death his heirs make default in payment of the said monthly sum of Rs. 40, then *K* or his wife would be competent to partition out the immovable properties of his share and to transfer the same by sale, gift, etc., at his or her pleasure. (He) was to receive from *T* or his heirs the sum of Rs. 2,000 (two thousand) on account of the price of the movable properties (and) *T* or his heirs would be bound to pay the same; if the same be not paid then *K* or his wife would be entitled to realize the same from the movable and immovable properties of *T* or his heirs."

Further so long as *K* or his wife received the said monthly sum of Rs. 40, he or she should not have any power to transfer by sale, gift, &c., or to encumber his share of the properties. As regards *K's* son and daughter the provision was "If a son be born to *K* then that son shall receive the sum of Rs. 2,000, the price of the movable properties and the immovable properties of his share. If no son be born, then after the death of *K* and his wife, his daughter or daughter's son or daughter should get from *T* or his heirs the sum of Rs. 2,000 (two thousand) only, and shall not be competent to claim any other property. If *T* or his heirs fail to pay the said sum of Rs. 2,000 (two thousand), then the aforesaid daughter or daughter's son or daughter shall get the immovable properties of *K's* share and to this neither *T* nor his heirs shall have any objection."

K was predeceased by his wife, and he himself died later on leaving a daughter who was his sole heir and thus entitled to succeed to any property that was vested in him at the date of his death. *T* did not keep up his terms even during *K's* lifetime and therefore *K* demanded partition of the joint properties and payment of the Rs. 2,000 in question. No legal proceedings were taken for the

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partition of the properties but *T* acknowledged the justness of his brother's claim. He, however, being unable to pay, later on sold his share in certain of the joint properties the consideration for which was certain debts due to *K* and the amount of Rs. 2,000. *K* let the properties so acquired from his brother and they passed to his daughter as her heir. A large number, however, of the other properties which belonged jointly to the brothers, had not been partitioned,and accordingly the daughter sued for partition of these properties and for the recovery of specific possession of a 6 annas share thereof.

Held: that her right to obtain partition was not excluded by provisions in the annuity bond. (*Lord Salvesen*). HEMLATA DEBI *v.* SALYA CHARAN BANERJI. **109 I.C. 642=5 O.W.N. 652=A.I.R. 1928 P.C. 248.**

———*Deed must be construed as a whole.*

Deeds of family settlement are of a nature peculiarly their own and the rule of interpretation which would be applicable to pure deeds of transfer cannot be permitted to be applied in the case of such deeds. The deed of family settlement must be read as a whole and the intention of the parties must be gathered from the various provisions contained therein and such intention should be respected. (*Stuart, C. J. and Misra, J.*). AHMAD AZIM *v.* SAFI GAN. **97 I.C. 897=2 Luck 335=3 O.W.N. Sup. 102=A.I.R. 1926 Oudh 561.**

———*Grant in lieu of maintenance—Whether estate conferred is absolute or limited depends on circumstances of each case—The words "proprietor" or "for ever" do not necessarily confer absolute estate—A claim divesting an absolute estate on happening of certain contingency is not invalid.*

When the purport of the grant is the maintenance of the grantee, there is a *prima facie* indication that the grant was intended only to be for life. But it cannot be said that where the purport of the grant is maintenance, the estate conferred cannot be an absolute estate. This would depend on the construction of the particular deed taken as a whole. If the deed stated clearly that the grantee was to have an absolute interest, such interest cannot be controlled by the mere fact that the motive of the grant was maintenance, but where the terms of the grant are not clear and there are inconsistent conditions in the deed itself pointing to opposite conclusions, the safe rule is to construe the document as a whole and not to hold it to confer absolute title merely on the ground that the words used were "as proprietor" and "for ever" and "in perpetuity."

In the case of family settlements, conditions may be inserted therein which would not be valid in the case of ordinary deeds, under the ordinary law, but such conditions in the deed would be valid and enforceable, when forming a part of such family settlement: (*Case-law cited*).

A clause in a deed laying down that an absolute estate was to be divested on the happening of a particular contingency cannot be treated as invalid. It is neither the law in England nor in India. The correct rule of law appears to be that the first question which has to be decided on the interpretation of the deed is whether under the terms of that deed an absolute estate has been conferred or only a qualified estate. If it is clear that the estate is a qualified estate, no question as to the validity or otherwise of the gift ever can

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arise. It must be held to be good. If, however, the estate is found to be an absolute estate, Courts have to determine whether under the terms of the deed such estate is to be defeated on the happening of a particular contingency: 4 Cal. 23 (P.C.) and 16 Cal. 383 (P. C.), *Rel. on.*

Under a family settlement a talukdar granted some villages to his brothers in lieu of maintenance and in the deed of settlement it was stated that the villages given to each of the brothers were to be given to them in perpetuity for ever; generation after generation with proprietary powers, the words used in the vernacular being "*waste dawam wa hamesha ka naslan bad naslan batanan wa batnan bad batnan ba akhtiar malikana.*" It was further laid down that if no male issue was born to a Guzaradar, then the female issue would be allowed maintenance, and the widow of Guzaradar was to remain in possession of the entire property, without power of alienation during her lifetime, and after her death the property was to be divided among the surviving brothers.

Held: that the words "*naslan bad naslan*" and "*batnan bad batnan*" indicated an idea not to make a guzara resumable after the death of the particular grantee but to make it heritable and heritable only by the lineal male descendants, and such male lineal descendants would be covered by the expressions "*naslan*" (progeny) and "*batnan*" (womb).

The estate conferred upon each of the brothers was an estate in its inception of an absolute character, but heritable only by the male lineal descendants of the grantee and by his widow for her lifetime in case there was no such descendant, and descendible to his surviving brothers after the death of the widow. (*Stuart, C. J. and Misra, J.*). AHMAD AZIM *v.* SAFI JAN. **97 I.C. 897=2 Luck. 335=3 O.W.N. Sup. 102=A.I.R. 1926 Oudh 561.**

———*Settlement deed by members of family rendering alienation by one member singly invalid—Alienation by one member was held invalid.*

Where A executed a deed purporting to be a settlement deed which provided: "Myself, my mother and wife shall jointly enjoy the undermentioned properties. No alienation by one of us singly shall be valid. If an alienation is to be made, it shall be done by us three together, and if it is made without the consent of all the three, it shall not be valid. My heirs shall enjoy absolutely after our life time."

Held: that there was a remainder given under the instrument to the heirs of *A*.

Held: further, that an alienation by *A* alone of one of the items of properties does not convey that specific item to the purchaser. (*Venkatasubba Rao, J.*). SUBBIAH MOOPANAR *v.* PONNAMMAL. **88 I. C. 393=21 M. L. W. 637=A. I. R. 1925 Mad. 669.**

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—Plaintiff instituted a suit for the purpose of recovering an annuity of three muras of rice on the ground that he was the assignee of such right from one in whose favour such a right was created. The clause relating to it was as follows:

"The three muras of rice which are being given annually to *P*, shall be paid by the three sharers.

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at the rate of one mura of rice each on the responsibility of the share of each."

Held: that the grant in this case is not personal and so not an inalienable one. (*Srinivasa Ayyangar and Jackson, JJ.*). ANANTHA BHATTA *v.* KRISHNAYA SHANABHAGA. **110 I. C. 403 (Mad.).**

———*Inam grant—Confirmation in name of grantee, his representatives and assignees—No estate is conferred on grantee's heirs.*

Where an inam was confirmed by the Inam Commissioner in the name of the grantee, "his representatives and assigns to hold and dispose of the same as he or they think proper."

Held: that the words "representatives and assigns" in the title-deed were merely intended to express the absolute estate proposed to be conferred on the grantee and were not words of purchase granting any estate to the heirs of the grantee: A. I. R. 1923 P. C. 160 and 15 Bom. 222, *Rel. on.* (*Wallace and Madhavan Nair, JJ.*). CHENDRAMMA *v.* NARASIMHAM. **100 I. C. 741= 38 M. L. T. 133=1927 M. W. N. 156= 25 M. L. W. 546=A. I. R. 1927 Mad. 404= 52 M. L. J. 253.**

———*Service grant—Grant of house site, structure and some lands in lieu of service—Default in service—Lands are to be resumed and not the site and structure.*

A service grant set out that, in consideration of melam service, the trustees had granted to the defendant's ancestor some wet and dry lands and a thatched construction and the vacant site and other lands. The aforesaid ancestor was to reside from son to grandson in succession in the house with thatched construction mentioned thereunder. For the wages of service and the prasadams due every year to the defendants' ancestor he, the latter, was to enjoy from son to grandson the income derivable from the land. If the service (to be rendered) as per the above agreement suffered default either by the said grantee or, after him, by his descendants, of the wet and dry lands, etc., and the residential sites, etc., granted, barring the manaikattu and kattukoppu, the said grantee or his descendants would give up the rest of the lands.

Held: that the document meant that if default was made in the service, then the defendants should have no longer any right to the income of the lands, but that they should be allowed to keep the site and superstructure. (*Odgers, J.*). GURUSAMI PILLAI *v.* VEERABHADRA. **95 I. C. 325= 23 M. L. W. 540=A. I. R. 1926 Mad. 695.**

———*Confiscation of Tanjore Raj—Re-grant to widows—After them, daughter, and failing her, next heirs of Raja to inherit—Daughter predeceasing last widow—Widows take life-estate—Raja's next heirs inherit after last widow's death—Rights of illegitimate sons and after adopted son are not excluded.*

On the death of the Last Raja of Tanjore in 1855 leaving a number of widows, a daughter, a number of illegitimate children, a mother, etc., the Government confiscated in 1856 his Raj declaring the same to have lapsed to the British Government on the ground that "the Raja had died without leaving a son by birth or adoption." Subsequently in 1862, the Government decided to relinquish the private estate of the late Raja in favour of his heirs. The terms of the order declaring the manner in which this relinquishment was to be effected, contained the following :—

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"The Estate will therefore be made over to the senior widow who will have the management and control of the property, and it will be her duty to provide a suitable manner for the participative enjoyment of the Estate in question, by the other widows her co-heirs. On the death of the last surviving widow, the daughter of the late Raja, or failing her, the next heirs of the late Raja, if any, will inherit the property."

The senior widow subsequently adopted a son. The daughter predeceased the last surviving widow.

Held: (1) The title which the heirs got must depend entirely on the terms of the re-grant. (2) The grant did not create an ordinary Hindu widow's estate in favour of the widows of the Raja but a life-estate very much resembling the ordinary estate of a Hindu widow and with all the incidents of a widow's estate except the liability to be divested, by a subsequently adopted son rather than an estate of inheritance. (3) The daughter was given what may either be described as a vested interest defeasible in the event of her predeceasing the last widow or a contingent interest on her surviving all the widows. (4) "Failing her" did not mean "failing her and her heirs." (5) The right of the after-adopted son and his descendants to succeed after the death of the widows and daughter was not negatived by the grant. (6) The grant did not negative by its terms, the right of the Raja's illegitimate sons to succeed on the death of the last widow. (7) The heirship on the death of the last of the widows was to be determined according to who was the nearest heir to the Raja on such death and not according to who was the heir next after the daughter in order of succession according to Hindu Law.

Per *Kumaraswamy Sastri, J.*—The grant being a Crown grant, Act XXV of 1895 (Crown Grants Act) which is made retrospective applies and the grant must take effect according to its tenor irrespective of the Hindu Law. (*Spencer, O.C.J. and Kumaraswamy Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AIYAR. **93 I.C. 705= 48 Mad. 1=A.I.R. 1925 Mad. 497.**

———*'Inherit' was held to mean 'to take.'*

While re-granting to the "heirs" of a deceased Raja, his estate which the Government had confiscated on his death, the following order was made :—

"The estate will therefore be made over to the senior widow who will have the management and control of the property, and it will be her duty to provide in a suitable manner for the participative enjoyment of the Estate in question, by the other widows—her co-heirs. On the death of the last surviving widow, the daughter of the late Raja, or failing her, the next heirs of the late Raja, if any will inherit the property."

Held: *Per Kumaraswami Sastri, J.*—"Inherit" can only mean take and that the use of the word "inherit" in the grant did not preclude any idea of a gift in favour of the daughter or next heirs. (*Case-law discussed*). (*Spencer, O.C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I. C. 705=48 Mad. 1= A. I. R. 1925 Mad. 497.**

———*Maintenance grant is resumable on the death of grantee and not on the death of grantor—Such a grant may be heritable if intended.*

A maintenance grant is resumable on the death of the grantee and not on the death of the grantor.

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A maintenance grant is not absolutely inconsistent with a grant to the donee and his heirs. Such a grant is *prima facie* resumable on the death of the grantee, but the context may show that it was intended to make provision not only for the donee but for the heirs of the donee. Where the grant is so expressed, the grantor has the right to resume the grant on the extinction of the line of the grantee. It is all a question of construction. The operative clauses in a maintenance grant were in these terms : "I have made a grant of the milkiat right in the Mouzas named below by way of maintenance with the detail as follows: If any of the said three persons or their heirs put forward hereafter any objection against the rais of the Raj as regards the difference in their maintenance grants which according to the custom obtaining in the family I am competent to assign more to one and less to another, such objection shall not be held legal or tenable in Courts."

Held: that the grantor by providing against the possibility of an objection on the part of the heirs of the grantees had clearly indicated that the grantees took a heritable but not an absolute interest under the grant. 27 Cal. 156; *Foll.* 22 W. R. 225; 23 All. 194, *Ref.* (*Das and Ross, JJ.*). THE HON'BLE MAHARAJA BAHADUR KESHO PRASAD SINGH *v.* MADHO PRASAD SINGH.

83 I. C. 812=3 Pat. 880=5 P. L. T. 513= A. I. R. 1924 Pat. 721.

———*Deed carrying out decision of Court—Should be construed* ut res magis valent quam pereat—*Maxim.*

In construing an instrument of settlement carrying out a decision of the Court, Courts ought to take for their guidance the rule that, if possible, such a document should be construed *ut res magis valent quam pereat.*

A deed of settlement provided that on the death of the last three persons, *i. e.*, H. R. and D. the mother of R. L. the second son of H. and his heirs and representatives, shall succeed to the entire Rampur Kaithala estate, as provided by S. 22 of Act I of 1869. But the said L. shall not interfere in any way with the said *ilaqa*, besides the six villages which he has received under S. 8, during the lifetime of R. and his mother, D.

Held: in the first place the words "heirs and representatives" are to be treated as words of limitation and not of purchase, that is, they are merely intended to express the absolute estate which it was proposed to give to Lachman as distinguished from the life estates which had preceded it. This being so, the later words in the sentence may be regarded either as an idle attempt to derogate from the grant previously made and therefore to be rejected, or as words of description only, stating the legal incidents which the grantor conceived to belong to the estate which he had granted. In this case his mistake as to the legal consequence does not affect the grant which he has made and that it was his self-acquired property and therefore received an absolute estate in reversion. *(Lord Phillimore).* LAL RAM *v.* Dy. COMMR., PARTABGAR.

76 I.C. 922=29 C.W.N. 86= 1923 M.W.N. 591=45 All. 596= 50 I.A. 265= 26 O.C. 257=21 A.L.J. 777=33 M.L.T. 355= 10 O.L.J. 513= A.I.R. 1923 P.C. 160=47 M.L.J. 260 (P.C.).

———*Reservation not expressly found in grant cannot be implied or proved.*

DEED—Construction—Grant.

If apt words are not used and if reservations are not made in the grant itself, it does not lie in the mouth of the grantor to contend that the grant is not so extensive as on an ordinary interpretation of the words used in the grant, it would seem to be. *(C.C. Ghose and Panton, JJ.).* HARIPADA BANDOPADYA *v.* EQUITABLE COAL CO., LTD.

76 I.C. 413=A.I.R. 1923 Cal. 335.

———*British North America Act* (1867), *Ss.* 90-*E*, 56 —*Provincial Legislation, disallowance of Private rights completely constituted cannot be affected by disallowance—Crown grant under Vancouver Island Settlers Rights Act* (1904) *read with amending Act of* 1917—*Grant remaining unregistered at date of disallowance but grantee entitled to registration at that date—Disallowance of Amending Act of* 1917 *cannot affect grantee's title—Conflict of laws.*

The language of Sections 56 and 90 of the British North America Act of 1867 itself discloses with sufficient clearness an intention that as to private rights completely constituted and founded upon transactions entirely past and closed, the disallowance of a provincial statute shall be inoperative. It is important in construing such a provision to consider the probable tendency of any proposed construction in relation to its effect upon the working of the constitutional system set up by the British North America Act. If private rights that have been finally constituted under Provincial Legislation are swept away by disallowance which may take place at any time upto the expiration of a year after the enactment of the legislation the Provincial legislation may become the subject of a considerable degree of doubt as to its ultimate operation and effect. This uncertainty would be much limited in its practical incidence by recognized constitutional conventions restricting the classes of cases in which disallowance is permissible; but, in point of law the authority is unrestricted, and under conceivable conditions the uncertainty touching the fate of Provincial enactments might be productive of some degree of general inconvenience. Another objection lies in the probability that the Dominion Government when considering the advisability of disallowing a Provincial enactment in circumstances making the exercise of the power proper and desirable on general grounds would be faced at times with the certainty that in many cases that Government would encounter embarrassments (otherwise not likely to rise) by reason of apprehensions as to the consequences of its action upon the rights and interests of private individuals.

Under the Vancouver Island Settlers Rights Act of 1904 read with the amending Act of 1917, a Crown grant was made in favour of A. The registration of the grant was stayed in consequence of a *lis pendens* having been filed in certain actions which were not well founded. At this stage the amending Act of 1917 was disallowed by the Governor-General in Council.

Held: that the actions in which the *lis pendens* was filed being not well founded, A had when he applied for registration a completely constituted right to register his title and that such a right is one of the class of rights intended to be protected by Section 56 of the British North America Act. Therefore notwithstanding that at the time of the disallowance of the Amending Act of 1917, the grant was not registered. A's right to the land could not be extinguished by the disallowance of the Act of 1917.

DEED—Construction—Hire purchase.

(Viscount Haldane, Viscount Cave, Lord Carson, Mr. Justice Duff and Sir Robert Stout.) WILSON *v.* ESQUIMALT. **A.I.R. 1921 P.C. 234.**

—Construction—Hire purchase.

———*True effect of instrument depends upon intention of parties as gathered from its terms.*

In construing a hire-purchase agreement the substance of the agreement must be considered as a whole, not the substance apart from the language used not the mere words divorced from the substance, but the substance which must be gathered from the true meaning of the language in which it is sought to be expressed. The true effect of an instrument depends upon the intention of the parties as gathered from its terms, and in construing the terms it is the duty of the Court to regard the intention rather than the form and to give effect to the whole instrument. (*Wadia, J.*). BHIMJI N. DALAL *v.* BOMBAY TRUST CORPORATION LTD. **124 I.C. 800=32 Bom. L.R. 64= A.I.R. 1930 Bom. 306.**

———*Agreement imposing obligation upon hirer to buy—Agreement is sale and not hire purchase agreement.*

Where the agreement imposes an obligation upon the "hirer" to buy the chattel mentioned therein from the other party, such obligation attaches on the execution of the agreement and the agreement is really an agreement of sale notwithstanding the use of words, such as hire purchase agreement, lessor and lessee, hiring, rent, tenancy, etc. Such an obligation arises when it is clear from the agreement that the party taking the chattel called the hirer or lessee, has to pay the full amount of the consideration mentioned in the agreement even though the payment is by instalments and that amount is sufficient to cover the purchase price of the chattel; or when it is clear from the agreement that the hirer or lessee cannot at any time during the period mentioned in the agreement return the chattel to the other party called the owner or lessor and absolve himself from the obligation to make further payment. *Lee* v. *Butler*, (1893) 2 Q. B. 318; A.I.R. 1925 Bom. 18, *Rel. on.* (*Wadia, J.*). BHIMJI N. DALAL *v.* BOMBAY TRUST CORPORATION, LTD. **124 I.C. 800=32 Bom. L.R. 64= A.I.R. 1930 Bom. 306.**

—If the hirer is not bound to pay the full amount of the purchase price or if he can terminate the hiring at any time by delivering the chattel to the other party the agreement is in fact as well as in form a true agreement for hire, and all that the hirer has obtained is an option to purchase. *Helby* v. *Mathews*, (1895) A.C. 471; *Lewis* v. *Thomas*, (1919) 1 K.B. 319 and 6 Bom. L.R. 871, *Rel. on.* (*Wadia, J.*). BHIMJI N. DALAL *v.* BOMBAY TRUST CORPORATION LTD. **124 I.C. 800= 32 Bom. L.R. 64=A.I.R. 1930 Bom. 306.**

—Construction—Instalment bond.

———*Whole amount becoming due after two defaults —Condition precedent of demand was held not contemplated.*

If on proper construction of the language employed on instalment bond, taking the whole document into consideration the Court should come to the conclusion that a demand was contemplated by the parties to be a condition precedent to the right to sue, then the demand cannot be regarded as merely technical but as being of the substance and no cause of action can be regarded as arising except on the condition being satisfied.

DEED—Construction—Intention of parties.

An hypothecation instalment bond provided for regular payment of instalments and in default of any two instalments it provided: "Whenever you desire you should realise the amount from the properties mentioned hereunder by proceeding against the property specified, by proceeding against our other property and by proceeding against ourselves."

Held: that as soon as the second default was committed, what the parties contemplated as due was the whole of the balance under the bond together with interest thereon without any reference to the provision with respect to instalments. It was impossible to read the document as though it contained a condition precedent, for the whole of the balance becoming due, that a demand should be made by the payees for the whole of the balance. (*Srinivasa Ayyangar and Reilly, JJ.*). SHANMUGA *v.* RAMALINGAM. **108 I.C. 786= A.I.R. 1928 Mad. 952.**

—On 9th July, 1914, one *M* agreed to buy from *J* a four annas share of a village including *sir* and *khudkhast* lands, with cultivating rights in *sir* for Rs. 46,100. *M* paid Rs. 5,000 as earnest money, but being unable to raise the balance of the purchase-money, arranged with *S* that he should have the benefit of the contract with *J*, pay the balance, take the sale-deed in his name and convey to him the said share at any time within ten years on his paying him Rs. 41,000. On 25th August, 1914 *S* accordingly took a sale-deed from *J* and paid him the balance of the purchase-money. On 4th September, 1914, an agreement was executed by *S* in favour of *M* stating the arrangement already mentioned. This document made no specific mention of the cultivating rights in *sir*. In a suit by *S* for specific performance of the agreement,

Held: that the subject-matter of the agreement of 4th September, 1914 between *M* and *S* was the same as the subject-matter of the sale-deed of 25th August, 1914.

Held further: that *S* having agreed to transfer the cultivating rights in *sir* land, there was an implied covenant on his part to do all things necessary to effect such transfer, which would include an application to the Revenue Officer to sanction the transfer according to C. P. Tenancy Act, S. 50 (1). (*Sir Lancelot Sanderson*). MOTILAL *v.* NANHELAL. **A.I.R. 1930 P.C. 287.**

—An instalment mortgage-bond contained the clause "in the event of default of payment of one *kist*, all the *kists* being taken as defaulted, mortgagors shall pay interest, etc." *Held* the intention was that in the event of default in payment of one *kist* the whole amount and interest on that was to be paid and that a suit on the basis of the bond brought more than 12 years after the date of the first default would be time-barred. (*Walmsley and Greaves, JJ.*). SAKHWAT ALI KHAN *v.* AMIR PRAMANIK. **61 I.C. 208 (Cal.).**

—Construction—Intention of parties.

———*Intention determines nature of document.*

Intention on the part of parties is the criterion for deciding whether, a document is a petition to the Court or not: 78 P.R. 1917, *Rel. on*; 27 P.R. 1906, *Expl.*; A.I.R. 1926 Lah. 586 and A.I.R. 1923 Lah. 581, *Dist.* (*Hilton, J.*). SHADI RAM *v.* AMIN CHAND. **A.I.R. 1930 Lah. 937.**

———*Intention is to be gathered from words used and should not be speculated.*

In interpreting a document the Court has not to speculate as the supposed intention of the author

DEED—Construction—Intention of parties.

but has to gather it from the plain words used by the author in the document itself. *(Tek Chand, J.).* GANGA RAM *v.* MT. BIRJI. **111 I.C. 893= A.I.R. 1929 Lah. 143.**

———*Intention is to be gathered from document as a whole.*

It is an established canon of interpretation of documents that too much stress should not be laid on a word here or a word there, but the intention of the author is to be gathered from the document as a whole. *(Harrison and Tek Chand, JJ.).* ALLAH RAKHA *v.* ALI MAHOMED. **108 I.C. 741= 9 Lah. 567=30 P. L. R. 107= A.I.R. 1929 Lah. 45.**

———*Intention of maker must be found from expressions used—If two constructions possible, one making deed valid should be accepted.*

The true rule of construction of deeds is to find out the intention of the testator or settler from the expressions used in the document itself, and then to apply the law as to whether the intention so expressed is valid or not. If, however, it so happens that it is possible to construe a document in two different ways the Court may accept the construction which would make it valid. *(B. B. Ghose and Roy, JJ.).* RUKEYA BANU *v.* NAZIRA BANU. **105 I.C. 647=55 Cal. 448=32 C.W.N. 248= A.I.R. 1928 Cal. 130.**

———*Whether contract is joint or several is a question of construction.*

The question whether a contract is joint or several or joint and several is a question of construction, that is, a question of the intention of the parties to the contract. 12 C.W.N. 84, *Foll. (Kincaid, J. C. and Lobo, A.J.C.).* MIR ALI NAWAZ *v.* MIR ALI ASGHAR. **97 I.C. 124= A.I.R. 1927 Sind 62.**

———Intention of parties should be looked to in construing documents containing repugnant words. *(Phillips, J.).* RAMA RAO *v.* CHELLAYYA PILLAI. **97 I.C.580=A.I.R. 1926 Mad. 1208.**

———*Intention may be elucidated by conduct.*

The intention of the parties must be collected from the language of the instrument and may be elucidated by the conduct they have pursued. *Chapman* v. *Bluck*, (1838) 4 Bing. N. C. 187, *Foll. (Ross and Kulwant Sahay, JJ.).* MIDNAPORE ZAMINDARI. CO., LTD. *v.* MUKTA KESHI PATRANI. **96 I. C. 188= 6 Pat. 51= 1926 P. H. C. C. 199=A. I. R. 1926 Pat. 340.**

———*Question is not much of parties' intention as of meaning of words used.*

In construing the terms of a deed the question is not so much what the parties may have intended as what is the meaning of the words which they use. *(Shah, Ag. C. J. and Fawcett, J.).* SECRETARY OF STATE *v.* SHANTARAM NARAYAN DABHOLKAR. **84 I. C. 397=49 Bom. 99=26 Bom. L. R. 847= A. I. R. 1925 Bom. 12.**

———*Intention of parties should not be considered when deed is unambiguous.*

Where the document is not itself ambiguous, the intention of the parties should not be taken into consideration. *(Suhrawardy and Graham, JJ.).* KHETTRA MOHAN DAS *v.* BISWANATH BERA. **82 I. C. 411=51 Cal. 972=28 C. W. N. 894= 40 C. L. J. 79=A. I. R. 1924 Cal. 1047.**

———*Deed should be construed according to the intention of the parties as evidenced by it and circumstances—Burden of proving the contrary on the party attacking.*

The intention of the parties must be gathered from the terms of the deed itself and the surrounding circumstances. Oral evidence is excluded by S. 92 of the Evidence Act. [22 All. 149, P. C., *Foll.*]. Where a deed is attacked after a long period of years, the burden of proving that it is not what it purports to be lies heavily on the person attacking it. [38 All. 570, P.C., *Ref.*]. The fact that one of the parties to the deed is a Mahomedan may in a doubtful case lend some additional probability in favour of a document being construed as a mortgage, but it does not in any way do away with the rule laid down by the Privy Council that a document is to be construed in accordance with the intention of the parties as evidenced by its terms. *(Ryves and Daniels, JJ.).* BISHAMBER NATH *v.* MUHAMMED UBAID ULLAH KHAN. **77 I. C. 572= 45 All. 581=21 A.L.J. 503=4 L.R.A. Civ. 433= A. I. R. 1923 All. 586.**

DEED—Construction—Law applicable.

———*Term will not be implied unless parties must necessarily have intended it.*

A term will not be implied in a grant, unless the Court is driven to the conclusion that the parties must necessarily have intended that stipulation and in that case only to the limited extent absolutely necessary to carry out what is believed to be their intention. *(Schwabe, C.J., Coutts Trotter and Kumaraswami Sastri, JJ.).* TIRUNEELAKANTAM *v.* RAJA RAJESWARA. **70 I.C. 469= 46 Mad. 177=15 M. L. W. 556= 30 M. L. T. 317=A. I. R. 1922 Mad. 263= 43 M. L. J. 158.**

—Construction—Law applicable.

———*Contract Act, S. 253—Deed of partnership—Majority authorised to expel partner under certain conditions—Partner proposed to be expelled should have notice of charges against him—He should have reasonable opportunity of defending himself—Charges should be substantiated in a reasonable manner.*

Where under a partnership deed, a majority of the partners are authorized to remove a partner from the firm if certain conditions are fulfilled, and expulsion of a certain member is applied for in a Court, the law applicable in such a case is that the person charged should have reasonable notice of the charges proposed to be brought against him, that he should have a reasonable opportunity of defending himself and that the charges should be substantiated in a reasonable manner. *Labouchere* v. *Earl of Wharncliffe*, (1880) 13 Ch. D. 346; A. I. R. 1914 P. C. 105; and 47 Cal. 623, *Ref.* *(Stuart, C.J. and Nanavutty, J.).* NEM DAS *v.* KUNJ BEHARI LAL. **110 I.C. 500= A.I.R. 1928 Oudh 424.**

———*Award—Intention of maker not clear from language used as regards distribution of property to different claimants—Personal law was applied.*

In construing a document the same meaning must be given to the same word throughout the document unless there are very good reasons justifying the attribution of different meanings.

Where, in construing an award, it was not possible to gather the intention of the arbitrator in respect of the division of property dealt with in the award among the different claimants,

Held, that the personal law of the claimants should be applied in determining the shares of each of the claimants. *(Mukherji and Boys, JJ.).* MT. HABIB FATMA *v.* MT. ARJUMAND KHATUN. **95 I.C. 140=A.I.R. 1927 All. 228.**

———*Document executed by Mohammedan — Mohammedan Law should be applied.*

DEED—Construction—Law applicable.

Mohammedan Law has to be taken into account in construing documents executed by Muhammadans.

In the case of Muhammadans, unless there is an explicit statement to the contrary, the words "brother" and "sister" would include both half brothers and half sisters. *(Devadoss, J.).* MD. S. CHAMNAD *v.* JAINABI. **96 I.C. 105= 23 M.L.W. 740=A.I.R. 1926 Mad. 861.**

———*Impartible estates—Law as understood up to a particular year would govern contracts prior to that year even when they fall to be determined after change in the law.*

It was the settled law in India until the decision of the Judicial Committee in 10 All. 272, that the holder of an impartible estate had only a limited estate and except for special justifiable causes had no power of alienation beyond his life-time. The subsequent holder might indeed confirm the grant and such confirmation operated as confiscation and re-grant and the grantee could not claim to hold under the original grant upon the death of the grantor. The reversal of this accepted interpretation of the law does not displace its application to the contract contained in the transactions of 1794 and 1819 since the parties must be deemed to be bound by the law as then understood. 27 Mad. 141 (P. C.), *Foll.* *(Dass and Ross, JJ.).* DEBI SINGH *v.* F. E. CHRISTIAN. **84 I.C. 429= 1924 P.H.C.C. 201=A.I.R. 1924 Pat. 776.**

———*To vary rights defined by General Law the directions must be clear and unambiguous.*

The direction to the trustees in the trust in the settlement was to pay to the widow of the settlor within thirteen months of the settlor's death out of the balance of the "income accruing within the first thirteen months" the Rs. 80,000. The trustees were further directed to divide the remaining balance of the income "arising or accruing" during the first thirteen months after the settlor's death among the four beneficiaries named in equal shares. The direction in the deed operated under the form of a trust for sale. The balance of the proceeds of sale and income to be derived from it were to be held as subsequently directed "except the income arising or accruing due for and within the first thirteen months after the settlor's death," as to which there was reference back to the direction.

Held, the character of payments such as these directed is *prima facie* discontinuous at common law. No doubt, the settlor could have given directions which would have modified this character, or at least, have deprived it of the consequences arising from its discontinuity. But such directions would have had to be clear and unambiguous in order to have the result of varying the rights defined by the general law. There was no such distinctness in direction in the deed as would have been required to have this effect. *(Viscount Haldane).* PHIROZSHAW *v.* BAI GOOLBAI.

76 I.C. 929=28 C.W.N. 882=1923 M.W.N. 616= 47 Bom. 790=50 I.A. 276=26 Bom. L.R. 76= 33 M.L.T. 372=18 M.L.W. 940= A.I.R. 1923 P.C. 171=47 M.L.J. 79.

—Construction—Lease or License.

———*Agreement for lease held to operate present demise.*

The operative words in the deed of agreement were these: "I therefore considered it proper and suggested to the said Mussammat to take over 16-annas Mauza Makdhumpur.... in lieu of Rs. 10,000 of her dower-debt on the condition of paying annually Rs. 500 on account of revenue and cesses and for any personal expenses. Accordingly my second wife, Mt. Bibi Khodaijatul Kubra *alias* Jamil Khatun liked and accepted it. But, it is impossible at this time to execute any necessary deed at this place Islampur Konand.... I, therefore, executed this deed of agreement with the same condition. I do declare that on reaching Sahibganj, District Gaya, within three months, I shall execute a necessary deed to the above effect, and shall put (her) in possession and occupation of the said mauza. If, God forbid, a necessary deed to the above effect may not be executed even on the expiry of the aforesaid period of three months or I fail to execute it for any reason, the said Mt. Khodaijatul Kubra *alias* Jamil Khatun has and shall have right and power, according to this deed of agreement, to take possession of the said Makhdumpur in lieu of Rs. 10,000 out of the dower-debt due to her on the condition of paying annually Rs. 500 on account of revenue and road cess and for any personal expenses to me and to my heirs and representatives in respect of Mauza Makhdumpur.... and paying *sadr jama* of Rs. 36-9 year after year and to get a necessary deed executed by me and my heirs and representatives through Court or in whatever way she may think possible and proper."

Held, on construction that the instrument was an agreement for a lease operating as a present demise. *(Ross and Wort, JJ.).* KHODAIJATUL KUBRA *v.* KRISHNA PRASAD.

A.I.R. 1930 Pat. 530.

———In a mining lease of a village the property demised was described in the operative part of the document as "the underground coal and stones, etc., of mauza bearing Thak No. 11 specified in the boundaries below" and the area of the mauza was stated to be 121 *bighas* more or less. The schedule of the boundaries given at the end of the document merely contained the words "mauza bearing Thak No. 11-121 *bighas*," it was contended that the lease was made with reference to the thakbast map and not with reference to the revenue survey map.

Held, that on a true interpretation of the document the intention of the parties was that the mauza was demised with reference to the survey map and not with reference to the thak map. The reference to Thak No. 11 was only for the purpose of identification. A.I.R. 1924 Pat. 402 and A.I.R. 1926 Pat. 385, *Rel. on.* *(Ross and Kulwant Sahay, JJ.).* PITCHER & CO. *v.* SATISH CHANDRA. **115 I. C. 217= A. I. R. 1928 Pat. 399.**

———Ijara *lease—No right of transfer given under the lease—Lessee to surrender premises on expiry of lease—Lessee taking* kabuliyat *in respect of some lands and for default in paying rent purchasing himself the lands in execution of decree for rent*—Ijardar *cannot retain suit lands after expiry of lease.*

An *ijara* lease provided: "The lessee will not save and except for the purpose of granting *dur-ijara* settlements to *dur-ijaradars* or other tenants or persons by means of which the rents of the said demised premises or the greater portion thereof may be collected as heretofore, assign, under-let or otherwise part with the possession of the said hereby demised premises or any part thereof and will not enter into any partnership with any other person or persons in respect of the demised premises or any part thereof or charge or assign the lessee's interest under these presents or any part

thereof without the previous written consent of the lessor. At the end (expiration) or other sooner determination of the said term the lessee peaceably and quietly surrender and yield up the said demised premises to the lessor.

Held, that the *ijaradar* could not under the terms of the lease retain possession of a jote purchased by him in decree for arrears of rent for the jote in respect of which he had given a *kabuliyat*. (*Chatterjee and Page, JJ*). K. S. BANNERJEE *v.* DHARENDRA KRISHNA DEB. **96 I.C. 659 (Cal.).**

———Where a document provided "You will have an authority during the term of the contract to pluck or purchase both crops yourself or to give others permission to pluck or purchase them, and if you are unable to purchase their goods yourself then you are to allow the other traders who have purchased goods to take them out after levying the tax according to the assessment rules of the estate."

Held, that the document amounted to a lease of immovable property for a term of years and required registration. The document meant that nobody could gather or purchase any of the produce without the grantee's permission, which would of course be taken for granted in the case of the "forest people" who gathered it, and that "unable to purchase" meant only "do not choose to purchase". 5 N.L.R. 21, *Rel. on.* (*Hallifax and Kotwal, A.J.Cs.*). SETH GOKULDAS NATHANI *v.* LAL ARTATRAM. **95 I.C. 824= A. I. R. 1926 Nag. 466.**

———*Dak fard is not a lease.*

A bid-sheet or dak fard showing the bids made at the auction of land for settlement is a verbal settlement, and the document which did not contain the most important terms and was never intended to be delivered to the lessee as a document of title cannot in such circumstances constitute a lease. (*Dawson Miller, C.J. and Foster, J.*). RAMESHWAR SINGH BAHADUR *v.* KITAB ALI. **98 I.C. 374=1926 P.H.C.C. 261= A.I.R. 1926 Pat. 487.**

———*Tenant permitted to plant grove—Agreement that tenant should become owner of part of the grove subject to restrictions stated in agreement—One restriction being against sale by tenant to outsider—Restriction was held not to prevent mortgage to stranger.*

Under an agreement between a tenant and his landholder as to the terms on which the former would be permitted to plant a grove, the tenant was to become the owner of one-quarter of the grove, subject only to such restrictions as were laid down in the agreement itself. One of these restrictions was that he should not sell this one-quarter share to any stranger, but only to the proprietor by whose permission the grove was to be planted, or to co-sharers of such proprietor.

Held, that there was no covenant against mortgaging. (*Mears, C.J. and Piggott, J.*). HAR PRASAD *v.* GULJARI LAL. **88 I.C. 265=47 All. 604= 6 L.R.A. Civ. 347=A.I.R. 1925 All. 651.**

———*Head lessee not bound to renew head-lease—Covenant to allow renewal to sub-lessee if and when renewal is obtained by head-lessee cannot claim right to renewal in perpetuity.*

Where the head-lessee in head-lease does not bind himself to take out a lease at the end of 99 years' period fixed in the head-lease, but has agreed that if and when the lease is renewed, he and his heirs and assigns would pass on the benefit of that renewal to their lessee, that is not sufficient to give to the sub-lessees the right to the renewal

of the lease in perpetuity. (*Shah, Ag. C. J. and Kincaid, J.*). MEGHJI MOORJI *v.* TYEBALLI KAMARUDDIN. **90 I.C. 189=26 Bom. L.R. 1019= A.I.R. 1923 Bom. 64.**

———*Lease described as permanent, at fixed rent and of hereditary nature indicates permanency—Clause for re-entry will change the nature of lease unless words prohibiting re-entry are clear—Right of entry is not repugnant to the title "kayamgeni chit."*

In determining whether a lessor has a valid right of re-entry under a lease executed by him, the nature of the terms used for the description of the document, the clause with regard to the enjoyment of the property from generation to generation and the rent being a fixed rent would be of great value in the absence of clear words to the contrary. But in a lease of this kind the Court has to see what is the contract entered into by the lessor with the lessee. It is open to the lessee to surrender the land leased to him and it is also open to the lessor to contract with the lessee that the land should be available for him whenever he required it. The mere use of the word "Kayamgeni chit" would not take away the force of the recital in the document that the lessee should surrender the land whenever required by the landlord. In construing a document of this kind the whole of the document should be taken into consideration. Unless there are clear words in the body of the document that the landlord was not to enter upon the land at any time, the clause in question would not be considered repugnant to the general tenor of the document. (*Devadoss, J.*). RAMA RAO *v.* THIMMAPPA. **87 I.C. 433=1925 M.W.N. 157= A.I.R. 1925 Mad. 732=48 M.L.J. 463.**

———*Clause for re-entry—Payment for improvements—Deed fixing proportion of value of trees payable out of the value for improvements—Landlords were held liable for all improvements whatsoever.*

The clause for re-entry in a lease deed ran as follows:—"When we require the property you should take half the value of the improvements for the trees planted by us and full value of the plants planted by you out of the value fixed by wise persons for the improvements and surrender the property to us."

Held: that before re-entry the landlord was to pay for the value of the improvements whatever they may be. (*Devadoss, J.*). RAMA RAO *v.* THIMMAPPA. **87 I.C. 433=1925 M.W.N. 157= A.I.R. 1925 Mad. 732=48 M.L.J. 463.**

———*Lease in terms perpetual, with fixed rent, heritable, and in default of payment of rent of three kists becoming void, was held unresumable.*

The terms of grant of lands to two brothers made the grant a perpetual one. The grantees and their descendants were to pay a fixed rent and enjoy the lands from generation to generation. The grantor's descendants were to collect the fixed rent generation after generation and when there was default in payment of the fixed rent for three kists the fixed lease was to be void.

Held, that the grant was not resumable and that it was permanent in its duration with a fixed rental, capable of descending to heirs in male and female lines and of being held from generation to generation. That is, in short, the grant was an absolute, perpetual, heritable and transferable grant. (*Jwala Prasad and Macpherson, JJ.*). GOPAL OJHA *v.* RAMADHAR SINGH. **82 I.C. 204= A.I.R. 1925 Pat. 228**

DEED—Construction—Lease or License.

———The material clauses of a lease were :—

(1) The purpose of the lease was to enable the lessee to erect Gola house and to purchase and sell all sorts of commodities therein, or in other words to open his business therein ;

(2) The lease was not limited for any definite period but that it was a *bemaiyadi* lease or a lease without any term ;

(3) That the lessee shall not have the power to construct any pucca building without the express and written permission of the lessor and if that stipulation be violated and pucca building be raised by the lessee without such permission of the lessor, he, the lessee, shall be liable to be evicted ; and

(4) In case the lessee went to erect pucca building and to have a pucca well or *Indara* he shall have to do so according to the advice of the lessor.

Held, that the erection of pucca buildings for the business as well as for the purpose of residence was in the contemplation of the parties with the condition that permission for erecting pucca structures will have to be taken from the lessor, and that under these circumstances the inference is not unreasonable, that the lease in question was meant to be of a permanent character and not from year to year.

A *Bemaiyadi* lease or a lease without any term may in the circumstances of a particular case be shown not to confer any permanent grant. (*Jwala Prasad and Adami, JJ.*). A. H. FORBES *v.* HANUMAN BHAGAT.

2 Pat. 452=1 Pat. L.R. 190=77 I.C. 32= A.I.R. 1924 Pat. 88.

———Zurpeshgi *lease by* raiyat—*Transferee to hold directly under landlord—Transferor ceases to be a* raiyat *for the period of the transferee's occupancy.*

In consideration of Rs. 975 the *raiyat* of land put the plaintiff in possession and occupation of the land for a term of nine years. The plaintiff was to appropriate the produce and pay the rent to the landlord, that is to say, the plaintiff was to hold directly under the landlord and not by way of sub-lease under the *raiyat*. The term of the lease was to be extended automatically until the *peshgi* money was paid.

Held, that by this instrument the original *raiyat* transferred his *raiyati* right to the plaintiff who thereby acquired the right to hold the land for the purpose of cultivating it; and the defendant consequently ceased to be *raiyat* as long as the lease was outstanding against him. He had only the reversion of the *raiyati* interest on the expiry of the term of the lease, but during the term of the lease the *raiyati* interest was in the plaintiff. (*Ross, J.*). CHATURGUN BIND *v.* TILAKDHARI SINGH.

71 I.C. 470=A.I.R. 1923 Pat. 402.

———*Bengal Rent Act* (*X of* 1859), *S.* 6—*Tenancy—Construction—Occupancy was held not to be created.*

A suit in 1864 by a *zamindar* against his tenant claiming possession of certain *chur* land, was compromised and fresh *patta* and *kabuliyat* fixing a yearly rent for a term of 8 years, were executed. After the expiry of the term a fresh *patta* and *kabuliyat* were to be given at a fair rate to be then settled. The *kabuliyat* continued "if after the fair rent is settled according to the proper rate prevailing in the villages I refuse to pay that rent, then you will bring the lands under your *khas* possession by evicting me therefrom; and I shall not be able to make any objection to the same." Until a fresh rent was settled the tenancy was to continue at the fixed rate.

DEED—Construction—Marriage Settlement.

Held : upon the construction of the lease, there was no right of occupancy. (*Lord Dunedin.*) MIDNAPUR ZAMINDARI CO., LTD. *v.* NARESH NARAYAN ROY. **64 I.C. 231=30 M.L.T. (P.C.) 279= 48 I.A. 49=48 Cal. 460=14 M.L.W. 265= A.I.R. 1922 P.C. 241.**

———*Landlord and tenant—Lease containing option for renewal—Terms of renewal not stated—Period and terms of new lease will be same as those of original lease, except clause as to renewal.*

Where there is a covenant for renewal, if the option does not state the terms of the renewal, the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof except as to the covenant for renewal itself. (*Mookerjee and Panton, JJ.*). GURU PROSANNA BHATTACHARJEE *v.* MADHUSUDAN CHOWDHURY. **64 I.C. 824= 35 C.L.J. 87=26 C.W.N. 901= A.I.R. 1921 Cal. 574.**

———*Landlord and tenant—Putni lease*—Chaukidari Chakran *lands—Putni lease silent as to rent payable—Zemindar is entitled to rent in addition to amount payable to Chaukidari fund.*

Where the putni lease is silent as to the rent payable for *chaukidari chakran* lands, the zamindar is entitled to some rent in addition to the amount payable to the chaukidari fund. As to the amount of the rent where there are no materials on record the putnidar is entitled to something for collection charges. (*Chatterjea and Newbould, JJ.*). MAHARAJADHIRAJ SIR BEJOY CHAND MOHATAP BAHADUR *v.* KRISHNA CHANDRA MUKHERJEE. **66 I.C. 357=34 C.L.J. 275= A. I. R. 1921 Cal. 466.**

———*Holder to be in exclusive possession—Duration not specified—Provision for month's notice—Agreement is lease not license.*

Where it is clear from the terms of the agreement that the holder is put in exclusive possession of certain premises although the time for which the property was to remain with him is not expressly specified but there is a provision that he need not give vacant possession without one month's notice, this provision implies that the exclusive possession of the holder is to be for one month at least and the effect of the agreement is a lease in favour of the holder. (*Mirza and Broomfield, JJ.*). SHERIF DADUMIYAJI *v.* EMPEROR.

32 Bom. L. R. 332=A. I. R. 1930 Bom. 165.

———*Agreement to pay certain amount of grain every year as damage caused by using the land is lease and not license—T. P. Act, S.* 105.

An agreement by which a certain quantity of grain is agreed to be paid to the owner every year on account of the damage to be sustained by him by his allowing the other persons to take their cattle or carts over a strip of land is lease and not a license nor an easement and the payment claimed is rent. (*Hallifax, A. J. C.*). INDAL *v.* DEBI.

92 I. C. 683=A. I. R. 1926 Nag. 174.

———*Contract to extract lac is a mere license and not a lease.*

A contract for the extraction of lac from trees is of the nature of a license and not a lease. No interest whatever in the trees is given by such contract nor even the right to temporary possession of them. (*Daniels, J. C.*). IDOO *v.* NEHAL KHAN.

88 I. C. 1010=12 O. L. J. 328=2 O. W. N. 312= A. I. R. 1925 Oudh 456.

—Construction—Marriage settlement.

In marriage settlement and Wills of parents there is a presumption that the settler or testator

DEED—Construction—Marriage settlement.

intended the portions should vest in the case of daughters on their attaining majority or marriage and in the case of sons on their attaining majority, whether the children do or do not survive their parents. (*Twomey, C. J. and Young, J.*). ESTHER COHEN *v.* E. I. COHEN. **59 I.C. 806= 13 Bur. L.T. 78=10 L.B.R. 196.**

———*Gift to son's wife—Divorce—Effect.*

On the marriage of his son *A*, one *H* executed a deed of settlement which directed the payment of certain income to "the said *A*, during his life and in trust after the decease of the said *A* to *H*, his wife, during her life." *H* obtained a divorce from *A*; on the death of the settlor the question arose as to whether *H* forfeited the gift of income by reason of the divorce.

Held, that the devolution of marriage made no difference to the settlement and that the wife was entitled to the income. (1875) 1 Ch. D. 563; (1876) 2 Ch. D. 318, *Foll.* (*Baker, J.*). AIMAI HORMUSJI WADIA *v.* JAMSHEDJEE JEEJEEBHOY. **32 Bom. L.R. 1175.**

—Construction—Mortgage or Charge.

———*Memorandum recording receipt of money and giving possession to usufructuary mortgagees as also entitling them to registered deed does not require registration and agreement embodied in it can be specifically enforced—Registration Act, S. 17—T. P. Act, S. 59.*

A memorandum recording the fact that money had been borrowed on the terms of a usufructuary mortgage and that the mortgagees had been put in possession and giving the mortgagees the right to obtain a document in a proper registered form does not require registration. It is merely an agreement to execute a usufructuary mortgage bond. This agreement is specifically performable and can be set up as a defence to a suit for redemption. A.I.R. 1929 P. C. 269, *Dist.* (*Ross, J.*). HARNANDAN SINGH *v.* BASUDEO NARAYAN. **A.I.R. 1930 Pat. 479.**

———*On partition village X given to one co-sharer A—Agreement that A should pay certain amount from profits annually to other sharers and that the sharers had right to recover same from whoever was in possession (for the time being) of X—Payment regarded as "Malikana"—Agreement created not mere personal liability—It was not only charge but created interest in land.*

At the time of partition, village *X* was given to one co-sharer and in order to equalize the shares it was arranged that this co-sharer should pay a certain sum from its profits annually to the other co-sharers. It was agreed that the sum should be paid by the person in possession (for the time being) of village *X* and that the other co-sharers had a right to recover the sum. This payment was regarded as malikana in this village *X*.

Held, that this agreement did not create merely a personal liability. It was even not only a mere charge on the profits of the village, but it was more than such a charge, *i.e.*, it created an interest in the land itself. 9 All. 591, *Rel. on.* (*Niamatullah, J.*). MT. SAHODRA *v.* BADRI PRASAD. **A.I.R. 1929 All. 737.**

———Where a fund is indicated for payment of a certain allowance, the latter must be deemed to be charge on the former. (*Niamatullah, J.*). MT. SAHODRA *v.* BADRI PRASAD. **A.I.R. 1929 All. 737.**

———*Transfer of Property Act, S. 100—Executant of a pro-note stipulating that the amount should come out of timber of certain jungle—Valid charge is created on the timber.*

DEED—Construction—Mortgage or Charge.

M executed a promissory note in favour of *P*. On the same date a *beechak* was sent by *M* to *P*, in which it was stipulated that the amount due under the promissory note should "come out of the *diar* (*deodar*) timber" of the jungle.

Held: that although the fund out of which the debt was to be satisfied had not come into existence, still *P* was entitled to a charge on *M's* timber in the jungle. *Collyer* v. *Issacs*, (1882) 19 Ch. D. 342; *Tailby* v. *Official Receiver*, (1888) 13 A.C. 523; *Tancred* v. *Dalagoa Bay and East Africa Ry. Co.*, 23 Q.B.D. 239; 10 All. 133; 13 Cal. 262; 16 Mad. 429; 38 Mad. 500 and A.I.R. 1924 P.C. 162, *Cons.* and *Appl.* (*Tek Chand and Agha Haidar, JJ.*). MANGAT RAM *v.* PIYARA LAL-SUNDAR LAL. **115 I.C. 762=30 P.L.R. 53= A.I.R. 1929 Lah. 274.**

———*Stipulation entitling mortgagee to recover amount and interest as well as compound in case of default—Right to sue for whole mortgage money held accrued even before period fixed for payment of whole sum had expired.*

A sued *B* on a mortgage-deed. The deed contained a clause to the effect that "in case of the breach of contract the above-mentioned mortgagee shall be entitled within the fixed period of 6 years and also after it at any time to recover the entire mortgage money and the interest as well as the compound interest through the Court by attachment and sale of the mortgaged share and my other property." *A* contended that the stipulation contained in the given clause related to the mortgagees (*A's*) right to obtain a simple money-decree in respect of the unpaid interest and did not refer to his right to get a decree for sale for the entire mortgage money.

Held, that the clause did not admit of this interpretation. The clause was intended to give the mortgagee the right to institute a suit for the whole of the mortgage money before the completion of the term of six years in case the mortgagor failed to pay interest regularly at the end of each year. (*Wazir Hasan and Srivastava, JJ.*). LAJADIN *v.* MT. GULAB KUNWAR. **6 O.W.N. 925= A.I.R. 1929 Oudh 536.**

———An agreement for a mortgage was made between the parties, the purpose of which was to arrange the terms upon which the respondent was to grant, for the true amount of the indebtedness, whatever this might be, a mortgage of property, which had formerly been the subject of an agreement for sale and partnership between the parties. Following on the agreement a draft mortgage was in fact prepared purporting to carry out its terms, was approved by solicitors on behalf of the respondent, and the mortgage itself was actually engrossed and the stamp paid for by the respondent.

Held, that the property being identified and the terms of the loan being fixed, the document constituted an agreement which equity would enforce, unless there were circumstances which the Court would consider sufficient to justify the unqualified refusal on the defendant's part to carry out its terms, that there was a valid agreement charging the property with whatever sum was actually due, together with interest, and that a proper mortgage ought to be executed to carry out those terms, for nowhere was the binding effect of the agreement made conditional on fixing the amount of the debt, so that it would be wholly inoperative unless this was first done, and the fact that the action was begun before the account was settled does not

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deprive the plaintiffs of all right to relief. (*Lord Buckmaster*). JEWAN LAL DAGA *v.* NILMANI CHOUDHRI. **107 I.C. 337= 26 A.L.J. 124=30 Bom. L.R. 305=47 C.L.J. 302= 1928 M.W.N. 154=55 I.A. 107= 32 C.W.N. 565=27 M.L.W. 740= 7 Pat. 305=A.I.R. 1928 P.C. 80= 54 M. L. J. 325.**

———*Deed described as mortgage—Transfer of interest not for securing payment of money advanced—Deed was held not to be a mortgage.*

The contents of a deed and the jural relations constituted by it and not the name given to it determine its nature.

Where the transfer of interest was not made for the purpose of securing payment of money advanced or to be advanced for the performance of any engagement,

Held, that though the contract was described as a mortgage, it was not a mortgage. 2 Bom. 113; 11 Bom. 462; 26 Bom. 252; 25 All. 115 (P. C.); S. A. No. 573 of 1911 (Bom.); S. A. No. 574 of 1911 (Bom.); S. A. No. 816 of 1912 (Bom.); Appeal No. 7 of 1912 (Bom.); and 32 Bom. 569, *Foll.* (*Patkar, J.*). GULABBHAI *v.* BHAGVAN. **114 I. C. 266= 30 Bom. L.R. 980=A.I.R. 1928 Bom. 377.**

———*Award partitioning property between J and S —S to pay certain amount to J and not entitled to alienate his share till such amount is paid—No charge is created on S's share for the amount.*

J and *S* had a dispute with each other and finally their property was partitioned by an award given by arbitrators. *S* was to pay Rs. 21,000 with interest at 0-9-6% per mensem in three instalments of Rs. 7,000 to *J* and if he failed to pay any two instalments, *J* was at liberty to realize the whole sum due with interest by suit or otherwise. The award then proceeded to state as follows: "*S* shall not be competent to sell, mortgage, hypothecate or gift or make *waqf* in respect of the immovable property allotted to him till the said amount is not paid off by him to the first party." One instalment of Rs. 7,000 was paid and no further instalments were paid at all. It was contended that by the award a charge or a mortgage was created in favour of *J*.

Held, that the words in the award themselves did not create either a mortgage or a charge. So far as the mortgage is concerned the award not being an act of parties it is difficult to see how any mortgage could be created at all. A mere covenant not to alienate does not by itself create a charge on the property. The mere direction by the arbitrators not to alienate would not by itself be sufficient to create any charge in the property. (*Zafar Ali and Dalip Singh, JJ.*). MANOHAR LAL *v.* RATTAN LAL. **109 I. C. 479=A. I. R. 1928 Lah. 440.**

———*Period fixed in mortgage—It should generally be construed for mortgagor's benefit unless intention is clearly to the contrary.*

Though generally there should be a leaning towards considering the period fixed in an instrument of mortgage as having been fixed for the convenience of debtor, still if the intention should be clear that the mortgagor stipulated for the condition of his being in possession for a specific period the same should be given effect to. The debtor is at liberty to discharge the mortgage debt at any time unless the terms of the document clearly prohibit it and fix a time before which it is not to be paid. 23 Mad. 33 and 17 M.L.J. 83, *Foll.*; 48 I. C. 379; 35 M. L. J. 287, Held Overruled.

DEED—Construction—Mortgage or Charge.

(*Phillips and Srinivasa Ayyangar, JJ.*). VENKATARAMANAMMA *v.* BASANA SIMON. **108 I. C. 277= 1927 M. W. N. 617=A. I. R. 1928 Mad. 234.**

———*Condition in mortgage-deed that if mortgagor wished to sell or mortgage property he should sell to or mortgage it with mortgagee if latter desired to purchase—There is an intention to give mortgagee right of pre-emption—Pre-emption.*

A mortgage-deed contained a condition that if ever the mortgagor wished to sell or mortgage the mortgaged property, he should not be able to sell or mortgage it to any one except the mortgagee and that if the mortgagee was unwilling to purchase it or have it mortgaged in his favour, the mortgagor would be at liberty to transfer it elsewhere.

Held, that there was an intention to confer on the mortgagee a right of pre-emption in respect of the property. (*Adami and Fazl Ali, JJ.*). MATURA SUBBA RAO *v.* SURENDRA NATH. **113 I. C. 106= 9 P. L. T. 747=8 Pat. 243= A. I. R. 1928 Pat. 637.**

———*Want of due formalities of a mortgage would not convert a mortgage into charge—No reference to sale of hypothecated property—Charge is created—Transfer of Property Act, Ss.* 100 *and* 58.

If an instrument is expressly stated to be a mortgage, and gives the power of realization of the mortgage-money by sale of the mortgaged premises; it should be held to be a mortgage. The fact that the necessary formalities of due execution were wanting would not convert the mortgage into a charge. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realization of money from a particular property. without reference to sale, it creates a charge, 35 Cal. 837 *Foll.* (*Lobo, A.J.C.*). OFFL. RECEIVER *v.* TIRTHDAS MEWARAM. **97 I.C. 321= A.I.R. 1927 Sind 66.**

———*Unregistered document to pay certain commission in perpetuity to lender—Property of the factory also liable for loan—Transfer of Property Act, S.* 100 *—Registration Act, S.* 17.

Defendants borrowed a loan from the plaintiff for starting a factory and an unregistered agreement was entered into, which gave the right to the plaintiff to obtain a commission of two and a half per cent. on the gross income of the factory in perpetuity. There were also provisions binding the defendants not to remove the factory, but to get any future partners to enter into a similar agreement and that, in certain events, the properties of the factory would be liable for certain moneys, and that, in certain other contingencies, the lender would be at liberty to recover a certain amount from the machinery of the factory or from the borrowers. A promissory note also was passed in favour of the plaintiff which formed a part of the same transaction.

Held, that the agreement amounted to an equitable charge on the property within the meaning of S. 100 of the Transfer of Property Act. Also it purported to create an interest in land within the meaning of S. 17 of the Indian Registration Act, and as such it would *prima facie* require registration, and as it was never registered, it could not be relied on. The same result follows, if it amounted to an equitable charge within the meaning of S. 100 of the T. P. Act. (*Marten and Madgavkar, JJ.*). AMRATLAL *v.* KESHAVLAL. **98 I.C. 696= 28 Bom.L.R. 939=A.I.R. 1926 Bom. 495.**

———*Mortgage for 5 years—Mortgagee authorised to redeem a prior mortgage within 5 years—*

DEED—Construction—Mortgage or Charge.

Mortgagee can redeem it even after 5 years until his mortgage is redeemed.

Where by a condition in the mortgage which was for a period of five years, the mortgagee was authorised to redeem a prior mortgage any time within the five years,

Held, the mortgagee was entitled to redeem the prior mortgage any time, even after five years, before his mortgage was redeemed. (*Zafar Ali and Addison, JJ.*). GOPAL DAS *v.* MULCHAND.

98 I.C. 960=7 Lah. 399=27 P.L.R. 688=A.I.R. 1926 Lah. 607.

———*Usufructuary mortgage providing that mortgagee should pay certain amount as nankar every year for mortgagor's and his dependant's maintenance—Nankar is a charge on mortgaged properties even after foreclosure.*

When a covenant extends to a thing in esse parcel of the demise, the thing to be done by force of the covenant is cuodammodo annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee.

A usufructuary mortgage of a share in a village provided "the mortgagees shall take possession of the mortgaged property with the exception of the 130 *bighas sir* land and of Rs. 100 cash annually, which amount has been fixed for maintenance of the executants and their dependants and adherents, etc." The mortgage was foreclosed in favour of the mortgagee and he got possession of the share. The annuity was treated as a nankar by the parties for all time, both before and after the foreclosure decree.

Held, the nankar was a charge on the property and the mortgagee was liable to pay it even after the foreclosure decree. (*Wazir Hasan, J.*). BISHWANATH PRASAD *v.* ABDUS SAMAD KHAN.

94 I.C. 788=1 Luck. 176=13 O.L.J. 149=A.I.R. 1926 Oudh 349.

———Usufructuary mortgage deed stating that mortgagor should not be entitled to disturb the mortgagee's possession without payment of the principal amount at 1 per cent. per mensem for the whole term and that mortgagor should not claim the income of the property before disturbance shows that redemption prior to the expiry of the entire term was agreed not to be claimed and not that such redemption was contemplated under the conditions mentioned. (*Kinkhede, A.J.C.*). RANA *v.* WAMAN. **79 I.C. 870=A.I.R. 1925 Nag. 11.**

———*Deed containing promise by vendee of* zamindari *to pay maintenance to vendor—Question whether deed created charge on* zamindari*—Entry in* khewat *prepared shortly after, stating that charge was created—*Khewat *deserves no higher value than as contemporaneous construction.*

A certain person sold his *zamindari* to another. After the sale was completed, the vendee executed a document in favour of the vendor, whereby the vendee, in consideration of the sale of the *zamindari* to him, undertook to pay a certain sum every year to the vendor and his descendants for their maintenance. 3 years after the deed was executed, this allowance was entered in the *khewat* of the village as amounting to a charge on the *zamindari*.

Held, that in construing the document for the purpose of seeing whether it created a charge on the property, the value to be ascribed to the *khewat* was that of *contemporanea ex positio* and nothing more. (*Ashworth, A.J.C.*). CHHOTTY LAL *v.* IQBAL NARAIN. **85 I.C. 331=A.I.R. 1925 Oudh 550.**

DEED—Construction—Mortgage or Lease.

———*General stipulation regarding interest, without limitation as to its currency—Must be treated as applicable to whole period of subsistence of mortgage—Deed—Construction.*

Where a deed of mortgage provided that the mortgagor shall pay the principal money secured by the mortgage with stipulated interest within 7 years, and further that the interest due shall be paid half-yearly and that if the interest for any half-year remained unpaid it shall be added to the principal and shall carry compound interest at the stipulated rate,

Held, a general stipulation in a mortgage deed that the mortgage money shall bear interest at a certain rate without any limitation as to its currency should be treated as applicable to the entire period for which the mortgage money might remain unpaid. (*Kanhaiya Lal, J.C.*). NAJM-UN-NISA *v.* RAGHUNATH. **67 I.C. 963=25 O.C. 36=A.I.R. 1922 Oudh 122.**

———*Right to have property sold for debt given but no express transfer of interest—Deed was held to be a mortgage—T. P. Act, S.* 58.

A document ran as follows:—"This settled coal land, mines, etc., as well as all other movables shall ever be regarded as a security for the payment of the rent and cesses due together with interest thereon due to you. I shall not be competent to transfer the said property by sale, gift, or remove the same, so long as the rent, etc., due to you will remain unpaid."

Held, it created a mortgage and not merely a charge. 34 All. 446, *Foll.* (*Das and Adami, JJ.*). SHIVA PRASAD SINGH *v.* BENI MADHAB CHOWDHURY. **70 I.C. 24=1 Pat. 387=4 P.L.T. 6=A.I.R. 1922 Pat. 529.**

———*Mortgage-deed stating that till certain time the mortgagee should be in possession—There is no covenant to pay—Transfer of Property Act, S.* 68.

A deed of usufructuary mortgage contained the following clause:—"Till the above stated Vaida (time), you shall take possession, make improvements and enjoy and also pay the thirva due, in respect of the property, warg No. 81."

Held, that there was no covenant to pay. 35 M.L.J. 219, *Rel. on.* (*Abdur Rahim and Oldfield, JJ.*). KUNHIMAI KUTTY BEHARI *v.* HALEKOTE AISABI. **62 I.C. 723=13 M.L.W. 434=A.I.R. 1921 Mad. 636.**

———*Security of other lands also offered after discharging pre-existing mortgage thereon—No intention to postpone the arising of the cause of action was held to exist—Limitation Act, Art.* 132.

Where a mortgage in plaintiff's favour provided that the mortgagors would pay off the amount on the security of the lands covered by the deed as well as on the security of certain other lands "after discharging" the mortgage thereon to a third party,

Held, that the words "after discharging," etc., were not intended to postpone the date on which the cause of action for the enforcement of the plaintiff's mortgage was to arise. (*Sadasiva Aiyar and Spencer, JJ.*). SANYASIAH *v.* M. P. ATCHANNA NAIDU. **70 I.C. 759=15 M.L.W. 289=A.I.R. 1921 Mad. 624=42 M.L.J. 339.**

—Construction—Mortgage or Lease.

———*Premium taken—Portion of produce to be given to executants—No amount to be paid as redemption money—No accounts of rents and profits except Government revenue—Deed is lease.*

DEED—Construction—Mortgage or Lease.

It is sometimes difficult to draw the line between a mortgage with possession and a lease where a premium is recovered by the lessor. But where a premium is taken, which premium is to be worked off by the enjoyment of the produce for 30 years and a portion of the produce is to be given to the executants of the document and there is no liability to account for the rents and profits, nor is there any question of redemption on payment of any money and all that the document requires is that an account should be kept as regards the payment of the kist to Government and of the various expenses, the transaction is a lease and not a mortgage. 25 All. 115 (P.C.), *Foll.* (*Kumaraswami Sastri and Devadoss, JJ.*). SUNDARA RAJU *v.* SESHADRI. **106 I.C. 426=26 M.L.W. 739=1927 M.W.N. 556= A.I.R. 1928 Mad. 35=54 M.L.J. 76.**

———*Debt being secured and transferor being entitled to redeem, transfer is mortgage, not lease.*

The only test to find out whether a transfer is a lease or a mortgage is to examine whether the object of the transfer is to secure the re-payment of a debt and secondly whether there is, either expressor by implication, reserved to the transferor a power of redemption of the property. (*Dawson Miller, C.J. and Foster, J.*). MATHURA PANDEY *v.* CHDRIKA RAI. **83 I.C. 192= 3 P.L.R. Civ. 103=A.I.R. 1925 Pat. 319.**

———*Defendant to remain in possession for a number of years and then to surrender possession—Deed is a lease.*

A deed provided that in accordance with a prior agreement, the property, which had been placed in 1st defendant's possession in 1910-11, should remain in it until the end of the year 1917-18 in consideration of a cash payment of Rs. 160 at the date of the prior agreement and other subsequent payments on plaintiff's behalf, in all, Rs. 1,280, that 1st defendant should pay all dues other than extra taxes, which might be levied hereafter, and, should at the end of the term surrender without any separate relinquishment,

Held, the document was a lease. The mortgage character is established only when there is a power of redemption reserved to the lessor either expressly or impliedly, so that it distinctly appears that the parties themselves intended the transaction to be of the nature of a mortgage. 3 All. 1, *Rel. on.* (*Oldfield and Ramesam, JJ.*) NOOKAYYA *v.* BHEEMANNA. **73 I C. 733=17 M.L.W 712= 1923 M.W.N. 176= A.I.R. 1923 Mad. 454=45 M.L.J. 91.**

———*No provision for paying off amount and no accounts to be rendered—Deed is not a mortgage.*

Where there was no provision under which power was given to the executant of the deed to pay off the amount which was the consideration for the deed, and no accounts were to be rendered or required. (*Batten, J.C.*). BIKHA *v.* SHEIKH AMIR. **69 I.C. 511=19 N.L.R. 1= A.I.R. 1923 Nag. 60.**

—Construction—Mortgage or simple bond.

———*Document mentioned as mortgage and description of properties given—Deed is one of mortgage.*

An undertaking by a mortgagor who takes a fresh advance, that he will not redeem the mortgage, until he has repaid the advance is legal and enforceable against himself, but it is not a charge on the land and it is not enforceable against a purchaser of the land. But where a deed is described as a mortgage-deed (*rehennama*) and the boundaries of the village already mortgaged are added at the end of the deed, the use of the term "mortgage-deed," coupled with some detail of the property mortgaged, is not a mere misnomer applied to the document, and the document constitutes a further charge. (*Simpson, A.J.C.*). GAYA PRASAD *v.* RACHPAL. **70 I.C. 66=9 O.L.J. 484=A.I.R. 1923 Oudh 24.**

—Construction—Partition deed.

———*Hindu Law—Private trust—Partition deed providing for its management interpreted.*

Where as regards the family charity a partition deed provided that the eldest member from among the four branches of the family should exercise supervision and after him those that come next in the order of seniority should take and manage it, and the question was whether on a proper construction of the deed the right to manage the family charity vested in the eldest member of all the four branches of the family or in the eldest member of senior line,

Held, that under the terms of the deed of partition, the management vested in the senior of the four brothers and after them, in the senior member of the four branches and not in the senior member of the first branch alone. 27 Mad. 192, *Foll.* (*Kumaraswami Sastri, J.*). SWAMINATHA AIYAR *v.* RAMASWAMI AIYAR. **99 I.C. 828= 38 M.L.T. 8=A.I.R. 1927 Mad. 1155.**

———*Hindu Law—Partition—Sisters' right to survivorship is lost by relinquishment.*

By a partition deed two step-sisters who inherited their father's properties divided his immovable properties. It closed with the following words :— "Henceforth the only relationship between us will be one of friendship and not of property."

Held, that the parties intended not merely to give their present right to the properties but to exclude the right of succession by survivorship in case one of them predeceased the other. (*Krishnan and Waller, JJ.*). RUKMANI AMMAL *v.* NARASIMHACHARIAR. **78 I.C. 173=19 M.L.W. 465= 34 M.L.T. 29=A.I.R. 1924 Mad. 696= 46 M.L.J. 285.**

—Construction—Personal Liability.

———*Partition deed between father and son providing that if either should fail to pay debts allotted to him under deed and thereby cause loss to other, it should be collected from property allotted in partition —Father paying debts allotted to son can get personal decree against son—Hindu Law—Partition.*

A partition deed between father and son provided "if each fail to discharge the debts allotted to his share and thereby cause loss to the other, it should be collected from the property allotted in partition to the person who had not discharged the debt." With regard to certain debts allotted to the son the creditors pressed the father who first renewed them by keeping them alive and then discharged them. He then brought a suit to recover the money from the son.

Held, that a personal decree could be granted against the son. 33 M.L.J. 58; A.I.R. 1924 All. 105, *Dist.*; 23 Mad. 441; 36 Mad. 348 and 34 Mad. 479, *Rel. on.* (*Odgers, J.*). RAMASAMI AYYAR *v.* DORAISWAMI AYYAR. **114 I.C. 226= A.I.R. 1929 Mad. 137.**

———*Security bond for over-drafts by Company—Tenor of document held to point to a personal liability to pay money.*

DEED—Construction—Personal Liability.

Three of the directors of the Luxmi Company, Ltd. executed a surety-bond which was addressed to the manager of the Marwar Bank, Limited, of Ambala City which was as follows:—"Dear Sir,—In consideration of your allowing the Luxmi Company, Limited, to overdraw sums not exceeding in the aggregate of rupees fifty thousand only (on the security of Luxmi Company, Limited, demand pro-note in your favour of date) we hereby pledge for the re-payment on demand of the said overdraft, together with interest thereon and of any other sums or money which may be or become due to you from the Luxmi Company, Limited, on any account whatsoever, during the continuance of this pro-note. And we hereby declare and agree that the overdraft allowed and intended to be secured by the agreement shall be taken to have been allowed by you entirely upon the faith of and relying upon the declaration signed by us at the foot hereof, which declaration solemnly we declare to be true in every respect. It is hereby further agreed and declared that these presents shall remain and be a continuing security to you for the balance of the said account for the time being to the extent aforesaid, notwithstanding that at any time or times the balance of the said account may be in your favour, it being expressly intended that these presents shall be a security for the balance of the said account due by the Luxmi Company, Limited, to you while the said account shall continue open.

Held, that the natural construction to put upon what is indicated by the use of the imperfect but definite expression "pledge" is that the fresh liability of the three signatories personally was the new security. The whole tenor of the document pointed to an obligation to pay money. (*Viscount Haldane*). PANNALAL *v.* NIHAICHAND.

67 I.C. 423=26 C.W.N. 737=1922 M.W.N. 376=36 C.L.J. 5=16 M.L.W. 80=24 Bom. L.R. 971=31 M.L.T. 129=30 P.W.R. 1922=A.I.R. 1922 P.C. 46=43 M.L.J. 66.

—Construction—Powers of Court.

———*Court is good judge of meaning of words and it is not duty of Court to affirm meaning or definition given in dictionaries.*

When one is enquiring after the ordinary popular meaning of a term, the Court is as good a judge of that meaning as any learned authority. There is no reason to suppose that the Court is not put in better position for judging by consideration of the definitions which are to be got from dictionaries. But it is essential in this case to remember that the duty of the Court is to take a particular case and decide whether or not that case comes within the term that is in question, and it is not any part of the duties of the Court to affirm a definition as one which can safely be relied upon to govern all other cases. (*Rankin, C. J. and Mukherji, J.*). OJAMSHEE PURUSHOTHAM DAS *v.* ABDUL RAHIM OOSMAN. **33 C.W.N. 709=A.I.R. 1929 Cal. 703.**

———*Document construed by Privy Council in a certain way—It is not open to further consideration by High Court.*

Where a document was construed by the Privy Council in a certain way in a previous litigation.

Held, that the effect of the document is a matter of construction and is a question of law and that question of law having been decided in a certain way by the highest tribunal is not open to further consideration by the High Court in subsequent litigation. (*B. B. Ghose and Panton, JJ.*). JANAKI NATH ROY *v.* KHAWAJU HABIBULLA SAHEB. **100 I.C. 413=45 C.L.J. 151=A.I.R. 1927 Cal. 359.**

DEED—Construction—Powers of Court.

———*Court must see what meaning parties intended to convey where terms of art or terms having well-known meaning are not used.*

In construing documents where terms of art or terms which have got some well-defined meaning are not used the Court should see what meaning the parties intended to convey by what they wrote in the document. However inelegant the language may be the Court should try to see what the parties intended to convey by the terms or by the words used in the document. (*Devadoss, J.*). PODAPATI CHENDRAYYA *v.* MANDUVA HANUMAYYA. **98 I.C. 450=A.I.R. 1927 Mad. 193.**

———*Deed called "sale-deed"—Courts are not precluded from ascertaining its true nature.*

The fact that a deed is styled a "sale-deed" and the further fact that the word employed for the purpose of transfer is "sale" cannot preclude Courts from ascertaining the true nature of the transaction and to hold on a proper construction of the deed as a whole that it does not in essence evidence a transaction of sale: A.I.R. 1921 P. C. 89, *Rel. on.* (*Stuart, C.J. and Wazir Hasan, J.*). TALIB ALI *v.* KANIZ FATIMA BEGAM. **102 I.C. 142=2 Luck. 575=4 O.W.N. 400=A.I.R. 1927 Oudh 204.**

———*Each document must be interpreted according to its tenor—Lessee or other person undertaking to pay in kind, need not invariably pay in kind—Where option is given to pay in kind or in money Courts should not go behind the document.*

Each document should be interpreted according to its tenor. It is not an invariable rule that where a lessee or other person undertakes to pay rent or maintenance or any such thing in kind he should always pay it in kind. Where an option is given to the promisor to pay in kind or in money, and if the amount payable in money is fixed in the document, Courts should not go behind the document and say that the intention of the parties was to pay in kind. 47 Cal. 133, *Foll.* S. A. No. 460 of 1922, *Dist.* (*Devadoss, J.*). CHENNAMA NAIDU *v.* VENKATAMMAL. **90 I. C. 996=22 M. L. W. 369=1925 M. W. N. 735=A. I. R. 1925 Mad. 1023=49 M. L. J. 186.**

———*Clerical error should be corrected.*

In construing a document a Court should treat the document as a whole and if in a particulat context, anything is obviously a clerical error, the Court should correct it. 54 H. C. L. 66, *Ref. to.* (*Wazir Hasan, A. J. C.*). CHAUDHURI ABDUL WAHAB *v.* MT. TAHIRA BANO. **89 I. C. 51=12 O. L. J. 167=2 O. W. N. 357=A. I. R. 1925 Oudh 377.**

———*Court may go into surrounding circumstances to find out relative position of parties.*

In all questions of the construction of written documents the Court is at liberty to and must usually go into the surrounding circumstances in order to see what was the relative position of the parties how they came to enter into business together and the particular circumstances of that business at the time may also be a matter for consideration and may be a matter of importance.

DEED—Construction—Powers of Court.

(Mears, C. J. and Knox, J.). RAM KUNWAR RAMESHAR DAS *v.* NARAIN DAS LACHMAN DAS. **A. I. R. 1921 All. 399.**

———*It does not matter whether a litigant calls a document a contract or by other name—Duty is on Court to decide.*

It does not matter what view a plaintiff or a defendant may take of his obligations. In questions of construction of documents it does not matter in the least whether a litigant calls a document "a contract" or by any other name; its true construction is entirely for the Court. Where a manifestly improper construction (to his own prejudice) was originally apparently admitted by a party.

Held: that the Court should apply the right construction only. *(Mears, C. J. and Knox, J.).* RAM KUNWAR RAMESHAR DAS *v.* NARAIN DAS LACHMAN DAS. **A. I. R. 1921 All. 399.**

—Construction—Principles.

Construction as a whole.
Construction giving validity.
Contemporaneous construction.
Conveyance.
Deed by layman.
Deleted words.
Incorporation by referring words.
Interest.
Letters of credit.
Name immaterial.
Natural meaning.
'Next heirs' meaning of.
Object of interpretation.
Plain intention.
Plural includes singular.
Points for consideration.
Precedents.
Presumption.
Previous conduct.
Probability.
Reference to other deeds.
Same meaning.
Strict construction.
Subsequent addition.
Terms of deed.

—Construction—Principles—Construction as a whole.

———Where each point by itself is inconclusive, but the weight which is obtained from the effect of the whole was ignored, the Privy Council adopted the construction as indicated by whole document: A.I.R. 1923 Mad. 1 (F. B.), *Disapproved.* *(Lord Atkin).* V. SEETHAYA *v.* P. SUBRAMANYA.
117 I.C. 507=33 C.W.N. 578=52 Mad. 453=29 M.L.W. 804=31 Bom. L.R. 756=49 C.L.J. 566=56 I.A. 146=1929 M.W.N. 553=A.I.R. 1929 P.C. 115=56 M.L.J. 730.

———*Shia mother inheriting 1/6th as fixed share and 5/96th by return—In the deed of gift of her share only 1/6th mentioned—Donees are still entitled to the whole.*

A deed must be read as a whole in order to ascertain the true meaning of several clauses. The words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible. It is competent to the Court to disregard the literary meaning of the words and give them another meaning, if the words are sufficiently flexible to bear that interpretation: *N. W. Ry.* v. *Lord Hastings*, (1900) A.C. 260, *Foll.*

DEED—Construction—Principles—Construction as a whole.

A Shia mother executed a deed of gift of her share which she inherited from her deceased son, *viz.*, 1/6th as her fixed share and 5/96ths by return. But the deed mentioned 1/6th share only.

Held: that the donees are entitled to the whole. *(Shadi Lal, C.J. and Aga Haider, J.).* YUSUF ALI MAMUJI *v.* ALIBHOY MAMOONJI. **116 I.C. 177=10 Lah. 671=30 P.L.R. 709=A.I.R. 1929 Lah. 53.**

———Documents ought to be construed with due regard to the intention of the parties as it is to be collected from the whole context of the instrument so as to make one entire and consistent construction of the whole.

A loan of Rs. 10,000 was made for three years with interest at ½ Re. per cent. per mensem. The interest was to be paid before 10th of every month and a receipt obtained, but if default should be made in payment in this manner, or in getting a receipt, the provision was "shall pay interest on interest" at the rate of 1 per cent.

Held: that these words fairly enough refer to interest to be borne by a sum in arrear, if that sum was payable as interest and they did not mean that interest on the composite sum of principal and interest at double the rate reserved upon the principal sum for the whole three years was to be paid: *Barton* v. *Fitzgerald* (15 East, 530); *Sicklemore* v. *Thistleton* (6 M. & S. P. 9) and *Elderslie* v. *Borthwick*, (1905) A.C. 93, *Foll.* *(Lord Atkinson).* P.C. MUTHU CHETTIAR *v.* K.V. MEENAHSHISUNDARAM AYYAR. **107 I.C. 1=47 C.L.J. 183=1928 M.W.N. 91=5 O.W.N. 166=30 Bom. L.R. 261=27 M.L.W. 395=26 A.L.J. 488=32 C.W.N. 569=A.I.R. 1928 P.C. 35=54 M.L.J. 82.**

———*Name given by maker should not be lightly brushed aside but it is not conclusive.*

In construing a deed the entire document should be considered and not merely particular words, terms, or even clauses and this has to be done in the light of the surrounding circumstances. The name by which the instrument is called by the maker must be borne in mind and should not lightly be brushed aside, but it is not conclusive.

Ananthakrishna Aiyar, J.—No doubt when a party uses a particular nomenclature in connexion with a document that he executes, the Courts are bound to start with the presumption that he knows the law as every man is supposed to know the law and starting with the presumption that the executant purports to call the document that he executes by a particular name the Court should examine the principal terms of the document in the same light. *(Srinivasa Aiyangar and Ananthakrishna Aiyar, JJ.).* PASUNGILIA PILLAI v. ISAKKIMUTHU PILLAI. **111 I.C. 22=A.I.R. 1928 Mad. 349.**

———In a deed of settlement executed by the father to settle his property upon his male issue and also to provide for the maintenance of himself, his wife, his daughter and his mother, in short to make such arrangements for the members of his family and for those whom he was morally bound to support, as might prevent future disputes, it would be unsafe to interpret its provisions piecemeal and to rely upon them for the purpose of determining the rights conferred on a particular individual mentioned therein. In order to put a correct interpretation

DEED — Construction—Principles—Construction as a whole.

on a deed it must be looked to as a whole. It would be unsafe to ignore certain express provisions in the deed and merely to rely upon the rest: 9 M.I.A. 123 and 9 Cal. 952 (P.C.), *Foll.* (*Stuart, C. J. and Gokaran Nath Misra, J.*). MT. WAHIBUNNISA *v.* MUSHTAF HUSAIN. **95 I.C. 113=13 O.L.J. 278=3 O.W.N. 434=A.I.R. 1927 Oudh 328.**

———The general rule of construction of a written contract is that the language of an instrument is to be understood in its ordinary and natural meaning but at the same time the whole of the contract must be considered in order to ascertain the meaning of any particular part thereof. (*Raymond, A.J.C.*). TYEBALLY ABDUL HUSSAIN *v.* JAMES FINLAY & CO. **80 I.C. 969=17 S.L.R. 15=A.I.R. 1924 Sind 105.**

———*All parts must be construed harmoniously—Erroneous addition to previous correct description will not vitiate latter.*

The best construction of deeds and the one most satisfactory to the Courts is to make each part expound the other, so as to make all parts agree and if a doubt arises as to the construction of a grant and the doubt can be removed by construing the deed adversely to the grantor, this will be done. As soon as there is an adequate and sufficient definition of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it. (*Das and Bucknill, JJ.*). KUMAR KALIKANAND SINGH *v.* SHIVA NANDAN PRASAD SINGH. **63 I.C. 625=3 Pat. L.T. 149=A.I.R. 1922 Pat. 122.**

———Construction harmonising all parts is preferred to one causing repugnancy. (*Daniels and Dalal, A.J.Cs.*). HAFIZ-UN-NISA *v.* JAWAHIR SINGH. **1921 Oudh 209=66 I.C. 24=24 O.C. 374.**

———*Construction harmonising all parts must be preferred to that introducing repugnancy.*

If a document is open to a construction which makes all parts of it harmonise with one another, that construction is always to be preferred over one which introduces a repugnancy between one part of the document and another. (*Daniels and Dalal, A.J.Cs.*). MT. HAFIZ-UN-NISA *v.* JAWAHIR SINGH. **66 I.C. 24=24 O.C. 374=A.I.R. 1921 Oudh 209.**

—Construction—Principles—Construction giving validity.

———When two constructions of an instrument are possible, the law favours the construction which will make it valid. (*Shadi Lal, C.J. and Bhide, J.*). GODHA RAM *v.* SUDH SINGH. **116 I.C. 457=10 L.L.J. 375=10 Lah. 381=30 P.L.R. 546=A. I. R. 1929 Lah. 812.**

———Court should lean towards a construction favouring the validity of the contract rather than its illegality. (*Shah, Ag. C. J. and Fawcett, J.*). BALWANT VISHNU *v.* MISHRILAL SHIVANARAYAN. **85 I.C. 177=26 Bom. L.R. 1194=A. I. R. 1925 Bom. 115.**

—Construction— Principles — Contemporaneous construction.

———*Contemporaneous construction is not binding if manifestly incorrect.*

The Courts cannot be compelled to follow a contemporaneous but incorrect construction of a document. When the construction of the document is doubtful, then a contemporaneous construction of it will have great weight in turning the scale. (*Ashworth, A.J.C.*). CHHOTEY LAL *v.* IQBAL NARAIN **85 I.C. 331=A.I.R. 1925 Oudh 550.**

DEED—Construction—Principles—Interest.

—Construction—Principles—Conveyance.

———*Conveyance to 2 or 3 without specifying shares creates tenancy in common.*

A conveyance to two or more persons without words specifying their shares does not constitute a joint tenancy but constitutes a tenancy in common. (*Walsh and Lindsay, JJ.*). RAM PIARI *v.* KRISHNA PIARI. **63 I.C. 301=43 All. 600=19 A.L.J. 608=A.I.R. 1921 All. 50.**

—Construction—Principles—Deed by layman.

———*Will—Testator a layman—Words must not be strictly construed—Circumstances also should be looked at.*

Where a Will is made by a layman, Court must not construe it with too great nicety, or assign too much weight to the exact words that are used for a transfer of property, as if the testator were accurately weighing the difference between a testamentary instrument and one operating *inter vivos*. In a case like this not only the words actually used in the deed should be considered, but also the circumstances should be taken into consideration and the matter ought to be broadly looked at: 10 Cal. 792 and 32 All. 227, *Foll.* (*Walmsley and Chakravarti, JJ.*). BRAHMOPADA BHATTACHARJEE *v.* RAI MOHAN HALDAR. **94 I.C. 967.**

—Construction—Principles—Deleted words.

———*Printed form with clause deleted—Same effect as if non-existent.*

The effect of deleting words in a printed form of mercantile contract was the same as if the deleted words had never formed part of the print at all. (*Viscount Sumner*). SASOON AND SONS *v.* INTERNATIONAL BANKING CORPORATION. **107 I.C. 225=55 Cal. 1=54 I. A. 317=25 A. L. J. 665=29 Bom. L. R. 1181=46 C. L. J. 61=1 L. C. 241=1927 M. W. N. 648=32 C. W. N. 30=39 M.L.T. 659=A. I. R. 1927 P.C. 195=53 M. L. J. 42.**

—Construction—Principles — Incorporation by roferring words.

———*If term to be incorporated is at variance with the terms in main document, latter will prevail.*

The rule of incorporation by referring words is a rule of construction. But if the term to be incorporated is at clear variance with a term in the main document itself, it is the latter term that must prevail and not the former. The question in each case is one of intention and it cannot reasonably be presumed that, when the parties make a distinct provision in the main document, they intended that that term was to be subject to, and directly contradicted by a term in the subsidiary document, the terms of which have become a part of the bargain only by force of the referring words. (*Venkatasubba Rao, J.*). MYLAPORE H. P. F. LTD. *v.* SABAPATHI. **105 I.C. 796=39 M.L.T. 261=A. I. R. 1927 Mad. 894=53 M.L.J. 272.**

—Construction—Principles—Interest.

———*Interest will run till date of re-payment of principal unless stipulated to the contrary.*

The general principle of construction is that money borrowed on interest will carry interest till the date of repayment of the principal unless the contract makes provision to the contrary: A.I.R. 1922 Oudh 122; A. I. R. 1923 All. 7 and 19

DEED—Construction—Principles—Letters of Credit.

All. 39 (P. C.), *Foll.* (*Stuart, C. J. and Wazir Hasan, J.*).GOKUL PRASAD *v.* GOITRI PRASAD.
100 I. C. 180=4 O. W. N. 147=A. I. R. 1927 Oudh 595.

—Construction—Principles—Letters of Credit.

———*Letters of credit are defined—Liberal construction is permissible only if there is scope for construction.*

While no set form of words may be necessary yet a letter of credit as known to the law must contain a request (general or special) to pay the bearer or person named, money, or sell him some commodity on credit, or give him something of value, and look to the drawer of the letter for recompense, and it partakes of the nature of a negotiable instrument. The rules governing bills of exchange and negotiable promissory notes are always the same, fixed and determinate; while letters of credit are to be construed with reference to particular and often varying terms in which they may be expressed, the circumstances and intentions of the parties to them, and the usages of the particular trade or business contemplated. Letters of credit are accordingly not construed with technical nicety, but are considered as being usually framed with more or less informality and looseness of expression, and hence Courts have sometimes indulged in considerable freedom of interpretation in the effort to arrive at what is designated as the true intention of the parties. Instruments of this sort ought to receive a liberal interpretation. The words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purposes to which it is applied. There is room for this principle, only when the provisions of the agreement are ambiguous, loose, or susceptible of more than one fair interpretation; if it admits of two fair interpretations and the guarantee has advanced money on the faith of that most favourable to his rights, that interpretation will prevail. The expression "confirmed irrevocable credit" does not amount to a guarantee of the solvency of the person for whom letter of credit is passed. (*Mookerjee and Rankin, JJ.*). CHANDANMULL BENGANEY *v.* NATIONAL BANK OF INDIA LTD. **79 I. C. 757=51 Cal. 43=A. I. R. 1924 Cal. 552.**

—Construction—Principles—Name immaterial.

———*Title of deed is not conclusive of rights of parties.*

The mere fact that the document of title held by the grantees is called a potta, and that they executed a *kabuliyat* in similar terms is not conclusive of the question of whether they were mere leaseholders, *i. e.*, farmers of revenue or were true proprietors paying a *jamabundi* to the overlord. (*Lord Dunedin*). NAYAK VAJESINGJI *v.* SECRETARY OF STATE. **82 I. C. 779=21 M. L. W. 28=1924 M. W. N. 694=48 Bom. 613=51 I. A. 357=22 A.L.J. 951=5 L.R.P.C. 199=26 Bom. L.R. 1143=40 C. L. J. 473=29 C. W. N. 317=A. I. R. 1924 P. C. 216=47 M. L. J. 574.**

———The true construction of a document does not depend upon the name which is given to it, but it must be determined with reference to its terms. (*Dalal and Wazir Hasan, A.J.Cs.*). KARIM DAD KHAN *v.* MT. BIBI GHAFURAN. **66 I.C. 110=9 O.L.J. 104=A.I.R. 1922 Oudh 42.**

———*Document being called* dowl kabuliyat *does not decide its nature—Document as a whole should be considered*—Dowls *expressly excluding transferability*

DEED—Construction—Principles—'Next Heirs' meaning of.

—Custom of transferability cannot be proved—Evidence Act, S. 92 (5).

The mere fact that a document is called a *dowl kabuliyat* does not decide its nature; the document should be looked at as a whole to see what it is.

Any evidence designed to show customary incidents of tenure as attaching to the jotes must be rejected if and so far as it conflicts with what is contained in the *dowls* themselves.

Where the *dowls* contain an express statement that there is no right of sale, gift or transfer without the landlord's consent in face of this, it is impossible to admit evidence of a custom of transferability in the jotes. (*Greaves and Newbould, JJ.*). MD. AYEJUDDIN MEA *v.* PRODYAT KUMAR. **61 I.C. 503=48 Cal. 359=25 C.W.N. 13=A.I.R. 1921 Cal. 741.**

———*Terms and not name of deed are material.*

Merely calling the document a *patt Istimrari* does not make it so. The Court must ascertain the legal effect of the document with reference to its terms. A.I.R. 1921 P. C. 89, *Ref.* (*Wazir Hasan, A.J.C.*). LIAKAT HUSAIN *v.* NAROTAM DAS. **65 I.C. 780=8 O.L.J. 516=A.I.R. 1921 Oudh 254.**

—Construction—Principles—Natural meaning.

———The natural and obvious meaning of the words in a deed cannot be refused to be given to them, merely because it is suggested that the words have been inserted in the deed for the purpose of ascertaining and specifying the stamp duty which was to be paid. If that were the object of inserting the words in the deed it ought to have been so stated. (*Sanderson, C.J. and Richardson, J.*). FANINDRA NATH ROY *v.* BHOLA DASSI DEBI. **75 I.C. 402=38 C.L.J. 21.**

———*Words must be construed according to natural meaning.*

The words in a written instrument must be constructed according to their natural meaning. (*Jwala Prasad and Adami, JJ.*). RAMLAL KAVERAJ *v.* SATYANIRANJAN CHAKRAVARTY. **1921 P.H.C.C. 49=A.I.R. 1921 Pat. 379.**

—Construction—Principles—'Next heirs' meaning of.

———*Daughter and after her, next heirs' ordinarily means heirs next after the daughter but where daughter dies before succession opens up 'next heirs' mean simply the nearest heirs of the propositus.*

Per *Spencer, Offg. C. J.*—If several objects are placed in a certain order, and mention is made of one and then of the next, the word "Next" ordinarily signifies the next in that order. *Eastwood* v. *Lockwood*, (1868) 8 M. H. C. R. 424, *Ref.*

Where an estate was given to the widows of a certain deceased Raja and it was provided that on the death of the last surviving widow, the daughter of the Raja or failing her the next heirs of the Raja would inherit that property and where the daughter predeceased the last surviving widow.

Held: that ordinarily the words "next heirs" would refer to the heirs next after the daughter but that in this case, owing to the death of the daughter before that of the last surviving widow, the next heirs were the nearest heirs of the Raja and not the heirs next after the daughter.

Per *Kumaraswami Sastri, J.*—Unless the terms of the grant, clearly render it necessaay to do so the nearer heirs of the Raja under the Hindu Law ought not to be excluded in favour of remoter heirs.

DEED — Construction — Principles — Object of interpretation.

(*Spencer, O. C. J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1=A.I.R.1925 Mad. 497.**

—Construction—Principles—Object of interpretation.

———*Intention determines nature of deed and it is to be gathered from the deed.*

The primary object of all interpretation is to determine what intention is conveyed by the deed and the primary source of determining such an intention is the language used in the deed. (*Wazir Hasan and Raza, JJ.*). BASHIR AHMAD *v.* MT. ZUBAIDA KHATUM. **92 I.C. 265=1 Luck. 83=29 O. C. 108=3 O. W. N. 105=A. I. R. 1926 Oudh 186.**

—Construction—Principles—Plain intention.

———*Meaning of clause according to plain intention rendering clause invalid—Still meaning cannot be modified or cut down.*

The meaning of a clause in an agreement according to the plain intention is not to be modified or cut down with reference to the consideration that the construction according to the plain intention may render the clause invalid. (*Ramesam and Reilly, JJ.*). TIRUMALA CHETTY RANGAYYA CHETTY *v.* SRINIVASA RAGHAVACHARLU. **121 I. C. 753=52 Mad. 300=1929 M. W. N. 93=29 M. L. W. 329=A. I. R. 1929 Mad. 243=56 M. L. J. 318.**

—Construction — Principles — Plural includes Singular.

Where a *wajib ul-arz* while recording a custom provided, "or if there be no wife with sons, then the wives of the deceased shall become absolute owners with a right of transfer over the inheritance of the deceased in equal shares."

Held: that the statement meant that where the deceased co-sharer has left only one wife without a son, that wife becomes an absolute owner with a right of transfer over the whole property. The plural includes the singular, and it would be contrary to all right rules of interpretation to hold that the custom did not affect a single wife without a son. (*Stuart and Hasan, JJ.*). SARTAJ KOER *v.* MAHADEO BUX. **92 I. C 657=1 Luck. 120=29 O. C. 153=13 O. L. J. 416=A. I. R. 1926 Oudh 332.**

—Construction—Principles—Points for consideration.

———*Factors for consideration besides wording.*

In construing a document antecedent events, subsequent conduct of the parties to it and the surrounding circumstances are as important as the words employed in disposing of a property. (*Mukerji, Kendall and Niamatullah, JJ.*). FAZUL AHMAD *v.* HAR PRASAD. **116 I. C. 1=1929 A. L. J. 620=A.I.R. 1929 All. 465. (F. B).**

———*Tenor or actual words of the document must be seen.*

The Court is not justified to read into any document an intention which is not expressed in it. It is not proper to interpret the terms of one document in the light of the terms of another document. Each document must be interpreted according to the tenor and actual words used in it. (*Devadoss, J.*). SUBRAYA PAI *v.* SUBRAMANIA PATTAR. **111 I.C. 218=A.I.R. 1928 Mad. 648.**

—In construing a deed the Court should consider all the surrounding circumstances, the position of

DEED — Construction — Principles—Points for consideration.

the parties to the agreement, its subject-matter, and the apparent purpose and object thereof, and in particular the provisions to be construed.

At the conclusion of the War the Government of South Australia was faced with the problem of dealing with numbers of discharged soldiers, and determined to make provision for the settlement of such men on unoccupied Crown lands and for advances out of public funds to men so settled.

The respondent, a discharged soldier, who had some training on a Government training farm, by a letter applied for a grant of the lands in question. His application was granted. He later on accepted an agreement over the land which was to be for a term of 65 years, and thereby the vendor agreed to sell and the purchaser to purchase the land as therein described. One of the conditions in the agreement was: "If at any time within the period of ten years from the date of this agreement the vendor is satisfied on such evidence as he deems sufficient that by reason of incompetency or personal disability the purchaser is incapable of managing the said land with advantage to himself or that the purchaser has neglected to work the land satisfactorily or has been guilty of serious misconduct during his occupation thereof, the vendor by notice in writing given to the purchaser may determine this agreement upon and subject to such terms and conditions as the vendor thinks fit (and) upon the expiration of three months from the giving of such notice the agreement and the right of the purchaser to complete the purchase and possession of the said land shall cease and determine and be void, anything in this agreement to the contrary notwithstanding."

It was contended that before deciding to terminate the agreement it was incumbent upon the vendor to institute some judicial or *quasi* judicial enquiry or at the least to communicate to the purchaser the information he had received and his intention to act thereon and give him an opportunity of stating his case in answer thereto.

Held: that no such enquiry was contemplated that the vendor was exercising a merely administrative function and was entitled to form an opinion on such materials as he himself thought sufficient. (*Lord Warrington of Clyffe*). G. R. LAFFER *v.* F. A. GILLEN. **107 I.C. 347=A.I.R. 1927 P.C. 275.**

———*Intention is to be gathered from words, and doctrines are to be given due weight.*

Per *Dawson Miller, C. J.*—The intention of a deed is primarily to be gathered from the words of the instrument itself, and the application of doctrines, although they must be given due weight, must not be allowed to overrule the clear indications of intention to be gathered from the words of the document. But the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. 25 All. 351, *Diss.*; 42 Mad. 283, *Diss.* (*Dawson Miller, C. J. on difference between Das, J. and Foster, J.*). HITENDRA SINGH *v.* RAMESWAR SINGH. **88 I. C. 141=87 I. C. 849=4 Pat. 510=6 P. L. T. 634=A. I. R. 1925 Pat. 625.**

———*Deed of settlement—Object, scope and surrounding circumstances must be considered.*

To determine the true construction of a deed of settlement regard must be had to the object and the whole scope of the instrument, judged, if necessary, by reference to the surrounding

DEED—Construction—Principles—Points for consideration.

circumstances. (*Mookerjee and Fletcher, JJ.*). SANTONA ROY *v.* ADVOCATE-GENERAL, BENGAL. **62 I. C. 193=48 Cal. 124=25 C. W. N. 343= A. I. R. 1921 Cal. 389.**

———*Court must consider substance of transaction, not mere form.*

It is incumbent upon the Court to look to the substance of the proceedings and not to confine its attention to the mere form, 42 Cal. 56 (P. C.) *Foll.*

This principle is applicable, quite as much to involuntary alienations as to voluntary conveyances. In a sale in execution of a decree against the executor in possession of an estate as such it cannot be contended merely because he is not described as executor that the sales cannot pass any title except that of the executor. (*Mookerjee, A. C. J. and Fletcher, J.*). MAHENDRA NATH *v.* SAMSUDDIN. **62 I. C. 344=25 C. W. N. 279= 33 C. L. J. 198=A. I. R. 1921 Cal. 146.**

—Construction—Principles—Precedents.

———*Construction put on similar document is no guide.*

A document is not to be construed with reference to authorities as to how a similar document was construed. *Aspden* v. *Seddon*, (1875) 10 Ch. 394, *Ref.* (*B. B. Ghose and Bose, JJ.*). SARAJUBALA DEBI *v.* JYOTIRMOYEE DEBI. **112 I. C. 113= A. I. R. 1929 Cal. 166.**

———*Every document must be construed by itself.*

Every document has to be interpreted upon its own language and an interpretation put upon one document cannot be a safe guide in interpreting another. (*Gokarnath Misra and Nanavutty, JJ.*). DURGA *v.* LAL BAHADUR. **112 I. C. 387= 5 O. W. N. 992=4 Luck. 138= A. I. R. 1928 Oudh 509.**

———*Each document should be construed on its own merits.*

The practice to endeavour to obtain assistance in construing a document from the construction of different documents arrived at by other Courts is unprofitable. (*Stuart, C.J. and Raza, J.*). AJODHYA *v.* SHEO SHANKER. **100 I.C. 193=2 Luck. 416= 4 O.W.N. 137=A.I.R. 1928 Oudh 25.**

———*For applying construction of one document to another, the language of both must be identical.*

Unless the language of the documents be identically the same, a decision upon the construction of one document is not of much assistance to the Court in construing another: 31 Cal. 195, *Foll.* (*Rupchand Bilaram and Lobo, A.J.Cs.*). HUKUMAT SING *v.* NENUMAL REJHUMAL. **104 I.C. 572= 22 S.L.R. 117=A.I.R. 1928 Sind 45.**

———*Construction of one document is no safe guide or construing another differently worded.*

The construction placed on the terms of one document will not afford a safe guide in construcing a document differently worded. (*Kumaraswami Sastri, J.*). SWAMINATHA AIYAR *v.* RAMASWAMI. **99 I.C. 828=38 M.L.T. 8= A.I.R. 1927 Mad. 1155.**

———Decisions on interpretation of wholly different documents between different parties executed in different circumstances are of little use as a guide in interpreting a document. (*Wazir Hasan, J.*). MAHOMED JABBAR *v.* HARNATH KAUR. **105 I.C. 196=4 O.W.N. 857= A.I.R. 1927 Oudh 436.**

———*Contract—Each contract must be construed with reference to its own terms.*

Each contract must be construed according to its own terms and in the circumstances of that case. Cases may be helpful in so far as they lay down general principles but cannot be direct authority as to the construction to be put upon the deed before the Court in another case: 22 C.W.N. 904, *Dist.* (*Chakravarti, J.*). DHIRENDRA NATH ROY *v.* AHMED MIA. **97 I.C. 279=30 C.W.N. 765.**

DEED—Construction—Principles—Presumption.

———*Precedents are useful only for principles laid down.*

It is not proper that the terms of one document should be interpreted in the light of the words used in another document; but if the principles of construction are enunciated in a case, the Court should consider whether they are applicable to the construction of the document before it. (*Devadoss, J.*). PIRAMU AMMAL *v.* SERUNATHA AMMAL. **86 I.C. 737=A.I.R. 1925 Mad. 1175.**

———*Use of precedents—Case law—Documents should be construed on the basis of their own language and the relevant circumstances in each case and precedents are generally fruitless, save in so far as they lay down any general principles of interpretation.*

It is generally fruitless to refer to precedents on the question of construction of a document. Each document must be construed with the aid of the language used therein and such other surrounding circumstances as may be relevant to the question of construction. They may however be referred to in so far as they lay down any general prinoiples of interpretation. (*Wazir Hasan and Neave, A.J.Cs.*). GULJAR SINGH *v.* MADHO RAM. **78 I.C. 547= 11 O.L.J. 275=A.I.R. 1925 Oudh 11.**

———*Construction of identical document under identical circumstances only is useful as guide.*

Any ruling as to the interpretation of a document can only be applied in its entirety to a document absolutely identical in language and in a case the general circumstances of which are substantially the same. Where these conditions are not satisfied a party relying upon previous rulings of the Court and putting them forward as guides to the correct interpretation of the particular document on which the case under appeal actually turns can do nothing more than ask the Court to take into consideration the general principles which have been applied by other Hon'ble Judges in similar cases and to derive from them whatever assistance it can towards arriving at a correct conclusion. (*Piggott, Lindsay and Sulaiman, JJ.*). ALKHU RAI *v.* LACHMAN UPADHIYA. **80 I.C. 550=46 All. 274= 22 A.L.J. 137=5 L.R.A. Civ. 145= A.I.R. 1924 All. 324.**

———*One deed cannot be construed with reference to other similar deeds.*

No hard and fast rule can be laid down as to the construction of documents and eaoh case must be decided upon the construction of the particular document and the circumstances connected with it. Upon the question of construction no light can be derived from the construction of similar documents in other cases. (*Banerji, Stuart and Wallace, JJ.*). HARPRASAD *v.* RAM CHANDAR. **63 I.C. 750=44 All. 37=19 A.L.J. 807= A.I.R. 1922 All. 174 (F.B.).**

—Construction—Principles—Presumption.

———*Presumption that price was fixed with reference to quantity may be weakened by special circumstances.*

Though the presumption is that in fixing the price, regard was had on both sides to the quantity which both supposed the estate to consist of, "yet there may be considerations which may rebut or weaken the presumption," *Hill* v. *Buckley*,

DEED—Construction—Principles—Previous Conduct.

17 Ves. 394, 1811), *Ref.* (*Mr. Ameer Ali*). HUSSONALLY SULLEMANJI *v.* TRIBHOWANDAS MANGALDAS NATHUBHAI. **61 I.C. 361=23 C.W.N. 385=1920 M.W.N. 726=A.I.R. 1921 P.C. 40.**

—Construction—Principles—Previous conduct.

———*Formal contract must be construed according to its terms—Antecedent communings are not to be considered.*

When parties have entered into a formal contract that contract must be construed according to its own terms and not be explained or interpreted by the antecedent communings which led up to it. *Shower* v. *Wilson*, 9 Cl. and F. 515 ; *Smith* v. *Doed Jersey*, 2 Brod. and Bing. 473; *Prison Commissioners* v. *Clerk of the Peace for Middlesex*, 9 Q.B.D. 506; *Lee* v. *Alexander*, (1883) 8 A. C. 853 *Rel. on.* (*Viscount Dunedin*). BOMANJI ARDESHIR *v.* SECY. OF STATE. **114 I.C. 1=31 Bom. L.R. 256=53 Bom. 230=56 I.A. 51=1929 A.L.J. 47=49 C.L.J. 179=33 C.W.N. 293=A.I.R. 1929 P.C. 34.**

———*Whether previous correspondence is relevant is doubtful.*

It is doubtful whether a Court can refer to the previous correspondence between the parties for the purpose of construing a deed. (*Macleod, C. J. and Madgavkar, J.*). JAMSHEDJI *v.* SECY. OF STATE. **93 I.C. 184=28 Bom.L.R. 25=A.I.R. 1926 Bom. 209.**

—Construction—Principles—Probability.

—Interpretation, which renders the terms of the document probable, is to be preferred to an interpretation which renders the conditions most unlikely. (*Macnair, Offg. J.C. and Staples, A.J.C.*). BHASKAR RAO *v.* BALMUKUND. **A.I.R. 1929 Nag. 162.**

—Construction—Principles—Reference to other deeds.

———*Language similar but not identical—Document should not be interpreted by language of another.*

It is well settled that it is not permissible to interpret one document by the language of another specially when the languages though similar are not identical. (*Bennet and Iqbal Ahmad, JJ.*). RAMADHAR *v.* RAJ NARAIN. **120 I.C. 552=1930 A.L.J. 40=A.I.R. 1929 All. 908.**

———It cannot be laid down that where a borrower has previously borrowed under other instruments, but on similar onerous terms, this cannot be evidence that the borrowing on the occasion in question was a reasonable and proper transaction : A.I.R. 1924 P.C. 184, *Considered.* (*Viscount Sumner*). SUNDER MULL *v.* S. KINKUR SAHANA. **108 I.C. 337=7 Pat. 294=55 I.A. 85=26 A.L.J. 364=9 P.L.T. 203=27 M.L.W. 461=1928 M.W.N. 242=5 O.W.N. 400=47 C.L.J. 403=30 Bom. L.R. 793=32 C.W.N. 657=A.I.R. 1928 P.C. 64=54 M.L.J. 427.**

———Each document has to be construed having regard to the particular terms and language employed and it is a trite saying that no document is exactly like another. (*Srinivasa Aiyangar and Ananthakrishna Aiyar, JJ.*). PASUNGILIA PILLAI *v.* ISAKKIMUTHU PILLAI. **111 I.C. 22=A.I.R. 1928 Mad. 349.**

———*Two different plots sold by two documents—One cannot be construed in the light of another.*

When two different plots are sold under two different documents, it is not reasonable to ask the Court to read the terms of one document into another. (*Devadoss, J.*). RAMASUBBIER *v.* SHENBAGARATNAM. **99 I.C. 1003=25 M.L.W. 154=A.I.R. 1927 Mad. 357.**

DEED — Construction — Principles—Subsequent additions.

———Each document and the circumstances under which it came into existence must be considered separately, and the construction of one document is not generally of much assistance in constructing another which may differ materially in its terms and in the attendant circumstances. (*Dawson-Miller, C.J. and Foster, J.*). RAMESHWAR SINGH BAHADUR *v.* KITAB ALI. **98 I.C. 374=1926 P.H.C.C. 261=A.I.R. 1926 Pat. 487.**

———*Other deeds cannot be used.*

The language of other documents not in suit cannot be called in aid to construe the words of a particular document which is in suit. (*Greaves and Graham, JJ.*). PRASANNA KUMAR RAY *v.* ARUN CHANDRA SINGHA. **85 I.C. 693=29 C.W.N. 353=A.I.R. 1925 Cal. 656.**

———The language of one instrument does not afford much assistance in the construction of another. 36 Cal. 1003 (P.C.). (*Macleod, C.J. and Shah, J.*). BAI DHONDUBAI *v.* LAXMAN T. JAVADEKAR. **68 I.C. 504=47 Bom. 65=24 Bom. L.R. 794=A.I.R. 1922 Bom. 352.**

———*Each case must be decided on its own merits.*

Cases of construction of leases must be decided on their own facts and the law being well understood the only question in each case is how far the law is to be applied to the particular facts which are put before the Court. (*Wazir Hasan, A.J.C.*). LACHHAMAN DAS *v.* BHAGWANT RAM. **65 I.C. 707=8 O.L.J. 481=A.I.R. 1921 Oudh 240.**

—Construction—Principles—Same meaning.

———*There is no general rule that same meaning must be given to an expression in every part of a document.*

There is no such rule of general application that the same meaning ought to be given to an expression in every part of the document in which it appears. A difficulty or ambiguity may be solved by resorting to such a device, but it is only in such cases that it is necessary or permissible so to do. (*Lord Warrington of Clyffh.*) JOHN LACHLAN MCGILLIVRAY WATSON *v.* B. E. L. HAGGITT. **107 I.C. 459=47 C.L.J. 225=29 M.L.W. 581=A.I.R. 1928 P.C. 115=56 M.L.J. 91.**

—Construction—Principles—Strict construction.

———*Contract—Power reserved to one party to vary terms of contract—Power must be strictly construed against that party.*

Where power is reserved under a contract to one of the contracting parties to vary the terms, the power should be very strictly construed and the indulgent party should not be allowed to travel beyond the plain words of authorisation. (*Seshagiri Aiyar, J.*). A. S. VENUGOPALA AIYANGAR *v.* SOUTH INDIAN RAILWAY COMPANY. **62 I.C. 602=13 M.L.W. 309=A.I.R. 1921 Mad. 621.**

—Construction — Principles — Subsequent additions.

———*Property conveyed clearly defined—Subsequent errors do not affect prior definition.*

As soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed any subsequent erroneous addition will not vitiate it. *Llewellyn* v. *Jersay*, 11 M. & W. 183 and *Meller* v. *Wamsley*, 2 Ch. 164, *Foll.* (*Walmsley and B. B. Ghose, JJ.*). DARAPALI SADAGAR *v.* NAJIR AHMED. **77 I.C. 1030=50 Cal. 394=A.I.R. 1923 Cal. 669.**

DEED — Construction — Principles—Subsequent additions.

———*Later clause destroying obligation created by earlier one should be rejected—But if later clause merely qualifies earlier one both should be read together.*

If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause is to be rejected as repugnant and the earlier clause prevails. (1843) 5 Man. & C. 736, *referred.*

But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole. (1877) 6 C. D. 544, *referred.*

In the latter case there could be no question if the later provision of the deed were introduced by the word "but" or the words "provided always nevertheless," or the like. But there is no necessity to find any such words. If a later clause says in so many words or as matter of construction that an earlier clause is to be qualified in a certain way, effect can be given and must be given to both clauses.

Where the first clause provides that in consideration of a certain sum payable in certain instalments the contractor will furnish certain materials and perform certain services and the second clause says that in a certain event that sum is not to be paid, that the agreement is to be at an end and payment is to be made only for labour expended, the operation of the first clause is qualified by the second clause. Where there is a third clause whose effect is to make the certain sum mentioned in the first clause an estimated sum whose accuracy is to be tested and controlled by taking the accounts for which provision is made in the third clause, the first and third clauses can be read together and the intention disclosed by the deed as a whole can be given effect to. (*Lord Wrenbury*). FORBES *v.* GIT.

A.I.R. 1921 P.C. 209.

—Construction—Principles—Terms of deed.

———The intention of a donor is to be ascertained by reading the terms of the deed as a whole, and giving to them the natural meaning of the language used. (*Sir Lancelot Sanderson*). AMJAD KHAN *v.* ASHRAF KHAN. **116 I.C. 405=6 O.W.N. 483=33 C.W.N. 753=1929 A.L.J. 571=31 Bom. L.R. 809=56 I.A. 213=30 M.L.W. 91=4 Luck. 305=A.I.R. 1929 P.C. 149=57 M.L.J. 439.**

———*Ananthakrishna Aiyar, J.*—In construing the terms of deed, the question is not what the parties may have intended but what is the meaning of the words which they used: A.I.R. 1917 P.C. 23, *Foll.* (*Srinivasa Aiyangar and Ananthakrishna Aiyar, JJ.*). TIRUPATHI NAICKEN *v.* VENKATASUBBA NAICKER. **112 I.C. 243=28 M.L.W. 819.**

———*Common words of style must be given their proper meaning.*

Common words of style used in conveyance of any sort, may be, and often are words of surplusage, but when they are, not words of surplusage, they must be given the proper effect of their own meaning. (*Lord Dunedin*). SATYA NIRANJAN *v.* RAM LAL. **86 I.C. 289=29 C.W.N. 725=27 Bom. L.R. 753=23 A.L.J. 712=6 P.L.T. 42=21 M.L.W. 289=4 Pat. 244=52 I.A. 109=A.I.R. 1925 P.C. 42=48 M.L.J. 328.**

DEED—Construction—Release.

———Courts will look at the substance of the transaction and not merely at the form of the deed for the purpose of determining whether a certain deed is liable to stamp duty as a transfer of mortgage or as a mortgage. (*Mookerjee and Rankin, JJ.*). BANK OF BENGAL *v.* WILLIAM ARRATOON LUCAS. **81 I.C. 471=51 Cal. 185=28 C.W.N. 497=41 C.L.J. 1=A.I.R. 1924 Cal. 578.**

———*Endorsements—Intention of parties must be gathered only from recitals in document—Interpreting one deed by recitals in another is not safe.*

In construing Pharmanas and grants great weight ought to be attached to the actual words used in the grant than to an endorsement which is brief and simple and may not fully express the intention of the grantor. In interpreting deeds and contracts the intention of the parties to the document should be gathered only from the recitals in the document to which they are parties and not from what they said or did before the document was executed.

It is not a safe principle to interpret one document by referring to the recitals in another document. But where the Court has given a definite meaning to certain expressions, that meaning should be applied to such expressions in other cases. (*Phillips and Devadoss, JJ.*). JAGGA ROW *v.* GORI BIBI. **72 I.C. 789=17 M.L.W. 521=1923 M.W.N. 347=A.I.R. 1923 Mad. 545.**

———*Document must be construed on its own terms.*

The meaning and legal effect of a document is to be determined on its own terms alone. (*Schwabe, C.J. and Wallace, J.*). BYSANI, MADHAVA *v.* KRISHNASAMI CHETTY. **72 I.C. 987=16 M.L.W. 743=A.I.R. 1923 Mad. 71.**

—Construction—Recitals.

———*Recitals in, are evidence.*

Recitals in a deed are evidence. **44 C. 186 P.C.,** *Rel. on.* (*Stuart, J.*). SITA RAM *v.* REVA RAM. **71 I.C. 390=A.I.R. 1923 All. 366.**

—Construction—Release.

———*Gaddi Nashin not conversant with customs and intending to prosecute his studies—Deed executed returning powers to his Guru for good management—After acquiring full literary qualifications and qualifications for management intention to come back—Deed was held not to be one relinquishing his rights of the Gadi.*

A Gadi Nashin Mahant executed a document with the intention that there should be no ill-consequence to the mutt as he was not conversant with the custom and had no insight into the management of the properties pertaining to the Gadi. It stated that on account of the affairs of the Gadi he could not prosecute his studies well. It further provided as follows: "It is also my intention that I should sever my connection with it and pass my days for sometime out station and prosecute my studies and acquire the qualification of Gadi Nashin Mahanth. Therefore, I return to my Guru *G.* all the powers which I had acquired for good management of the Gadi and the property appertaining thereto." My Guru shall have the right to exercise at present and also in future all the powers which he used to exercise before as Gaddi Nashin Mahanth, I shall have no objection till I acquire full literary qualifications and the qualifications to make management and those of a Fakir (ascetic) as required for the Gadi."

Held: that the executant had no intention of laying down the office entirely. He was not retiring altogether with the expectation that if he were

DEED—Construction—Religious Endowment.

to return he might be fortunate enough to be re-appointed Mahanth. The document indicated that he was absenting himself for a time and that he was for the time appointing a delegate to act for him in his duties during his absence. (*Lord Atkin*). BASDEVA NAND GIR *v.* SHAUTANAND GIR. **120 I.C. 49=50 C.L.J. 513=30 M.L.W. 1032=A.I.R. 1929 P. C. 266=57 M.L.J. 771.**

—Construction—Religious Endowment.

———*Absolute debutter or imperfect debutter—Surplus profits to go to Deity—Absolute debutter is intended.*

Where a deed of endowment provides that the surplus profits after performance of the *sheba*, should be acquired by the "Iswar Jee" and there was a marked dissociation made between this and other secular properties.

Held: that there was an absolute debutter in favour of the Deity named. (*Woodroffe and Suhrawardy, JJ.*). MANMOHAN GHOSE *v.* SIDHESWAR DUBAY. **76 I.C. 213=27 C.W.N. 218=A.I.R. 1923 Cal. 177.**

———Shebait—*Order of succession cannot be altered unless power is reserved.*

Unless the donor makes a reservation to alter the order of the devolution of the office of *shebait* laid down in the deed he has no right to do so. The *shebait* appointed contrary to the order laid down has no right to sue for arrears for rents of the debutter property. (*Woodroffe and Cuming, JJ.*). GOURI KUMARI DASI *v.* RAMANIMOYI DASI. **70 I.C. 175=50 Cal. 197=26 C.W.N. 920=A.I.R. 1923 Cal. 30.**

———*Lands dedicated to deity for conduct of worship by certain Archaka—Deed concluding with words that Archaka and his descendants shall enjoy lands—Gift is to deity and Archaka cannot appropriate surplus income.*

A document was addressed to the god and dedicated land to the god as "maniam for conducting your daily naivadyam and deeparadanai of Sri Swamivaru by Archaka . . ." The concluding words of the grant are "so he shall cultivate the same every year and use the produce thereof; he, his sons and grandsons in succession shall enjoy the same for ever and render the daily naivadyam and deeparadanai of Sri Swamivaru and live happily."

Held: that the archaka is not the donee, but is only to carry out the objects of the gift. The surplus income should revert to the deity and cannot be appropriated by the archaka.

It would be a dangerous proposition to lay down that, if the trustees of religious trusts have for many years been applying the income to their own personal use, the trust-deed must be construed in the light of such conduct. (*Abdur Rahim and Moore, JJ.*). SRINIVASACHARYULU *v.* D. PRATYANGA RAO. **64 I.C. 816=30 M.L.T. 101=A.I.R. 1921 Mad. 467.**

—Construction—Sale or contract of sale.

———*Sale-deed—Test is whether parties intended present conveyance.*

For determining whether a document is a deed of sale or only an agreement to sell, the test is whether, according to the intention of the parties as expressed in the instrument there is a present conveyance of the property or only an agreement to create a further right. This intention has to be gathered from the language of the document as well as from the surrounding circumstances:

DEED—Construction—Sael or Gift.

37 Mad. 480, *Foll.* (*Krishnan and Venkatasubba Rao, JJ.*). BALLIBOYANA YERRAMMA *v.* JAKANNAGARI RAMAPPA. **98 I. C. 729=24 M. L. W. 697.**

———Where the document was written upon ordinary plain paper bearing only an adhesive stamp of one anna on it, and the document was headed as *Boomi Vikraya Dasthaveju* and contained a statement that the properties are given this day for sale for.....and we have this day taken an earnest of Rs. 200, and it further stated: "We shall take out remaining amount in full and get registered at Kalyandrug."

Held: that the document amounted only to an agreement to sell and was not a sale deed. (*Krishnan and Venkatasubba Rao, JJ.*). BALLIBOYAMA YERRAMMA *v.* JAKHANNAGARI RAMAPPA. **98 I. C. 729=24 M. L. W. 697.**

———*Incorrect phraseology used by scribe should not be much relied upon.*

The fate of a document cannot be determined upon an incorrect phraseology used by the scribe. In order to decide whether the instrument is a mere agreement to sell or a conveyance, all the terms of the document must be looked to. (*Shadi Lal, C. J. and Harrison, J.*). LACHHMAN DAS *v.* BHOJA RAM. **84 I. C. 865=6 L. L. J. 554=A. I. R. 1925 Lah. 284.**

———*Transfer of Property Act, S. 54—Question must be decided from deed as a whole.*

The fact that a deed is described as a sale deed and stamped as such and contains a statement that the executant has made an absolute sale of the property in suit, is a strong point in favour of the view that a sale was made but is not conclusive. The Court should look to all the covenants in the deed and see whether the intention of the parties as expressed in the deed was to effect an immediate transfer of proprietary right in favour of the vendees. (*Daniels and Lyle, A. J. Cs.*). BISHESHAR DAYAL *v.* MST. HAR RAJ KUAR. **66 I. C. 622=8 O. L. J. 346=A. I. R. 1921 Oudh 248.**

—Construction—Sale or Gift.

———"Rajinama" *and* "Kabuliyat" *whether conclusive evidence of sale depends upon facts of each case.*

The question whether a rajinama and *kabuliyat* are conclusive evidence of sale depends on the facts of each particular case. 22 Bom. L.R. 140 and A.I.R. 1925 Bom. 402, *Ref.* (*Madgavkar, J.*). SHIVAJI SHESHGIR KULKARNI *v.* CHANNAVAKAM BASANGAVDA. **32 Bom. L.R. 687=A.I.R. 1930 Bom. 292.**

———*Mortgagor creating further charges—Mortgagee rights sold—Sale referring to rights sold by terms "Haq Murtahini"—Both Mortgage and further charges pass by sale.*

S executed a usufructuary mortgage in favour of Y and subsequently by two other deeds created further charges on the same property in favour of Y. The mortgagee rights of Y were then purchased by another man as "*Haq Murtahini*" and no reference was made at the time of sale to the further charges.

Held: that the rights which were purchased included both the mortgage and the further charges. There was no need that any specific mention should have been made of the existence of the further charges they being already included in the term "*Haq Murtahini*": A.I.R. 1922 All. 174 (F.B.), *Rel. on.* (*Gokaran Nath Misra and Pullan, JJ.*). RAHMAT ALI *v.* LUCHHMAN PRASAD. **117 I. C. 403=5 O. W. N. 1041=A.I.R. 1929 Oudh 40.**

DEED—Construction—Sale or Gift.

———*Contract Act, S.* 35.

Where a deed mentioned the sum and the rate of interest and the period for payment and further recited: "If for any reason we fail to pay the amount during the stipulated time then in lieu of the aforesaid sum the land is sold to you for the aforesaid amount in full satisfaction."

Held: the deed evidences contingent sale of the kind contemplated in Ch. 3 of the Indian Contract Act. It is an actual sale, subject to the condition that it is not enforceable if the executant pays a certain sum within a certain time. If he made that payment, the sale would be void under S. 35 of the Act. If he did not make that payment, the sale was one which became enforceable by law under the same section. (*Fawcett and Madgavkar. JJ.*). ASVATH *v.* CHIMABAI. **91 I.C. 330= 27 Bom. L.R. 1246=A.I.R. 1926 Bom. 107.**

———*Oudh Laws Act* (1876), *S.* 9—Hiba-bil-ewaz *cannot be construed as sale.*

It is not competent for the Courts of law to thwart the express intention of the parties and to convert a transaction of *hiba-bil-ewaz* into one of sale so as to attract to it a claim for pre-emption under the Oudh Laws Act. (*Wazir Hasan and Raza, JJ.*). BASHIR AHMAD *v.* MT. ZUBAIDA KHATUM. **92 I.C. 265=1 Luck 83=29 O.C. 108= 3 O.W.N. 105=A.I.R. 1926 Oudh 186.**

———*Question whether property or right to sue is sold should be decided on the merits of each case.*

The question of whether a transaction which purports to be sale is a genuine sale of immovable property or merely the sale of a right to sue, is frequently a difficult one to decide, and every case must be settled on its own merits. (*Kendall and Pullan, A.J.Cs.*). NAZIR HASAN *v.* MATIN-UZ-ZAMAN. **11 O.L.J. 672=A.I.R. 1925 Oudh 299.**

———*Easement—Right of way—Sale-deed describing southern boundary of the land conveyed as pathway to be reserved—Vendee is entitled to right of way on the land forming southern boundary though no pathway might actually have been set apart by vendor.*

Where in a sale-deed the southern boundary of the site conveyed was described to be "pathway 18 feet in breadth which I am going to set apart".

Held: that the vendee was entitled to an indefeasible right of way on the land which formed the southern boundary, though no pathway might have been actually set apart by the vendor. (*Venkatasubba Rao, J.*). KUPPAKKAL *v.* MATHAN CHETTIAR. **82 I.C. 430=A.I.R. 1924 Mad. 834= 47 M.L.J. 477.**

———*Clause in sale-deed of a portion of village expressly reserving certain* khudkhasht *land rent free to vendor and his successors in perpetuity—No indication of reserving only a life-interest or a tenant's right in the land—Vendor retains his entire interest in the land.*

Where the clause expressly reserved certain *khudkhasht* land, rent or revenue free to the vendor and her successors-in-interest, in perpetuity and did not purport to create or reserve only a limited interest, therein, or otherwise limit the scope thereof by merelyreserving a tenant right in the same and where there were no words in the deed which could be construed as granting only a lease of the land or creating a mere tenant right, and where there was nothing to prevent the parties to the deed from inserting appropriate words to show that the reservation was intended only to carve out the status of a permanent tenant with the incident of heritability attached to it, and not to leave the entire interest of a proprietor intact.

DEED—Construction—Sale or lease.

Held: that the reservation must be taken to be of the entire interest which the transferor could otherwise have passed to the transferee and that the vendor remained the owner of the *khudkhasht* land. (*Kinkhede, A.J.C.*). TULARAM *v.* SUMRATI. **79 I.C. 621=A.I.R. 1924 Nag. 422.**

———Where the boundaries of an estate are not mentioned in a sale-certificate the purchaser takes what was comprised in that estate by its name, at the date of the sale. (*Mookerjee, C.J., Fletcher and Teunon, JJ.*). SECRETARY OF STATE *v.* NARENDRA NATH MITTER. **61 I.C. 91=32 C.L.J. 402.**

———A sold certain *khewat* land to B, there being no reference to the share in *shamilat* land. B sold it to C by a sale-deed which provided: "Whatever rights I had in the *shamilat* in respect of the above mentioned land all those rights now belong to the purchaser." Subsequently A obtained a declaration to the effect that no share in the *shamilat* land passed either to B or to C. C. then brought a suit against B for compensation out of B's *khewat* land.

Held: that B did not purport to sell any *shamilat* to B and therefore he was not liable to compensate C., (*Scott Smith, J*). MALIK KHAN *v.* BHOLA RAM. **60 I.C. 459= 4 L.L.J. 434.**

—Construction—Sale or lease.

———*Document called lease but on proper construction appearing to be sale—Court is not bound to hold it to be lease—Real nature of transaction must be looked into.*

Merely because a document is called lease or a will, although on its proper construction it appears to be something else the Court is not bound to hold it to be that which it calls itself. The Court must look to real nature of the transaction.

H, an occupancy tenant transferred his holding to *D*. On *H's* deat,h *P* brought a suit for possession against D. *P*, contended that the deed of transfer executed by *H* was sale-deed and as such the sale was void, while *D* said that it was a perpetual lease and also put up plea of adverse possession, namely that *P* had not proved possession within 12 years.

Held: that the document purported to be a perpetual lease of an occupancy holding transferring all the rights of the occupancy tenant without any right of re-entry for ever to the lessee on the payment of a certain sum and an annual sum which was equivalent to land revenue due to Government. Nothing therefore was left to the lessor and the transaction was in fact a sale and not a lease. The transaction being void could not be challenged by *P*. A.I.R. 1928 Oudh 472; A.I.R, 1922 Oudh 81 : A,I.R. 1921 Oudh 240; A.I.R. 1922 Oudh 42 *Rel, on.* (*Pullan,J.*). GOPAL SAHU *v.* NAND KUMAR SINGH. **123 I.C. 53=7 O. W.N. 438= A.I.R. 1930 Oudh 300.**

———Where a permanent tenure-holder leased in perpetuity a part of his tenure for a nominal rent and that rent in fact represented a proportionate amount of the rent payable by him in respect of the tenure.

Held: that the transaction was a sale and not a lease. (*Kulwant Sahay and Macpherson, JJ.*). SECRETARY OF STATE *v.* NATABAR MANGRAJ. **103 I.C. 435=6 Pat. 358=A.I.R. 1927 Pat. 254.**

———*Document purporting to be a lease cannot be held to be a sale.*

Where a lease deed conferred on the lessee very extensive rights including the right to sink a well or to construct a house and no right of re-entry was reserved.

DEED—Construction—Sale or Lease.

Held, that these are not sufficient grounds as between parties to the document for holding that the lease is not a lease but a sale. (*Daniels, J.*). INDER DEO RAI *v.* RAM CHARITTAR RAI.
74 I.C. 971=5 L.R.A. Rev. 28=A.I.R. 1923 All. 560.

———*Right to hold land for* 500 *years conveyed—Alienation is one of lease.*

Where a document purported to convey the right to hold a land for a period of 500 years *held* that the transaction is an alienation by way of a lease for a long term and not an out-and-out sale or mortgage. (*Shah, Ag. C. J. and Crump, J.*). CHATURBHAI LALLU BHAI *v.* MOTI BHAI BAPUJI.
77 I.C. 952=24 Bom.L.R. 1315=A.I.R. 1923 Bom. 146.

———*Court will look to terms used by parties—Rent more than Government revenue—Deed is a lease.*

In a transaction, called a *patta istimrari mathati* an annual rent was reserved, out of which the lessee was to pay the Government revenue the remaining portion being payable to the lessor. Except this rent the lessor reserved nothing.

Held :that the transaction must be regarded as a lease not giving rise to a right of pre-emption. The Court will look to the substance of the transaction and will not construe a document which is plainly a sale to be anything else, but it will not overlook the terms which the parties themselves used in describing the deed. (*Simpson, A.J.C.*). SAHEB BAKSH SINGH *v.* THAKUR DIN SINGH.
68 I.C. 966=9 O.L.J. 334=A.I.R. 1922 Oudh 229.

—Construction—Sale or mortgage.

———*Two contemporaneous deeds, one purporting to sell property, other giving right of repurchase to vendor or his lineal descendants—Transaction is not mortgage.*

Unless the property transferred can be considered to be no more than a security and the money advanced as a loan the transaction cannot be characterised as a mortgage. Therefore, if one deed conveys in explicit terms all right, title and interest of the vendor without any reservation of any kind and a second deed merely gives a right of repurchase to specified individual, namely the vendor and his lineal male descendants, the right is not one which can run with the land nor can it enure to the benefit of the legal representative of the vendor. It is no more than a privilege and the property affected by them cannot be considered to be mere security and hence transactions cannot be considered as a mortgage. (*Niamatullah and Bennet, JJ.*). GOBARDHAN *v.* RAGHUBIR SINGH. **1930 A.L.J. 799=A.I.R. 1930 All. 101.**

———*Where there is a conveyance and a promise to re-convey, on receipt of purchase money, the transaction is a sale and not a mortgage.*

Vendor executed a deed of sale of immovable property, simultaneously with an *ekrarnama*, by which the purchaser agreed to take back the agreement and return the deed on payment of purchase money by the vendor at any time. The heirs of the seller, brought a suit to redeem the property, before the expiry of the limitation period of sixty years, on the ground that the transaction was a mortgage.

Held : that the transaction was an absolute sale and not a mortgage : 12 All. 387 (P. C.). *Rel. on.* 22 All. 149 (P. C.), *Dist.*; A.I. R. 1916 P.C. 49, *Ref.* (*Suhrawardy and Garlick, JJ.*). SISIR KUMAR *v.* NARAN CHANDRA. **119 I.C. 803=33 C.W.N. 591=A.I.R. 1929 Cal. 548.**

DEED—Construction—Sale or Mortgage.

———Where a deed purported to have transferred one-third of the holding in question to defendant in lieu of Rs. 500 spent by him on account of plaintiff.

Held : that the transaction was a sale and not a mortgage. (*Shadi Lal, C.J. and Agha Haider, J.*). ALI AHMAD *v.* KHAN MAHOMED. **120 I.C. 420=A.I.R. 1929 Lah. 833.**

———*Sale-deed an outright conveyance—Right of redemption expressly refused—Simultaneous agreement to reconvey if certain amount paid regularly as rent for five years—In default of any payment agreement to be void—The two documents constituted sale with right of re-purchaser and not mortgage.*

A conveyed certain land to *B* by deed of sale which was in its terms an outright conveyance and contained a clause expressly renouncing any right of redemption. At the same time *B* executed an agreement referring to the same land, that if *A* would annually pay to *B* certain sum as rent he may repurchase the land at any time within five years by paying the original price. There was also an express provision that default in payment of the rent would render the agreement of the resale void :

Held : that on the terms of the deeds the relation of debtor and creditor did not exist. *B* could not have sued for the recovery of his money. The two deeds purported to be an outright conveyance with a separate agreement to reconvey on certain conditions, and not to be a mortgage. (*Carr and Mya Bu, JJ.*). U THA MAUNG *v.* U AUNG MYAT GYOW. **117 I.C. 566=A.I.R. 1929 Rang. 39.**

———*Two documents executed almost simultaneously—One a deed of sale and another an agreement to re-sale—Surrounding circumstances and intention must be looked to for deciding whether they constituted a mortgage.*

When the question with reference to two documents, *e.g.*, *A* and *B* executed almost simultaneously, one purporting to be a sale and the other an agreement to re-sell, is, whether the transaction is a mortgage or whether it is merely a sale with an agreement to repurchase, the case has to be decided on the instruments and the language employed in them having regard to the surrounding circumstances. No oral evidence is admissible to prove the real meaning or intention of the parties and not even the subsequent conduct of the parties can be looked at or regarded for the purpose.

Where it was found that at the time of execution of the documents *A* and *B* the property was impending sale, that it was sold under the first document *A* for comparatively low price, that the vendors under *A* were plaintiffs and one *P* a prior mortgagee while the persons who were entitled to the benefit of the contract under *B* were only the plaintiffs, that the actual possession of the property was only with the vendors even before the execution of a muchilika by plaintiff in favour of the defendant the opposite party, that there was no evidence of any bargaining for the price of the property, there was no reliable evidence with regard to the inspection of the property or the examination of the title-deeds before concluding of the transaction, that the creditor while speaking of the amount paid always used the expression "advance the amount" and it was further found that the document *B*, namely the agreement to re-sell, provided after the expiration of the said period you will claim no right or privilege whatever to this agreement or to the properties detailed below and I shall be in undisputed possession of the said properties.

DEED—Construction—Sale or Mortgage.

Held: that the only conclusion that would be in consonance with what may be regarded as the real intention of the parties was that the transaction was only a mortgage and that the sale was merely by way of security for the amount that was advanced. (*Srinivasa Ayyangar and Reilly, JJ.*). SUTHARSANA *v.* SAMARAPURI. **110 I.C. 837= 1928 M.W.N. 634=A.I.R. 1928 Mad. 690.**

———Under a document which purported to be a sale deed the transferee was put in possession by a decree of Court on payment of the amounts mentioned in the document and which the transferee had undertaken to pay. No time for redemption was fixed, nor was any amount fixed as payable on redemption.

Held: that the transaction did not amount to a mortgage. (*Devadoss, J.*). MAHANTHAYA *v.* NANDIAPPA HEDGE. **99 I.C. 685= A.I.R. 1927 Mad. 1081.**

———*Stamp paper used is not sufficient evidence—Relation of real value to the consideration should be considered.*

The fact that the stamp paid on the document is one that was correct for a sale deed under the Indian Stamp Act is not in itself conclusive. The main thing to be considered is the terms of the document itself and the surrounding circumstances so far as they appear in evidence and are relevant in order to determine whether the real intention of the parties in executing a document was to enter into a mortgage transaction or a sale transaction. One of the main tests in construing a deed is the relation of the consideration mentioned in the document to the real value of the property transferred, and if the former sum is grossly inadequate, then it affords an indication that the vendor did not intend to sell the land out and out. (*Fawcett and Madgavkar, JJ.*). ASVATH *v.* CHIMABAI. **91 I.C. 330=27 Bom. L. R. 1246= A.I.R. 1926 Bom. 107.**

———*Agreement by vendee to reconvey the property sold on payment of a fixed sum is not in the nature of a mortgage but a mere agreement to reconvey.*

Where a document executed by the vendee in favour of vendor contained a postcript to the effect: "There is no rent for the house and no interest for the sum. You should not require account of rent and I shall not require interest for money. I shall recover and enjoy rent in lieu of interest. You should pay me Rs. 2,000 as per term as loan without interest."

Held: that the nature of the document was not of mortgage but was merely of an agreement to reconvey. (*Fawcett and Madgavkar, JJ.*). VAMAN *v.* CHANGI. **91 I.C. 360=49 Bom. 862= 27 Bom. L. R. 1261=A.I.R. 1926 Bom. 97.**

———*Sale for a period of fifty years was held to be a mortgage.*

A document purporting to be a sale of land for 50 years on condition of its return after that period was held to be a mortgage. (*Walmsley and B. B. Ghose, JJ.*). DURGA CHARAN MAJI *v.* PORESH BEWA. **76 I.C. 336=A.I.R. 1925 Cal. 105.**

———*Mortgage without possession—Subsequent transfer of possession to mortgagee—Burden of proving that the transaction is an outright sale is on the person alleging it.*

When land is mortgaged without possession and possession subsequently passes to the mortgagee, the burden of proving that the transfer in which possession was given was an outright sale lies on the person alleging it. But in considering whether that burden has been discharged all the

DEED—Construction—Surety bond.

circumstances of the case must be borne in mind including the conduct of the parties. 5 L.B.R. 40, *Foll.* (*Rutledge and Brown, JJ.*). A. T. A. R. M. M. CHETTY *v.* MD. KASIM. **90 I.C. 1011= 3 Rang. 367=A.I.R. 1925 Rang. 377.**

———One of the two documents purported to be a sale-deed by the plaintiff to the defendants for Rs. 1,200. The other document purported to be an agreement by which the plaintiff was to pay the defendant Rs. 125 per annum for ten years and on such repayment the defendant was to execute a deed of resale, and in default of payment the annual instalments were to carry interest and if the plaintiff failed to pay off the money he should not have any right left in the property.

Held: that these two documents taken together constituted a mortgage and not a sale. (*Marten and Fawcett, JJ.*). SANDU VALJI *v.* BHIKCHAND SURAJMAL. **75 I. C. 118=47 Bom. 621= 25 Bom. L. R. 381=A. I. R. 1923 Bom. 473.**

———The question whether a transaction is a mere mortgage in the form of sale must depend upon the intention of the parties which may be found in the deed itself or gathered from the circumstances attending the transaction in each case. (*Chatterjee and Panton, JJ.*). MADHAB CHARAN DAS *v.* RAJANI MOHAN DAS. **64 I. C. 583. (Cal.).**

—Construction—Surety bond.

———*Entire property made security for periodical payments—Every bit held to be liable for payment of whole.*

Where the entire property is made security for the periodical claims that are to accrue from time to time, the presumption is that from time to time a portion of the security would be sold to enable realization of the periodical claim. Every bit of the secured property becomes liable for payment of the whole, and there is no reason for claim to abate in proportion to the extent of the property previously sold. (*Mukerji and Bennet, JJ.*). AHMAD HUSAIN *v.* TAHIR HUSAIN. **123 I. C. 97= A. I. R. 1930 All. 475.**

———*Liability of surety for money received by* mukhtar *in virtue of his office* "*as* mukhtar",— *Money received by* mukhtar *contrary to directions—Surety was liable—Contract Act, S.* 128.

Money entrusted to the *mukhtar* as *mukhtar* but received contrary to directions in *mukhtarnama* is money received "in virtue of his office" as *mukhtar*."

A surety for a *mukhtar* appointed by the Court of Wards executed a surety bond, that the *mukhtar* will "account for, render and deliver all moneys, securities for money and property whatsoever which he may receive or be entrusted with by virtue of his office." The *mukhtar* withdrew from the treasury certain money deposited for payment to the Court of Wards contrary to the directions in the *mukhtarnama* not to receive any money payable to the Court of Wards.

Held: that the money was received by the *mukhtar* in virtue of his office as *mukhtar* making surety liable for the amount. (*Bennet, J.*). ZAKI HUSAIN *v.* DEPUTY COMMISSIONER OF GONDA. **115 I. C. 138=A. I. R. 1929 All. 687.**

———A surety bond must be construed strictly. (*Marten, A. C. J. and Crump, J.*). JAYAPPA *v.* SHIVANGOUDA. **107 I.C. 710=52 Bom. 72= 30 Bom. L. R. 19=A. I. R. 1928 Bom. 42.**

———*A surety bond should be interpreted in favour of surety.*

The terms of a surety bond should be interpreted in a manner favourable to the surety or guarantor

DEED — Construction — Surrounding circumstances.

as the case may be. (*Page and Graham, JJ.*). MUHAMMAD YUSUF *v.* RAM GOVINDA OJHA. **109 I.C. 538=55 Cal. 91=A.I.R. 1928 Cal. 177.**

—Construction—Surrounding circumstances.

———The terms or expressions in a deed or document, used by a layman not acquainted with legal or technical terms must be interpreted with reference to surrounding circumstances.(*Bhide, J.*). ABDUL LATIF *v.* RAHMATULLAH. **123 I.C. 533= A. I. R. 1930 Lah. 139.**

———*Intention must be seen.*

The principles of construction of statutes on which the Courts of Law act in construing instruments in writing—and a statute is an instrument in writing—are that in all cases the object is to see what is the intention expressed by the words used. But where the language is imperfect, and it is impossible to know what the intention is without inquiring further, the circumstances with reference to which the words were used should be looked to. (*Lord Atkinson*). ROYAL BANK OF CANADA *v.* JOSEPH SALVATORI. **107 I. C. 346= 47 C. L. J. 300=A. I. R. 1927 P. C. 272.**

———*Contract—To get away from plain terms of a contract there must be evidence and circumstances showing that parties intended to base their contract on something which was not incorporated in the contract —Evidence Act, S.* 92.

If you are to get away from the plain terms of the contract you have to read into it something which is not there, and in order to entitle you to read into it something, there must be a state of things which appears from the evidence from the circumstances, from the extrinsic surroundings, to have been assumed by the parties to have been the foundation or basis of the contract, so that if that basis fails the contract becomes unenforceable, you have to ascertain from the surrounding circumstances recognised by both the contracting parties what is the substance of the contract and then to ask the question whether the substantial contract needs for its foundation the assumption of the existence of particular state of things. (1863) 3 B. and S. 826, *Rel. on.*

A Muhammadan not being on good terms with his wife, who lived separate claiming maintenance an agreement was entered into between her and her brother-in-law whereby the brother-in-law promised to pay her certain amount per year for maintenance for her lifetime. Shortly after, the husband divorced her. In a suit for maintenance as per the terms of the agreement against the brother-in-law.

Held: that the divorce by husband did not put an end to the agreement and the lady was entitled to the maintenance. (*Odgers, J.*). ABDUL KHADAR *v.* LALU BI. **96 I.C. 900=24 M.L.W. 77= A.I.R. 1926 Mad. 932=51 M.L.J. 215.**

———*Evidence Act, S.* 92, *proviso* 6—*Circumstances surrounding a document may be proved only to make its meaning clear and not to prove it to be something else than what it purports to be.*

The language of the proviso is rather vague. It is true that evidence of the circumstances, surrounding a document is admissible; but it is admissible only for the purpose of throwing light on its meaning. It would not be permissible to consider the surrounding circumstances with a view to holding that a document which on the face of it is a sale-deed was intended to operate as a mortgage. There must be some limit to the suggestion that the surrounding circumstances can

DEED—Construction—Two Documents.

always be scrutinised so as to enable the Court to alter or change the nature of the document to something different from what it appears to be. Otherwise there could be no certainty as to the proper construction to be placed on a document which to all appearance is unambiguous. (*Macleod, C.J. and Coyajee, J.*). MARTAND TRIMBAK GADRE *v.* AMRITRAO RAGHOJIRAO DAMALE. **93 I.C. 924=49 Bom. 662=27 Bom.L.R. 951= A.I.R. 1925 Bom. 501.**

———In considering whether a particular interpretation is beneficial or not to a party, circumstances not appearing on the face of the deed may be taken into account. (*Lord Blanesburgh*). MA SA BON *v.* MA DA TWE. **84 I.C. 561= 20 M.L.W. 884=A.I.R. 1924 P.C. 233.**

———*Subject-matter and circumstances attending its creation should be considered.*

In the construction of written or printed documents it is legitimate in order to ascertain their true meaning if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply. (*Lord Atkinson*). VENKATA SUBHADRAYAMMA *v.* VENKATAPATI RAJU GARU. **80 I.C. 807=48 Mad. 230= 5 L.R.P.C. 147=26 Bom.L.R. 786= 20 M.L.W. 298=1924 M.W.N. 607= 29 C.W.N. 57=35 M.L.T. 210= 52 I. A. 1=A. I. R. 1924 P. C. 162= 47 M. L. J. 93.**

—Construction—Two documents.

———*Two intimately connected instruments of conveyance—Evidence of parties to one found false with respect to one—Their evidence with regard to other should be approached with suspicion—Evidence—Document.*

Where two instruments of conveyance between the same parties are very intimately connected with each other, and from the evidence of the parties one of them is found to be false and fraudulent, the evidence of the parties with regard to the other should be approached with great suspicion and subjected to strictest scrutiny. The mere fact that the one was false and fraudulent transaction does not by itself prove that the other deed was also false and fraudulent, but it does throw upon the party a heavy burden to prove that the same was a *bona fide* document and not executed with a view to defeat or delay any claims of the creditor on the executant of the deed. (*Sir Bindo Mitter*). MOHAMMAD ALI MOHAMMAD KHAN *v.* MT. BISMILLAH BEGAM. **A.I.R. 1930 P.C. 255.**

———*Reilly, J.*—An interval of time alone is not sufficient to show that two documents represent separate transactions. (*Ramesam and Reilly, JJ.*). TIRUMALA CHETTY RANGAYYA CHETTY *v.* SRINIVASA RAGHAVACHARLU. **121 I.C. 753= 52 Mad. 300=1929 M.W.N. 93= 29 M.L.W. 329=A.I.R. 1929 Mad. 243= 56 M.L.J. 318.**

———In 1734 a notification was issued by the President and Governor of Fort Saint George for the erection and building of a town in Chintadripet and it contained an invitation to people to come and settle there. Some exemptions were made in the case of persons whose services were required for the temple in Chintadripet. In that *cowle* there were provisions for payment of certain fees to the Palayagars of Triplicane. In 1787 the Government gave a *cowle* under which the *cowledar* was authorised to collect a fee on each house situated in the said pattah of 2 panams per month

DEED—Construction—Two Documents.

and one panam on every hut as had hitherto been customary, likewise on all shops erected there one panam each per month.

Held: that the latter document cannot be read into the former. (*Devadoss and Jackson, JJ.*). G.R. ADEKESAVALU NAIDU *v.* C. S. B. LAKSHMANA AYYAR. **113 I.C. 36=A.I.R. 1929 Mad. 204.**

———*Mortgage and lease of the same date—Matters to be looked to for determining if they form one transaction explained.*

Matters, to which weight has often been given in determining whether transactions represented by two deeds, *e.g.*, a mortgage and a corresponding lease, were one or separate, are; Whether the documents were executed on the same day or the second very shortly after the first; whether they were registered on the same day, whether they refer *inter se* to each other and, if so, in what terms; whether there is interest named in the mortgage of an amount equivalent to the rent named in the lease; whether period of the two deeds are identical. 19 All. 496, *Foll.*

It may well be that in cases where dates, period, interest and rent are not identical the two deeds may yet be regarded as really one agreement evidenced by the first deed with certain extra condition having effect only for a limited period or in regard to a limited portion of the usufruct, etc., (20 All. 401 and 41 All. 399, *Ref.*). Even if the period covered by the mortgage-deed and the lease are not identical, the mortgage-deed may yet be regarded as the principal agreement the terms of which as to the manner of receipt of a part of the usufruct are valid by a duly registered lease. (*Kanhaiya Lal and Boys, JJ.*). BISHAMBHAR NATH *v.* FIRM BANSAL & CO. **95 I.C. 893=24 A.L.J. 641=A.I.R. 1926 All. 578.**

———*Mortgage by conditional sale referring to earlier one with possession, stipulating that both would be redeemed together—Both should be read together.*

Two mortgages were executed on the same property, the latter provided among other things "That just as the mortgaged property is liable for the money due under the mortgage deed, dated the 15th May, 1869, similarly the same property is and shall be liable for the money due under this deed, that if I, the executant, pay in one lump sum within five years from to-day in a fallow season in the month of *Jeth*, the money due under this deed and the mortgage money of the mortgage-deed as well as other amounts due, the mortgaged property shall be redeemed, otherwise the consideration of this deed and the mortgage money of the deed of mortgage shall be deemed to be the consideration money and this deed shall be deemed to be the sale-deed.

Held: that the mortgage deed of the 15th May, 1869, and later mortgage-deed of the 24th June, 1878 must be read together and that the parties intended that the mortgagee should be treated as having held the mortgaged property from the 15th May, 1869, as a mortgagee in possession under a mortgage in the form of a mortgage by conditional sale. (*Sir John Edge*). MIRZA ABID HUSAIN KHAN *v* MT. KANIZ FATIMA. **80 I.C. 1019=29 C.W.N. 214=22 A.L.J. 284=34 M.L.T. 78=46 All. 269=19 M L.W. 703=51 I.A. 157=11 O.L.J. 427=27 O.C. 72=1924 M.W.N. 657=5 L.R.P.C. 212=A.I.R. 1924 P.C. 102.**

———*One cannot be construed with reference to recitals in the other.*

A document which is executed 1 year and 9 months after an earlier one cannot be treated as part of the same transaction with the earlier one and that the earlier document cannot be construed by a reference to the recitals in the later one. (*Shah, Ag. C.J. and Crump, J.*). NARU HARI GUJAR *v.* JAI DEOJI. **76 I.C. 265=25 Bom. L.R. 68=47 Bom. 431=A.I.R. 1923 Bom. 191.**

DEED—Construction—Will or Gift.

—Construction—Will and authority to adopt.

———*Registration Act (III of 187?), S. 17—Document was construed to be not a will but only an authority to adopt requiring registration.*

A Hindu executed an unregistered document calling it a Will in favour of his wife to the effect:—"I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner."

Held: the document is not a Will, but only a power to adopt, and as such ought to have been registered under S. 17 of the Indian Registration Act, 1877. (*Viscount Haldane*). JAGANNATH BHEEMA DEO *v.* KUNJA BEHARI DEO. **64 I.C. 458=26 C. W.N. 374=24 Bom. L.R. 600=30 M.L.T. 124=48 I.A. 482=44 Mad. 733=14 M.L.W. 398=1921 M.W.N. 713=A.I.R. 1922 P.C. 162=41 M.L.J. 648.**

—Construction—Will or Gift.

———*Where deed of gift indicates joint possession, donee is co-sharer and is entitled to resist pre-emption.*

Under a deed of gift a plot was transferred for planting groves but it was recited in the deed by the donor that the plot was a share out of fractional share of the mahal in his hand. The deed did not say that the donee would not be entitled to take part in the administration of the affairs of the mahal. The *khewat* also showed that donee was included among body of co-sharers with joint liability to pay Government revenue, no separate revenue having been assessed on his plot,

Held: that the donee was a co-sharer and entitled to resist suit for pre-emption. (*Sulaiman, Ag. C.J. and Sen, J.*). SHEO BALAK RAM *v.* MATHURA PRASAD. **122 I.C. 178=1930 A.L.J. 343=A.I.R. 1930 All. 117**

———*Gift evidenced by mutation—Whether was made to donee as adoptive son or whether it was his description should be determined from document and surrounding circumstances.*

In the case of gifts evidenced by mutation Court has to decide after considering the document and surrounding circumstances whether the adoption was the reason or motive for making the gift or bequest or whether the mention of the donee or the legatee as an adopted son was merely descriptive of the person to take under gift or bequest, and he was to take the property even though his adoption may not be valid. Subsequent statements by the donor cannot affect the question: A.I.R. 1924 Lah. 103, *Ref.* (*Shadi Lal, C.J. and Hilton, J.*). DAYA RAM *v.* HANS RAJ. **120 I.C. 793=A.I.R. 1930 Lah. 115.**

———*Document in question was will.*

A and *B* were joint brothers. On the death of *A*, *B* and *A's* daughter's son *D* applied respectively for mutation of names in their favour. Subsequently an application was presented to the revenue Court in which *B* declared that his name may be entered against the property by right of inheritance during his life-time and after his death half the property may be entered in the name of *D* and the other half in the name of his daughter,

Held: that this application operated as will of *B*. A.I.R. 1928 All. 641 (F.B.); 7 All. 163; 36 Cal. 149.

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Rel. on; 10 Cal. 792 (P.C.), *Ref.*; 33 Mad. 304, *Dist.* (*Dalal, J.*). DUDH NATH SINGH *v.* MT. MUNNA KUAR. **118 I.C. 662= A. I. R. 1929 All. 620.**

———*Hindu of Mitakshara School executing tamliknama making his two wives along with himself joint owners of his property—Tamliknama providing that neither he nor his wives could transfer share without consent of all—Shares not specified—Subsequently he executing another document purporting to cancel tamliknama—Tamliknama created tenancy-in-common and each was to get 1/3rd share—It could not be cancelled by subsequent document—Provision prohibiting transfer was absolute restraint on alienation within Transfer of Property Act, S. 10.*

A Hindu governed by the Mitakshara School of Hindu family executed a tamliknama whereby his two wives along with him were to be joint-owners in possession of his property. It was further provided that neither he nor his wives would have the right to transfer the property separately unless all combined to make such transfer. The document did not state specifically as to what share each was to get. Soon afterwards he executed a fresh document purporting to cancel the previous tamliknama.

Held: that the intention in executing the tamliknama was to create a tenancy-in-common with the wives and each of his wives were to get 1/3rd share, and he could not cancel the tamliknama by a subsequent deed.

Held further: that the provision prohibiting transfer was an absolute restraint within the meaning of S. 10 and so void; 23 Cal. 670 (P. C.), *Ref.*; 3 A.L.J. 621, *Rel. on*; 25 Cal. 369, *Dist.* (*Sulaiman and Kendull, JJ.*). GOMTI SINGH *v.* ANARI KUAR. **118 I.C. 152=1929 A.L.J. 880= A.I.R. 1929 All. 492.**

———*Test is whether power to revoke is reserved and time when document is to take effect.*

One of the essential tests for determining whether a document is a gift or a will is when the document is to take effect and whether a power to revoke it has been reserved to the author expressly or by necessary implication: 35 All. 337 (P.C.), *Ref.* (*Tek Chand, J.*). GANGA RAM *v.* MT. BIRJO. **111 I.C. 893=A.I.R. 1929 Lah. 143.**

———*Gift to a person possessing a particular character or relationship—Relationship failing—Onus is on donee to prove that gift is irrespective of relationship.*

Where a gift is made to a person who is described as possessing a particular character or relationship, the gift may be made to him absolutely as an individual, or it may be made to him on account of that relationship so that if the relationship fails, the gift cannot take effect. The onus is upon such a person to prove that the gift was made to him irrespective of the relationship. (*Shadi Lal, C.J. and Aga Haider, J.*). IBRAHIM *v.* MT. SADABIBI. **114 I.C. 334=10 Lah. 558= 30 P.L.R. 634=A.I.R. 1929 Lah. 20.**

———*Life-estate with powers of disposition can be created.*

There is ample authority in this country as well as in England for holding that there may be a life-estate with powers of disposition.

Where the adoptive mother entered into an agreement which provided "I have, therefore, henceforward given all the property belonging to my husband as per the schedule below, to my adopted son *S*, the said *S* shall therefore enjoy the said property with all the rights the remaining property shall be enjoyed independently by myself alone and that

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the property which remains after being utilised by me during my life-time shall be enjoyed after my death by the said *S*,"

Held: that the mother intended to reserve to herself a life-estate with full powers over the corpus during her life and as to whatever property was left the adopted son was to succeed. (*English and Indian case-law discussed*). (*Krishnan and Odgers, JJ.*). VENKATA CHANDIKAMBA *v.* VENKATA ROW. **105 I. C. 775=1927 M. W. N. 215= A. I. R. 1928 Mad. 39=53 M. L. J. 557.**

———*Declaration by depositor in Railway Provident Fund appointing a certain person to receive deposit after his death and due attestation as will—Declaration is a Will—Will—Construction.*

A person holding a deposit in the Railway Provident Fund filed a declaration in the following words: "I hereby declare the following to be the name and address of the person who in the event of my death, will be entitled to receive payment of my deposit in the Railway Provident Fund and I make this my Will so far as regards such deposit," and the declaration was duly attested by two witnesses,

Held: the document must be regarded as the Will of the deceased. It is quite true that freedom of the Will and ability to revoke on the part of the testator are two characteristics of a Will, but it cannot be said that the rules of the fund do more than put some limitation on those features and the limitation is not of such a kind as to prevent the declaration from being a Will. (*Walmsley and Chakravarti, JJ.*). KALISADHAN MITRA *v.* PRAFULLA CHANDRA MITRA. **95 I. C. 848= A. I. R. 1926 Cal. 1061.**

———*Gift of income of property is gift of corpus.*

A gift of the income of property without any limitation is a gift of the property itself. *Southmolton* (*Mayor, etc., of*) v. *The Attorney-General* (1854) 5 H. L. C. 1: *Mannox* v. *Greener*, (1873) 14 Eq. 456 and 41 M. L. J. 20, *Foll.* (*Odgers, J.*). VENKATACHARIAR *v.* PACHAYAPPA CHETTY. **92 I. C. 516=22 M. L. W. 698=1926 M. W. N. 106= A. I. R. 1926 Mad. 250.**

———*Revocability is test of a will.*

One of the tests to be applied, for the purpose of seeing whether the document is a will or not, is whether it is revocable. If the document is revocable, it must be construed as a will. (*Devadoss, J.*). SENGAMALAM *v.* LOGAMBAL. **86 I. C. 8=21 M. L. W. 45= A. I. R. 1925 Mad. 471.**

———*'Wasiat', use of—Does not necessarily imply a will.*

In constructing a document no part of it as far as possible should be left out as redundant. The mere use of the word 'Wasiat' cannot make a transaction a will if it was really intended that the property should vest in the donee immediately during the lifetime of the donor. (*Abdul Raoof, J.*). MT. DURGO *v.* PREM SINGH. **74 I C. 653= A. I. R. 1924 Lah. 196.**

———*Deed of gift—Right to recover compensation, whether assigned.*

Defendant sold two shops and in the deed of sale covenanted that in case of eviction by the Municipality the vendee would be entitled to refund of the purchase money. The vendee made a gift of the shops in favour of the plaintiff and the deed of gift contained the following clause: "The donee like the donor will be bound by all the terms and all the rights to realise rents, to do repairs, etc., which I had under this deed vest in the donee."

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Plaintiff was evicted from the shops by the Municipality and brought the present suit to recover the purchase-money from the defendant:

Held, that the right to recover compensation had not been assigned to the plaintiff under the deed of gift and that his suit must, therefore, fail. (*Abdul Raoof, J.*). MUHAMMAD SAID *v.* ABDUL ALI.

66 I. C. 256 (Lah.).

———*Annuity to two persons—On death of one, other gets proportionate amount, in absence of contrary intention of grantor.*

Prima facie an annuity to two persons should be construed to mean that on the death of one of them, the other should get a proportionate amount 23 Cal. 670 P. C., *Ref.*, but where there are indications of a contrary intention, the gift may be taken as a joint gift. 17 C. L. J. 87, *Ref.*

The testator who had been adopted into a wealthy family, was making provision for his natural father's family. He said "I have not been able to confer any special benefit on my natural father's family. Therefore my uterine brother Kunja Lal, if alive at the time of my death, would get from my estate Rs. 25 per month and on his death his sons would get the said amount as monthly maintenance from the estate for life.

Held, that so far as the sons were concerned, the gift was not intended for any particular person but to all the sons of his brother, namely, to a class, and the sons should be considered as a unit for the purpose of the gift. The gift was not to descend to the heirs of the sons but to enure only for their lives, and so no question of the heirs of one of the donees being deprived could arise in this case.

There was no indication that the intention of the grantor was to make a separate grant of a proportional sum in favour of each of the sons; and upon a construction of the whole document it must be considered that the grant was to the sons of Kunja Lal as if they were one grantee with right of survivorship *inter se*. 33 All. 41 and 33 All. 665, *Dist.* (*Chatterjea and Panton, JJ.*). HEMANTA KUMAR *v.* SUDHANSU GOBINDU.

62 I.C. 436=25 C.W.N. 262=A.I.R. 1921 Cal. 175.

———*Imperfect gift cannot be given effect to by being treated as a trust—Trust.*

There is no equity to perfect an imperfect gift, and a gift that has been intended to take effect by way of transfer, the Court will not hold the intended transfer to operate as a declaration of trust. *Milroy* v. *Lord*, (1862) 4 De G. F. & J. 264 and *Richards* v. *Delbridge*, (1874) L. R. 18 Eq. 11, *Foll.* (*Rankin, J.*). AMARENDRA KRISHNA DUTT *v.* MONIMUNJARY DEBI. **66 I. C. 586=48 Cal. 986=A. I. R. 1921 Cal. 148.**

———*Gift of income of property to charity without any limitation is gift of property.*

The gift of the income of a property to charity without any limitation is a gift of the property itself. *South Moulton Corporation* v. *Attorney General*, (10 Eng. Rep. 796) and *Mannox* v. *Greever*, (L.R. 14 Eq. 456), *Ref.* (*Abdur Rahim and Burn, JJ.*). VAITHINATHA AIYAR *v.* THYAGARAJA AIYAR.

68 I. C. 631=A.I.R. 1921 Mad. 563=41 M. L. J. 20.

———*Transfer of Property Act, S.* 123—*Gift of immovable property and actionable claim failing as regards former does not necessarily fail regarding latter.*

A deed purporting to be a deed of gift of immovable property and actionable claims, but failing as a gift of immovable property for non-compliance with statutory formalities, does not necessarily fail as a gift of the actionable claims also unless the gift of the latter can be regarded as conditional on the gift of the former being valid. 30 M.L.J. 62, *Foll.* (*Wallis, C. J. and Hughes, J.*). PERUMAL AMMAL *v.* PERUMAL NAICKER. **61 I.C. 461=44 Mad. 196=13 M. L. W. 69=1921 M. W. N. 5=A. I. R. 1921 Mad. 137=40 M. L. J. 25.**

DEED—Construction—Will or Transfer.

—Construction—Will or settlement.

———A document was executed by a mother who was a widow, in favour of her son, which dealt with property to an extent of over three velis left to her by her husband under his will absolutely and recited that in respect of that, on account of the request made to her by her son for the benefit of his minor son and out of favour to himself and in consideration of the arrangement that he would not during her lifetime encumber or alienate the rights that would come to him in the property after her death, she on her side undertook to meet all her own expenses till her death out of the income and not to alienate the property. It directed that after the widow's death, the son and his heirs shall enjoy the property with all absolute rights. It further provided that if the widow failed to pay the kist on the property, the plaintiff shall pay and may recover from her out of her income, and that the pattah for the property shall be transferred to the plaintiff. The document was styled a settlement and registered.

Held: that from the tenor of the document it was not a will but a settlement and so subsequent transfer transactions between the parties should be, if possible, interpreted consistently with the document treated as a settlement: 33 Mad. 304; A. I. R. 1927 Mad. 197, *Rel. on*; A. I. R. 1924 Mad. 605; 10 Cal. 792, *Ref.* (*Wallace, J.*). VENKATASUBRAMANIYA IYER *v.* SRINIVASA IYER.

118 I. C. 110=A. I. R. 1929 Mad. 670.

———*Document should if possible be construed in that manner in which effect will be given to all directions.*

It is a well-established principle and rule of construction that a document should be construed if possible only in that manner or as being of that character in which it would be possible to give effect to all the directions contained in the document. If, regarded as a settlement it turns out that any of the directions in the document could not be possible of being given effect to, and if, regarded as a will, effect could be given to all the directions and there would be no difficulty whatever in carrying out the intentions of the maker of the instrument in any manner, then it follows that the construction that it is a will and not a settlement should be the one that is accepted. (*Srinivasa Aiyangar and Ananthakrishna Aiyar, JJ.*). PASUNGILIA PILLAI *v.* ISAKKIMUTHU PILLAI.

111 I.C. 22=A.I.R. 1928 Mad. 349.

—Construction—Will or transfer.

———*Document purported to be made* inter vivos *is ordinarily to be in favour of a particular defined person—But will comes to be made not in favour of defined person.*

It is common knowledge that nearly all, if not all, documents probably without a single exception, executed by persons with the intention that they should come into operation immediately or documents containing dispositions made or purported to be made *inter vivos* always happen to be in favour of certain particular defined persons. Even a will often comes to be executed probably in accordance with this practice in favour of some particular individual. But generally speaking, it is a testamentary document that

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comes to be made not in favour of particular persons but merely for the purpose of effecting the dispositions therein contained. (*Srinivasa Aiyangar and Ananthakrishna Aiyar, JJ.*). PASUNGILIA PILLAI *v.* ISAKKIMUTHU PILLAI. **111 I.C. 22= A.I.R. 1928 Mad. 349.**

———One conclusive test as to whether a document was intended to take effect *inter vivos* or not, would be to see whether any irrevocable interest is thereby created immediately in favour of some other person. The question can arise only in respect of documents where the property is directed to go to the donee after the death of the maker of the instrument. In the case of a will, as it speaks only from the death of the testator, the disposition could only begin to take effect from time to time. But a disposition *in presenti* can be made vesting property in a third person on the death of the maker of the instrument, the distinction being that the interest in the latter case, though it comes into possession after the death of the maker, vests immediately. It may also be useful in connexion with such a question to consider whether the interest that the maker of the instrument reserves to himself should be regarded as reserved or retained by virtue of the instrument itself or merely by reason of there not having been any disposition of the property. (*Srinivasa Aiyangar and Ananthakrishna Aiyar, JJ.*). PASUNGILIA PILLAI *v.* ISAKKIMUTHU PILLAI.

111 I.C. 22=A.I.R. 1928 Mad. 349.

———*Most important test is to see whether power to revoke the conveyance is reserved.*

Although a document which is not a Will in form may yet be a Will, in substance and effect; but if an instrument is a deed in form, in order to hold that it is testamentary or in the nature of a Will, there must be something very special in the case, and unless there are circumstances which compel the Court to treat an instrument in the form of a deed as a Will, the Court will not do so.

The line between a Will and a conveyance reserving a life-estate is a fine one, and it would be hard to define; the easy and most important test to apply is to see whether the power to revoke is reserved or not. (*Curgenven, J.*). (GARAPATI) GANGARAJU *v.* PENDYALA SOMANNA.

98 I.C. 613=A.I.R. 1927 Mad. 197.

—Construction—Words.

———Adha *and* urdha.

The words "*adha* and *urdha*" in the document conveyed the underground rights to the lessees including the right to work mines and extract coals. (*Jwala Prasad and Adami, JJ.*). RAMLAL KAVIRAJ *v.* SATYANIRANJAN CHAKRAVARTY.

1921 P.H.C.C. 49=A.I.R. 1921 Pat. 379.

———"*Commercial terms.*"

(*Obiter*). The expression "commercial terms," as used in a deed is relative to the time and the place, the country and part of the country where the money is borrowed, the kind of security that is offered for the loan, the possibilities of realizing the security, the supply of capital and the opportunity of persons willing to lend for possibly a considerable time. It cannot be confined, as in England, to something connected with a publicly announced and official rate of interest for loans generally or to a current rate generally allowed upon the highest security in financial transactions, such as an issue of debentures or something regulated by the day to day supply of money and by facilities for short loans. The word "commercial" must be understood of a community which is not a commercial community and of transactions which no one

DEED—Construction—Words.

would call mercantile, as a comprehensive but convenient term for such terms as can be arranged freely between borrower and lender under the circumstances of the particular case : A.I.R. 1919 P.C. 12, *Expl.* (*Viscount Sumner*). SUNDER MULL *v.* S. KINKAR SAHANA. **108 I.C. 337= 7 Pat. 294=55 I.A. 85=26 A.L.J. 364= 9 P.L.T. 203=27 M.L.W 461=1928 M.W.N. 242= 5 O.W.N. 400=47 C.L.J. 403=30 Bom. L.R. 793= 32 C.W.N. 657=A.I.R 1928 P.C. 64=54 M.L.J. 427.**

———"*Farokht.*"

"Farokht" cannot be held to mean "transfer" as it is inconsistent with the ordinary meaning of the word. (*Rafique and Piggott, JJ.*). SURAJ NARAYAN PRASAD *v.* RAM GHULAM.

76 I.C. 1050=45 All. 321=A.I.R. 1923 All. 361.

———"*Fazendari.*"

The word "*Fazendari*" is used with reference to tenants holding under a private landholder to indicate sometimes an indefeasible right to hold in perpetuity on payment of a small quit or ground rent and sometimes any kind of tenure agreed upon between the parties. (39 Bom. 320, *Foll.*).

The term "Fazendar" cannot properly in its strict sense be applied to a lessee from Government.

Liability to disturbance by Government or to pay enhanced assessment makes description as 'perpetual' wrong. (*Fawcett, J.*). RAHIMTULLA *v.* HASAN ALI. **85 I.C. 1038=25 Bom. L.R. 1192= A.I.R. 1924 Bom. 212.**

———"*Hak, Hakuk.*"

The words "hak, hakuk", etc. do not increase the corpus of the grant but only purport to transfer all the rights in the subject-matter of the grant. 44 Cal. 585 (P.C.) and 45 Cal. 87 (P.C.), *Foll.* (*Jwala Prasad and Adami, JJ.*). RAM LAL KAVIRAJ *v.* SATYANIRANJAN CHAKRAVARTY.

1921 P.H.C.C. 49=A.I.R. 1921 Pat. 379.

———"*Heirs*" *means both of male and female line unless otherwise restricted.*

It is plain according to every rule of interpretation that if you wish to limit the word "heirs" either to the male or female line, it is essential that you should do so in direct terms, or by necessary implication ; and in the absence of that limitation there is nothing where female inheritance is possible to prevent the female being an heir equally with the male. (*Lord Buckmaster*). SAFDAR ALI *v.* MIRZA MAKSUDALI BEG. **121 I.C. 229= 1930 A.L.J. 68=34 C.W.N. 208=31 M.L.W. 304= 13 N.L.J. 27=26 N.L.R. 119=32 Bom.L.R. 484= A.I.R. 1930 P.C. 41=58 M.L.J. 125.**

———'*La-aulad*' *means issueless.*

The word '*la-aulad*' in vernacular means issueless or without any sons or daughters. (*Mukerji and Niamatullah, JJ.*). NIRMAN BAHADUR *v.* FATEH BAHADUR SINGH. **1929 A.L.J. 1233= A.I.R. 1929 All. 963.**

———'Kul Rupia' *cannot be taken as referring to interest only.*

A mortgage deed provided among other things *aur jab ada karunga kul rupiya ada kiya karunga.*

Held : that the word '*kiya*' is superfluous, that the words *kul rupiya*, cannot be taken as referring to the interest only ; but that the real meaning of the sentence appears to be that the mortgagor would pay the whole money, that is to say, the mortgage money and interest, at one time. (*Martineau and Zafar Ali, JJ.*). LABHU RAM *v.* ABDULLA.

75 I.C. 183=A.I.R. 1923 Lah. 587.

———"*Male heirs*" *in a deed do not import limitation—Under Indian Law the expression is ineffective.*

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The use of the words 'male heirs' in a Will do not import any limitation. According to the rule of construction in S. 84 of the Succession Act such an expression would be rejected as having no effect in absence of any indication of contrary intention. There is no reason under the Indian Law why a different effect should be given to that expression in a deed of family settlement. (*Lord Phillimore*). DADABHOY FRAMJI CAMA *v.* COWASJI DORABJI PANDAY.

94 I.C. 535=A.I.R. 1925 P.C. 306.

———"*Merchant*" *held to mean merchant in popularly accepted sense—*"*Assistant*" *held not* "*merchant.*"

A contract of sale provided that any dispute between the buyers and sellers who were commercial people should be referred to the arbitration of a "merchant." There was a dispute and it was referred to a person daily engaged in buying and selling the commodities contracted for as an assistant of a firm. The assistant was an assistant of some seniority with more responsible duties than many other assistants and was head of the department with wide discretionary powers.

Held: that he was not a "merchant" within the terms of the contract: *Hopkins and Co.* v. *Foukelmann*, 2 K.B. 948; *Gill's case*, 28 L. T. 589, *Ref.* (*Rankin, C.J. and Mukerji, J.*). OJAMSHEE PURUSHOTTAMDAS *v.* ABDUL RAHIM.

A.I.R. 1929 Cal. 705.

———"*On demand*"—*The phrase means only* "*immediately*"—*Demand is not necessary to create liability.*

Where it is provided that the mortgagor "will after the compound interest shall be due, upon demand pay to the mortgagee any interest which shall be capitalised hereunder and any interest which shall accrue due thereon."

Held: that this did not necessitate an express demand by the mortgagee for compound interest before any liability to pay it could be said to arise under the mortgage-deed. The words "on demand" do not necessarily mean that there must be an express demand. These words are merely equivalent to "forthwith" or "immediately." (*Fawcett, J.*). NADERSHAW SHERIARJI *v.* SHIRINBAI BAPUJI.

87 I.C. 129=25 Bom. L.R. 839=A.I.R. 1924 Bom. 264.

———"*Subject to.*"

The effect of the words "subject to" in a deed is to introduce condition or proviso. 7 Ch. D. 29; 2 Ch. D. 744 and 87 L.T. 547, *Foll.* (*Macleod, C.J. and Coyajee, J.*). SIMON REUBEN *v.* HAJI SHAIKH MAHOMED SHASTARY. **67 I.C. 433=24 Bom. L.R. 466=A.I.R. 1922 Bom. 404.**

———"*Surface*" *includes all land except mine.*

Surface includes all the land except the mine or the soil overlying the minerals. (*Jwala Prasad and Adami, JJ.*). RAMLAL KAVIRAJ *v.* SATYANIRANJAN CHAKRAVARTY. **1921 P.H.C.C. 49=A.I.R. 1921 Pat. 379.**

———Thavanai *in bill of sale was held to mean credit period—Limitation Act, Art.* 53.

The word *thavanai* was held to mean credit period and to place the suit for the price of goods sold and purchased within Art. 53 of the Limitation Act in the following circumstances:—In the bill for piecegoods purchased, sent by the vendor to the vendee, the following words were found at the top "debit interest at ¾ per cent. per mensem after 60 days *thavanai*." The question arose whether it was a credit sale or a cash transaction when the plea of limitation was set up as a defence to the suit for the money due, and it was held to be a credit transaction.

DEED—Construction—Miscellaneous.

Per Venkatasubba Rao, J.—The expression "*Thavanai*" has various meanings in various lines of business. Evidence is admissible under S. 98 of the Evidence Act to show the meaning it bears in the particular mercantile transaction in which it was used. When any such case is before the Court, the Court is bound to inform its mind not only by reference to well-known dictionaries but also by evidence of the meaning ordinarily given to it amongst those who use it. Even if the meaning of the word is a fixed period, Proviso 5 to S. 92 of the Evidence Act makes admissible oral evidence for the purpose of showing that by custom of a particular trade an incident not expressly mentioned in a contract is a term of that contract.

Per Jackson, J.—*Thavanai* is a colourless expression meaning only period. Proof *aliunde* is necessary for showing that it was used in a particular sense. (*Venkatasubba Rao and Jackson, JJ.*). K.M.P. R. N. M. FIRM *v.* M. SOMASUNDARAN CHETTY.

85 I.C. 299=48 Mad. 275=20 M.L.W. 981=A.I.R. 1925 Mad. 161=47 M.L.J. 844.

———"*Wilful*" *in* "*wilful acts and defaults*" *is used not as a definition but as description.*

The adjective "wilful" in "wilful acts or defaults" has evidently been used as a description and not as a definition. The idea intended to be conveyed is that the default is occasioned by the exercise of volition or as result of the non-exercise of will due to supine indifference, although the defaulter knew or was in a position to know that loss or harm was likely to result. The word does not necessarily suggest the idea of moral turpitude. The element of accident or inadvertence or honest error or judgment should also be eliminated. The default must be the result of deliberation or intent or be the consequence of a reckless omission. Wilful default therefore is indicative of some misconduct in the transaction of business or in the discharge of duty of omitting to do something either deliberately or by reckless disregard of the fact whether the act or omission was or was not a breach of duty: *Forder* v. *G.W. Ry. Co.*, (1905) 2 K.B. 562; *In Re City Equitable, Fire Insurance Co.*, (1925) 1 Ch. 407. *Ref.* (*Mears, C.J. and Sen, J.*). L. HUDSON *v.* OFFL. LIQUIDATOR, DEHRADEN MOSSOORIE ELECTRIC TRAMWAY CO. **121 I.C. 693=A.I.R. 1929 All. 826.**

—Construction—Miscellaneous.

———*Document interpreted by Privy Council in certain way—Parties to document asking other relief in subsequent litigation—Interpretation is still binding on them.*

Where an agreement between the parties has once been interpreted in a certain way by the Privy Council the mere fact that in another litigation some of the parties ask for some other relief does not entitle them to ask the Courts to reconsider the document: A. I. R. 1927 Cal. 359 *Affirmed.* (*Lord Buckmaster*). HABIBULLAH SAHEB *v.* JANKI NATH ROY. **121 I.C. 236=51 C.L.J. 131=31 C.W.N. 313=31 M.L.W. 317=A.I.R. 1930 P.C. 38=58 M.L.J. 252.**

———*Memorandum of company and the powers thereunder to raise money on security of debenture relating to immovable property from Imperial Bank of India examined—Imperial Bank of India Act* (47 *of* 1920), *Sch. I, Part* 1, *sub-Cls.* (5) *and* (6).

Among the objects for which a company was "to raise money by the issue of shares preference, ordinary or deferred, debentures, debenture stock,

bonds and other securities, and to invest the moneys so raised or any part thereof, upon any of the investments specified in this Memorandum." Upon the securities of the promissory notes executed by the company in favour of its directors who in their turn endorsed them in favour of the Imperial Bank of India, and also upon the securities of debentures issued by it in favour of the Imperial Bank creating charges upon all the company's undertakings, properties and assets including its uncalled capital, the company borrowed money from the Imperial Bank of India. The position as stated in one of the debentures was this: "The company in consideration of . . . now paid on loan to them by the Imperial Bank of India against certain securities authorised by Act 47 of 1920, do hereby as an integral part and collateral security for the said loan undertake to pay . . . "

Held: (1) on construction of the clause in "Memorandum" that the company was empowered to raise money by the issue of debentures and invest the same or any part of it;

(2) that the promissory notes were the original security and the other forms of security were when the loans were given collateral to that security so as to fall within the terms of Sch. 1, part 1, Cls. 5 and 6 of the Imperial Bank of India Act. (*Costello, J.*). IMPERIAL BANK OF INDIA LTD. *v.* BENGAL NATIONAL BANK LTD. **57 Cal. 328= A.I.R. 1930 Cal. 536.**

———*Contract of guarantee—Mortgage by debtor—Creditor incurring loan for advancing it on mortgage by debtor—Loan incurred by creditor on sureties guaranteeing payment by his debtor—Contract of guarantee to certain extent for sum ultimately found due from debtor—Suit against sureties without suit on mortgage held not maintainable till debtor's property sold and found insufficient—Contract Act, S.* 126.

One *G* who was the owner of a house and very considerable landed properties was in financial difficulties and needed a loan of 40 lacs of rupees. *S* borrowed the same from a bank, for the accommodation of said *G* and the latter on receipt of the sum executed a mortgage in favour of *S* for the purpose of securing the loan of 40 lacs, undertaking to pay interest at the rate of six per cent. per annum by equal monthly instalments with quarterly rests until payment. *S* had agreed to obtain the loan amount at the instance of three persons *A*, *P* and *C* who guaranteed to *S* the payment by *G* of the said sum of 40 lacs to the limit of their aggregate liability to the extent of 18 lacs of rupees each being liable for six lacs of rupees. The deed was the deed of continuing guarantee. The deed recited among other things "that within the aforesaid limit of liability this guarantee shall extend to and be applicable to the whole debt that shall ultimately be due to you from the said *G* in respect of such advance as aforesaid "and not merely to so much whereof as shall be co-extensive with our aforesaid maximum liability thereunder." It was also agreed between *S* and the sureties that should the common liability be less than the said maximum aggregate sum of 18 lacs of rupees, the share due from each one of them, in respect thereof should be in strict proportion to the individual liability of each of the appellants as referred to above. Payment was demanded and *G* having failed a notice was served on the sureties of the demand and subsequently a suit was filed.

Held: that construing the terms of the guarantee as a whole to liability under the guarantee did not attach until the creditor had pursued their remedies under the mortgage and the proceeds of the sale were proved to be insufficient to satisfy *G*'s outstanding indebtedness to *S* in respect of the loan. (*C. C. Ghose and Page, JJ.*). CARRLARASUS PHILLIPS *v.* ALFRED ERNEST MITCHELL.

50 C.L.J. 303=A.I.R. 1930 Cal. 17.

———*Settlement-deed held to have intended to bind parties permanently for future.*

Certain Mahomedans proceeded to take out the "duldul" procession, but as it was likely to result in serious trouble the authorities collected the leaders of the various communities and effected a settlement which provided: "As often Hindus and Mahomedans and Aryasamajists carry out new sorts of processions inside the *qasba* which hurt the feelings of some party, so we agree that we will not carry out any new procession without applying beforehand to the District Magistrate and obtaining his sanction thereto. There is no necessity of taking sanction for ancient processions."

Held: that the agreement was not merely intended to settle the immediate trouble, but was intended to settle permanently the trouble that had been arising. (*Boys and Bennet, JJ.*). BABU RAM SINGH *v.* SUBHAN MOCHI.

116 I.C. 302= 1929 A.L.J. 1083=A.I.R. 1929 All. 519.

———*Property given to A with power of settlement in favour of sister's sons of A to be taken as Abhiman Putra—A executing a deed of settlement in favour of V one of the sister's sons declaring him to be her Abhiman Putra and giving all rights in the property to V—Draft settlement alleged to be prepared in favour of N younger brother of V—V performing funeral obsequies of A according to the settlement—Settlement deed produced by assignee of V—Settlement was in V's favour not as* benamidar *for N.*

The property originally belonged to one *T* who gave it to *A* by will authorising her to execute a settlement deed in favour of such of *A*'s younger sister's sons as she might take as Abhiman Putra before her death. *A* in pursuance of the power thus delegated executed a deed of settlement in favour of *V* her sister's son. The deed provided: "that I have taken you as my Abhiman Putra pursuant to the will of *T*. As I have taken you (that is *V*) as Abhiman Putra and as I have affection for you and as you have to protect me and perform my funeral ceremonies when I die I hereby give you the properties mentioned in the schedule. You shall own and enjoy the said property with all rights of deed and gift, etc. I have put you in possession of the said property and you shall pay the Sarkar kist." It was alleged that in the draft settlement instead of *V*, *N*'s his brother's name was inserted. *A* a few days before her death went to *V*'s house and died there. The settlement deed was produced by the assignee of *V*, the obsequial ceremonies were performed by *V*. A suit was brought by the assignee of *V* for the possession of the property. *N* contended that the settlement deed was *benami* in *V*'s name but really for *N*. *N*'s plea was not that *V*'s name was inserted in settlement deed by any fraud or mistake,

Held, having regard to the terms and provisions of the settlement deed *V* was taken as Abhiman Putra by *A* and he was given the property in suit. The contention that *V*'s name was put in *benami* for *N*, could not be sustained. (*Ananthakrishna Ayyar, J.*). BAGIYATHACHI *v.* NARAYANASWAMI CHETTIAR. **A.I.R. 1929 Mad. 741.**

DEED—Construction—Miscellaneous.

———A promissory note was executed to "*A*, son of the senior paternal uncle and guardian of minor *B* after deducting a sum in respect of a pro-note executed in favour of guardian of *B*,"

Held, that the real payee was the minor and not the guardian. A.I.R. 1926 Mad. 390, *Dist.* and *Foll.*; Mad. C. R. P. Nos. 222 to 224 of 1927, *Rel. on.* (*Venkatasubba Rao and Walsh, JJ.*). ALAGARSAMI NAIDU *v.* RAMANATHAN CHETTY.

115 I.C. 830=29 M.L.W. 551=
A.I.R. 1929 Mad. 284=56 M.L.J. 399.

———One *K.P.R.*, as the manager of the joint family, executed a power-of-attorney in favour of one *S*. The power-of-attorney authorised *S* to use the name of *K.P.R.*, and, amongst other things, to sell or exchange all or any of the immovable property of or to which *K. P. R.* was or should at any time thereafter become possessed or entitled, for any estate or interest whatsoever or which he then had or at any time thereafter should have power to dispose of.

Afterwards a trust deed was executed between *K.P.R.*, for himself, and as head and manager of the undivided family of the one part, and *V.M.S.* of the other part. By the terms of this deed *V.M.S.* was given "a right over," by way of trust, all the properties, assets and interests mentioned in the schedule attached thereto for the purpose of selling the same. The trust-deed contained other powers, such as management the appointment and removal of agents, including the agents then working. One *M.S.M.* was appointed co-adjutor to counsel and advise the trustee, and it was provided that the trustee should obtain the consent in writing of the co-adjutor before appointing agents, or selling or mortgaging immovable properties in connexion with the trust.

The co-adjutor mentioned in the trust-deed died and no other co-adjutor, was appointed. After this, *V.M.S.* purporting to act as trustee by virtue of the powers conferred upon him by the trust-deed, appointed the said *S* his agent to transact, conduct and manage the affairs.

S, by a registered deed, purported to sell to *E.N. M.K.* the properties in suit.

Held: that the power-of-attorney given by the trustee to *S* was of no effect, as far as the sale of immovable properties was concerned, inasmuch as the trustee had not obtained the consent in writing of a co-adjutor to the sale thereof as provided by the deed the first co-adjutor having died and no successor to him having been appointed.

Held, further on the construction of the trust-deed, that the properties in the suit were not transferred to the trustee and that the authority given to *S* prior to the trust-deed to sell the property was not terminated by reason of that trust-deed.

Held, further, that the question whether the power-of-attorney executed prior to the deed of trust was still effective at the time *S* conveyed the property to the first respondent was a mixed question of law and fact. (*Sir Lancelot Sanderson*). CHOCKALINGAM CHETTIAR *v.* E.N.M.K. CHETTYAR FIRM. **107 I C. 461=6 Rang. 113=47 C.L.J. 429=**
30 Bom.L.R. 788=32 C.W.N. 677=
27 M.L.W. 811=A.I.R. 1928 P.C. 44=
54 M. L. J. 517.

———*Meaning of words is question of fact—Their effect is one of law.*

The expression "construction" as applied to a document includes two things: first, the meaning of the words; and secondly, their legal effect. The meaning of the words is a question of fact and the effect of the words is a question of law: *Chatenay* v. *Brazilian Submarine Telegraph Co.*, (1891) 1 Q.B. 79, *Rel. on.* (*Stuart, C.J. and Pullan, J.*). RAM PAL SINGH *v.* JAI RANI SINGH.

107 I.C. 560=4 O.W.N. 1229=
A.I.R. 1928 Oudh 121.

———*Promissory note—Contract for supply of goods—Money advanced on the contract to be deducted from the price of goods supplied—Notes in the form of promissory notes, executed as further security for return of advance—Notes are not negotiable and cancellation of contract will not make them so.*

The plaintiff entered into an agreement with the defendant for the supply of 100,000 tons of rubble coal. The defendant advanced one lakh of rupees against this agreement which was to be repaid by the deduction of one rupee per ton out of the price of the coal supplied. Three notes, appearing on their face to be promissory notes, were executed in further security of the loan. No interest was to be paid on these notes. As the Government took over the control of coal, the plaintiff was unable to supply the coal, according to the contract and the promissory notes were renewed by three fresh promissory notes,

Held: that the notes were not negotiable at the inception and the cancellation of the contract subsequently would not make them negotiable. (*Ross and Fazal Ali, JJ.*). GOBINDJEE MADHAWAJEE & CO., LTD. *v.* C. J. SMITH. **113 I.C. 698=**
A.I.R. 1928 Pat. 568.

———*Construction of document includes two things namely meaning of words and its legal effect—The former is a question of fact and the latter one of law.*

The expression 'construction' as applied to a document includes two things, namely, the meaning of the words and their legal effect. The meaning of the words is in all cases a question of fact and the effect of the words is a question of law. A.I.R. 1923 Lah. 626, *Foll.* (*Addison, J.*). DEVI CHAND *v.* JAI CHAND. **90 I.C. 1047=**
26 P.L.R. 605=A.I.R. 1926 Lah. 21.

———Anubhavam *deed—Definite quantity of grain mentioned—Only that much is of permanent nature.*

Where the remuneration mentioned in the deed is a definite quantity of grain out of the produce of the lands, a strong presumption arises that only a rent charge was granted. Where therefore the *anubhavam* is recited as relating solely to the amount of 60 *paras* of the produce there is a strong presumption that only 60 *paras* is of the permanent nature. 29 Mad. 501; and 30 Mad. 203, *Ref.* (*Phillips, J.*). KALLIANI AMMAL *v.* COCHIN SIRCAR.

91 I.C. 316=22 M.L.W. 473=
A.I.R. 1926 Mad. 143.

———An application for compromise provided that after the applicant died, the respondent was to be her representative and successor and it further provided that so long as the estate in dispute was not transferred to the respondent, a certain annuity would bep ayable from the said estate to the respondent, his heirs and representatives and that the said estate would be liable for payment of the annuity,

Held: that the respondent was meant to succeed the applicant only when a transfer was made by her in favour of the respondent either by way of gift *inter vivos* or by bequest and that so long as the estate did not so vest in the respondent, he was entitled to receive the annuity and if he died before the happening of that contingency his heirs

and representatives would be entitled to the annuity. (*Stuart, C.J. and Hasan, J.*). MT. SAKINA BEGAM *v.* ALI HAIDER. **94 I.C. 1039= A.I.R. 1926 Oudh 493.**

———*Dissolution of partnership-at-will—First partner appointing agent to settle accounts with second partner—Agent not authorised to refer to arbitration—Document between Agent and second partner ending in finding of balance due from second partner to the first partner and in statement by the Agent that he received the balance in settlement of accounts—Proceeding between agent and second partner was held a settlement of accounts and not arbitration ending in award.*

One of the two partners in a partnership exercised his right under the articles of partnership to determine the partnership at will. He gave a power of attoney to another. This power of attorney did not authorise the man to appoint an arbitrator on behalf of his employer or to submit disputes to arbitration in accordance with a clause in the articles of partnership, but it authorised him, in discussion with the other partner to settle the accounts of the partnership, to collect what money he could, and to sue for any balance which might be found due on the taking of an account. The partnership having been brought to an end, proceedings took place between this man and the other partner. The document that was drawn up in the result ended in a finding of a balance in goods and in cash, due from the other partner to the one who had determined the partnership and in a statement signed by the agent, that he had received the goods and the cash in settlement. This proceeding was repeatedly called an arbitration ending in an award, by the opposite side, in the course of the litigation,

Held: on a construction of the document, and on the ground that the power of attorney authorised the agent to effect a settlement of accounts and to receive goods and cash in discharge but did not authorise him to submit the matter to arbitration, that the proceeding between the agent and the other partner was a direct settlement of accounts of all questions arising between the two partners and not an arbitration of a dispute followed by an award pronounced by the arbitrators. (*Lord Sumner.*). AHMED KHAN *v.* ALI EBRAHIM.

27 Bom.L.R. 746=A.I.R. 1925 P.C. 177.

———*Defendant agreeing to work the plaintiff's railway—Defendant was held only plaintiff's agent.*

Where the defendant-company were, according to the agreement between the parties, to maintain, manage and work the plaintiff's railway system and where for the purpose of the contract the plaintiff was to hand over to the defendant company the railway system together with the rolling stock, plant and machinery belonging thereto, where the capital money required was to be provided by the plaintiff, where all expenses were to be sanctioned by the plaintiff, where at the end of the period of contract, the defendant company was to hand over the possession of the undertaking of the railway to the plaintiff,

Held: that the defendant-company was no more than an agent of the plaintiff and that stores purchased by the defendant-company for the use of the undertaking was the property of the plaintiff,

Held: further, that that the provision in the contract, for the appropriation of one-twentieth of the profits to the defendant company did not make the parties partners, but the appropriation was only a remuneration for services rendered by the defendant company as agent of the plaintiff. (*Sir Lawrence Jenkins*). SECRETARY OF STATE *v.* G. I. P. RAILWAY. **88 I. C. 107=30 C. W. N. 76= 52 I. A. 167=2 O. W. N. 379=1925 M. W. N. 358= 49 Bom. 320=27 Bom.L.R. 810= A.I.R. 1925 P.C. 103=48 M.L.J. 539.**

———*Manager of property to pay annuities to owners—Manager's interest was held more than a right to future maintenance.*

Where under an arbitration award a man's property was to be construed the property of two other persons, but at the same time the owner was allowed to remain in possession of the property and to manage it and collect income and out of the income he was to pay a certain sum yearly to each of the other two persons,

Held: construing the award as a whole, that what was reserved to the owner was something more than a right of future maintenance and that his interest in the property was attachable in execution. (*Ryves and Daniels, JJ.*). MAHFUZ ALI *v.* RADHA KISHEN. **85 I. C. 477=23 A. L. J. 149= 6 L. R. A. Civ. 133=A. I. R. 1925 All. 237.**

———*Deed specially relating to one kind followed by other kinds and then a general clause—General clause refers to kinds immediately before it.*

Where in a deed there is a sum which is specifically dealt with, and afterwards special terms followed by a general clause, the general clause should be taken to be referable to the subject-matter specifically referred to immediately before it, or, in other words, the rule which is to be applied is the rule *ejusdem generis*. Where a lease provided that the rent to be paid by *darpatnidar* was fixed for ever but there was a further provision that "the road and public works cesses which are now fixed or which may, in future, be fixed and any other new amount or payment that may be fixed, also whatever is payable by the *darpatnidar* according to law, these sums the *darpatnidar* is liable to pay to us over and above the *jama*,"

Held: that the rent, as rent, was fixed for ever, but that the road cess and public works cess or any other rate of assessment of the same kind whether payable now or payable in the future will be paid by the *darpatnidar* to the *patnidar*. But it was not permissible for the landlords to vary the rent which had been fixed under the tenancy by applying to the rent the general words which follow the road cess and public cess, *etc.*, "and any other new amount or payment that may be fixed." (*Suhrawardy and Page, JJ.*). SRISH CHANDRA PAL CHOWDHURY *v.* DEBENDRA NATH SINGH ROY. **79 I. C. 369= A. I. R. 1925 Cal. 522.**

———Where among other terms the award of arbitration between D and K declared that K should be in possession of property in dispute but should not alienate it that he should pay maintenance to D and that so long as he did so D could not have the arrangement set aside and where K alienated in spite of the award but continued to pay maintenance,

Held: that D's cause of action arose only after K's death. (*Mukerji, J.*). MT. DURGA KUNWAR *v.* MT. CHINNA KUNWAR. **78 I.C. 633= 5 L.R.A. Civ. 276=A. I. R. 1924 All. 862**

———*Practice—Fact and Law—Interpretation of document is a question of law.*

Interpretation of the terms of a deed is a question of law. (*Kinkhede, A.J.C.*). TULARAM *v.* MT. SUMRATI. **79 I.C. 621=A.I.R. 1924 Nag. 422.**

———Where a lease passed a certain area of land "as described in the schedule" thereto and in the

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schedule the leased land was described as " bounded on the south by the border of the limit of mouza Fatehpur as per thak,"

Held: that the words " as per thak" meant " as per thak demarcation" and not as per "thak map." (*Das and Macpherson, JJ.*). SHASHI BHUSAN BANERJI *v.* RAMJAS AGARWALA. **83 I.C. 205= 3 Pat. 85=A.I.R. 1924 Pat. 402.**

———*Words in deed was construed with reference to the context.*

A deed recited that there was originally one house and it then proceeded that three houses were afterwards built anew and "are hereby sold to you with the right of ingress and egress through the main door and given over to your possession." Then followed the particulars of boundaries. Then came a clause about the Chowk. It ran "there is an open Chowk belonging to those three houses and in front of the door of my other house. All may use the said Chowk according to the limits of their respective houses and inmates of all the four houses have the right of egress and ingress through the main Khadki door,"

Held: that the words 'Open Chowk belonging to these three houses' do not mean, having regard to the context, that the Chowk was to be in the exclusive ownership and possession of the three houses. The words 'all may use the said Chowk' meant all four houses and there they have the same meaning as the inmates of all the four houses referred to in the next sentence. The word according to the limits of their respective houses meant that all might use the Chowk and this means the whole Chowk. (*Marten and Fawcett, JJ.*). SHA BULAKHIDAS *v.* SHA GANPATRAM. **77 I.C. 412= A.I.R. 1923 Bom. 281.**

———The plaintiffs claimed under a policy, the conditions of which provided (1) that if the claim was made and rejected and an action or suit was not commenced within three months after such rejection all benefit under the policy would be forfeited, (2) that if any difference arose as to the amount of any loss or damage such difference should independently of all other questions, be referred to arbitration and that it should be a condition precedent to any right of action or suit upon the policy, that the award of the arbitrator or umpire of the amount of the loss if disputed should be first obtained.

Held: that when the defendants rejected the claim the plaintiffs had a right of action in order that it might be decided by the Court whether such rejection was right or wrong and it was only in the event of that question being decided in favour of the plaintiffs that it would become necessary that the amount of loss or damage should be ascertained. (*Macleod, C.J. and Crump, J.*). E. S. INSURANCE CO. *v.* DINANATH. **72 I.C. 266= 25 Bom. L.R. 164=47 Bom. 509= A.I.R. 1923 Bom. 249.**

———*Date of payment—Rate of exchange is one calculated at due date.*

Where according to the terms of the bills they were to be paid at the current rate for Bank Demand Drafts at date of payment.

Held, the rate of exchange should be calculated at the due date. (*Macleod, C.J. and Crump, J.*). MULLAR MACLEAN & Co. *v.* KADERBHOY M. ESMAILJI. **72 I.C. 246=25 Bom. L.R. 177= 47 Bom. 493=A.I.R. 1923 Bom. 241.**

———The trust deed ran as follows :—

" That the trustees shall be at liberty to apply to the Civil Court having jurisdiction over it for

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an extinction of trust if they after careful management and strenuous efforts find that they are unable to pay up the debts by resorting to any form of transfer hereinbefore provided in a manner which may be advantageous to the estate of my son the aforesaid *Sharf-uz-zaman*."

Held, the paragraph meant that the trust would end when the trustees became insolvent *qua* trustees, and was not a delegation of power reserved by the donor to put an end to the trust. (*Ashworth and Simpson, A.J.Cs.*). SHARF-UZ-ZAMAN *v.* SIR HENRY STENYON. **70 I.C. 253=25 O.C. 291=. 10 O.L.J. 491=A.I.R. 1923 Oudh 80.**

———*Probate and Administration Act (V of 1881), S. 90—Hindu widow as executrix—Conveyance reciting both capacities, must be taken to be, as an executrix.*

Section 90 of the Probate and Administration Act applies to all Hindu widows, and under that section a Hindu widow who is appointed as an executrix, is entitled to sell as executrix the property left by her husband, if no restriction is imposed on her powers of disposing of the property by the Will which appointed her executrix. A sale by a Hindu widow, who being the executrix of her husband's Will sells a part of her husband's estate and the deed does not expressly say in what particular capacity she sells, but merely recites all her capacities and conveys the whole property and all the title possessed by the widow in the property, must by taken to be effected by the widow in her capacity of executrix of her husband's Will. (*Kanga, J.*). MITHABAI *v.* MEHERBAI. **64 I.C.397= 46 Bom. 162=23 Bom. L.R. 858= A.I.R. 1922 Bom. 179.**

———*Two ladies to hold certain property for life, and the plaintiff to get it after death of both of them—On death of one of the ladies, plaintiff cannot claim half the property.*

Where a compromise provided that two ladies should get and hold certain property for their lives and after the death of both of them the plaintiff should get the same,

Held, that the ladies are joint tenants of the property and the plaintiff is not entitled to recover possession of any portion of the properties until the death of both the ladies. After the death of both of them the plaintiff will take possession of the lands. (*Dawson Miller, C.J. and Coutts, J.*). CHUNDRA MOHAN DATTA *v.* SASIBALA DASSI. **65 I.C. 277=1922 P. H. C. C. 39= 3 Pat. L.T. 623=A.I.R. 1922 Pat. 68.**

———*Arbitration — Submission to arbitration — Agreement between buyer and seller stating that all the terms of contract with importing firm to apply— Arbitration clause in latter contract referring to disputes arising under that agreement alone—Arbitration clause would not apply to agreement between buyer and seller—Deed—Construction.*

The contract between the parties contained a clause "all terms according to the importing firm." The contract with the importing firm contained a clause "Any dispute or claim under this contract is to be settled by . . ."

Held, that the terms of the contract with the importing firm should be read *verbatim* into the contract between the parties and as the arbitration clause referred to disputes arising under the contract with the importing firm and not under the contract between the parties, the arbitration clause was not applicable to disputes under that contract. *Temperley Steamshipping Co.* v. *Smyth & Co.*, (1905) 2 K. B. 791, *Dist.*; *Thomas & Co., Ltd.* v. *Portsea Steamship Co., Ltd.*, (1912) A. C. 1 and

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Hamilton & Co. v. *Mackie and Sons*, (1889) 5 T.L.R. 677, *Foll.* (*Mookerjee and Fletcher, JJ.*). CHATTURBHUJ CHANDAN MULL *v.* BASDEO DASS DAGA.
60 I.C. 909=33 C.L.J. 145=A.I.R. 1921 Cal. 767.

———The question of proper construction of a document is often a mixed question of law and fact. (*Bucknill, J.*). ABDUL RAHIMAN *v.* WALI MAHAMAD. **65 I.C. 224 (Pat.).**

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———All the stamps on which a document is written need not have been signed by the executant. (*Jailal, J.*). MATHRADAS *v.* SHAMBOO NATH,
112 I.C. 843=A.I.R. 1929 Lah. 203.

———Where a deed written in English was signed by a lady who did not know English and the deed deprived her of her legal rights of succession and degraded her status:

Held: that the deed was no bar to her rights under the law. (*Lord Shaw*). A. DINOHAMY *v.* V. L. BALAHAMY. **104 I. C. 327=4 O.W N. 759=A.I.R. 1927 P.C. 185=54 M.L.J. 388.**

———*Legal Practitioner—Signing a document, fixes signatory with knowledge of contents—A Vakil so signing cannot plead that he did not know the contents.*

A man who signs his name to a document makes himself thereby in every way as responsible for it as if he was the original drafter of it. If it turns out that the document is one which no man acting honestly could in the circumstances have drafted, then he will be bound to answer for every word, line, sentence and paragraph, and it will not be the least defence that some body else wrote it out and he only signed it. Signature implies association and carries responsibility.

If a legal practitioner puts his signature to a document he will be deemed to have read it and to carry it in his recollection to the extent that an ordinarily competent, careful and reasonable man would carry it and he will be bound by all the implications arising from it just as much as if he had written every word of it with his own hand. Practitioners must realize that if they make or associate themselves with statements which they know are dishonest and untruthful for the purpose of misleading the Court they must on proof of misconduct bear personal responsibility and that it will be no defence for them to say that it was done in the interests of the client or at his instigation or at the instigation of a colleague at the Bar, or that they were so negligent in the matter that they did not read the document or consider it at all. (*Mears, C. J., Lindsay and Dalal, JJ.*). AHMAD ASHRAB, VAKIL—In the matter of.
98 I.C. 493=48 All. 542=27 Cr.L.J. 1373=A.I.R. 1927 All. 45.

———*Person signing for illiterate executant at his request—Signature is with executant's authority.*

Where a person signs a document for an illiterate executant at his request with a pen touched by the latter, the signature must be held to be made under the authority of the executant. (*Misra, J.*). BHAGWAT PRASAD *v.* SHER KHAN.
94 I. C. 985=A.I.R. 1926 Oudh 489.

———*Different ink used for attestation—Attestor cannot be presumed to be absent.*

The fact that the signatures of the witnesses appear to be written with a different ink and pen from that used to write the body of the document does not necessarily show that the witnesses were not present when the document was executed.

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(*Le Rossignol and Fforde, JJ.*). SARDARI MAL *v.* ABDUL SAMAD. **90 I.C. 39=1 L.L.J. 208=26 P.L.R. 506=A.I.R. 1925 Lah. 430.**

———*Execution by weak-minded person—Strict proof of knowledge of contents is necessary.*

In a case where a deed is executed by a weak-minded person, a strong proof is needed to prove that he was explained the contents of the deed and he fully understood them. (*Kinkhede, A.J.C.*). KRISHNABAI *v.* KESHAO RAO. **83 I.C. 253=A.I.R. 1925 Nag. 245.**

Semble. Mere name of firm in the heading of letter is good signature. (1 All. 683; 6 Cal. 340, *Foll.*) (*Daniels and Neave, JJ.*). UMA SHANKAR *v.* GOBIND NARAIN. **80 I.C. 6=5 L.R.A. Civ. 638=22 A.L.J. 807=46 All. 892=A.I.R. 1924 All. 855.**

———"Execution" designates the whole operation including signing by the executant and attestation by the witnesses. (*Kinkhede, A.J.C.*). BALIRAM *v.* KAMALJA. **78 I. C. 330=A.I.R. 1924 Nag. 367.**

———Registration Act, S. 33 (2)—*Pardanashin* Lady—Power-of-Attorney by—Attestation by Sub-Registrar—Presumption of voluntary execution arises—Power to sign bond does not imply power to enter into transaction but power to execute document does. (*Coutts and Das, JJ.*). RAM LAL SINGH v. MT. BIBI SHAHRUNNISSA.
67 I.C. 315=3 Pat. L.T. 442=A.I.R. 1922 Pat. 559.

———Where it has been impossible to decide which of two mortgages bearing the same date was executed first it is not open to either of the mortgagees to claim priority over the other but both must rank *pari passu* as if both of them had been executed at the same time. (*Wallis, C.J. and Oldfield, J.*). KUTTI THEVAN *v.* RAYAPPA GOUNDEN.
65 I.C. 961=14 L.W. 422=1921 M.W.N. 703=A.I.R. 1921 Mad. 693.

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———Addition of two attesting witnesses made subsequent to the execution of an improperly stamped promissory note in order to convert it into bond and thereby opening up the possibility of suing upon it on payment of penalty is tantamount to material alteration which invalidates the instrument and destroys the right of action on it: 38 Mad. 746, *Ref.* 43; Mad. 703, *Dist.* (*Hilton, J.*). MANGAL DAS *v.* JASWANT SINGH.
A.I.R. 1930 Lah. 959.

———*Court should consider whether alteration is fraudulent or innocent—Alteration if not fraudulent amendment of plaint may be allowed—Plaintiff may be allowed to fall back on the original cause of action.*

Where there is no cause of action apart from the inadmissible document, the whole claim fails with the inadmissible document. Where there has been a material alteration in the document, the further questions for the consideration of the Court are whether the alteration is fraudulent or innocent and whether the plaint is or can also be based on the original loan itself and evidence exists *aliunde*. Where the alteration is fraudulent, the Courts will not allow the plaint to be amended and the plaintiff to fall back on the original cause of action. But where the alteration, though material, is innocent and the plaint is based on the original cause of action as well as on the document altered, the claim if properly proved, can be allowed on the original cause of action. Or if the original plaint is not on the original cause of action, it is open to the plaintiff to apply and the Court to consider whether the

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plaintiff should be allowed to amend it: (*Case-law discussed.*) (*Madgavkar, J.*). RAVJIBHAI NATHABHAI *v.* RANCHHOD RAGHUNATH.

31 Bom. L.R. 1262=A.I.R. 1930 Bom. 66.

———*Date of document is material part of it and party altering it with fraudulent object cannot rely upon it.*

The date of a document is a material part of it and the party who alters it for a fraudulent object cannot be allowed to avail himself of the document: 91 P.R. 1900, *Rel. on.* (*Bhide, J.*). BALMUKUND *v.* PURSOTAM DAS. **121 I.C. 73=31 P.L.R. 219=A.I.R. 1930 Lah. 548.**

———*Instrument purposely altered by person in lawful possession in material part is void and no suit can be brought on it nor can it be used in defence.*

Wherever any instrument is purposely altered by a person in lawful possession of it in a material part of it the instrument is void for the purpose of enabling any person to sue on it or defend himself by using it as a direct defence depending on its obligatory force as an instrument: *Master* v. *Miller*, 4 T.R. 320, *Foll.* (*Rankin, C.J. and Cammiade, J.*). HAREN CHANDRA *v.* KISHORI LAL.

50 C.L.J. 173=A.I.R. 1929 Cal. 789.

———Without fraud or wrong a document cannot be materially altered after its execution: *Doe* v. *Catomore*, 16 Q.B. 745 and A.I.R. 1924 Nag. 250, *Rel. on.* (*Kinkhede, A.J.C.*). SUNDERABAI *v.* BAPUNA. **116 I.C. 65=A.I.R. 1929 Nag. 305.**

———When a deed is altered on a material point by the party in whose favour it is executed it thereby becomes void: *Suffel* v. *Bank of England*, (1892) 9 Q.B.D. 555, *Foll.*: A.I.R. 1926 Cal. 831, *Dist.* (*Duval, J.*). DILJAN *v.* MAQBULKHAN.

107 I.C. 475 (Cal.).

———*Negotiable Instruments Act, S. 87—One executant forging signature of the other executant on pronote to creditor's knowledge—Creditor cannot recover.*

Where a pro-note purported to be executed by two persons, but it was found that one of the executants had forged the signature of the other, and the creditor was aware of this fact,

Held, there was material alteration and creditor could not succeed on the note: 26 M.L.J. 257 and C.R.P. 601 of 1912 (Mad.). *Foll.*; A.I.R. 1925 Mad. 929, *Not foll.* (*Wallace, J.*). MOHIDEEN PILLAI *v.* JAMAL MD. JAMALUDDIN. **112 I.C. 404=1928 M.W.N. 591=A.I.R. 1928 Mad. 1092.**

———*Changing of date of a surety bond is material alteration avoiding the bond.*

Prima facie, the date when a particular document is executed would be clearly material; and the *onus* would be on the person making the alteration to show that so important an alteration, on the particular facts of any case, was not material. It is not merely the actual final effect on a consideration of all the facts and the law in each case, that decides whether the alteration is material. An alteration which may affect the contract which the instrument contains, is also material.

Where a creditor altered the date of the surety bond given on behalf of the debtors being apprehensive of the bar of limitation,

Held, that the alteration was a material one and avoided the document. (*Marten and Madgavkar, JJ.*). NAMDEV JAYRAM *v.* SWADESHI VYAPARI MANDALI LTD. **98 I.C. 721=28 Bom. L.R. 944=A.I.R. 1926 Bom. 491.**

———*Mortgage-deed invalid because of subsequent alteration—Mortgagee can recover upon the original consideration.*

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Although a deed of mortgage is invalid by reason of subsequent alterations made in it, the admissions in the deed may be referred to for proving the original debt and the circumstances under which the original debt was contracted, and the plaintiff can recover upon the original consideration: 33 C. 812, *Dist.* (*Case-law discussed*). (*Chatterjea and Page, JJ.*). PARBATI CHARAN *v.* AMARENDRA NATH. **96 I.C. 97=53 Cal. 418=A.I.R. 1926 Cal. 831.**

———*Altered document not forming basis of action—Obligation evidenced by the deed is enforceable.*

The rule that there is no right of action on a document which has been materially altered after execution and without the privity of the party to be affected by it, and that no decree should be passed in a suit brought on such a document despite the fact that consideration for the document has been admitted by the defendant has no application where the obligation to be enforced does not arise under the altered instrument and the instrument is produced merely as a piece of evidence in proof of the obligation. 25 Bom. 616 and 9 C.W.N. 695, *Foll.* A.I.R. 1924 Cal. 452, *Cons.* (*Wadegaonkar, A.J.C.*). TAPIRAM *v.* JUGAL KISHORE.

92 I.C. 305=21 N.L.R. 169=A.I.R. 1926 Nag. 209.

———*Even alteration prejudicial to maker and beneficial to opponent if it affects integrity of deed is material alteration.*

The test of material alteration is not necessarily whether the pecuniary liability of one of the parties have been increased by the change; it is of no consequence, whether the alteration would be beneficial or detrimental to the party sought to be charged on the contract. The important question is whether the integrity and identity of the contract have been changed.

The rate of interest to be charged is one of the most important conditions in any contract of borrowing or lending. So an alteration in the terms of this very important provision must be deemed to be a material alteration. 33 C. 812, *Foll.* (*Rutledge, J.*). GODLA THAMMYA *v.* NARASIMULU. **89 I.C. 657=3 Rang. 227=A.I.R. 1925 Rang. 283.**

———*Claim based on a bond materially altered is untenable—But one based on an original contract, not merged in the bond, may be decreed.*

Per *Newbould, J.*:—Where there is a material alteration of the bond the claim based on it should not be decreed. (1 Sm. L. C. 767, *Foll.*). An implied contract to repay money lent arises from the fact that the money is lent even though no express either written or verbal is made to repay it. The material alterations of a written contract destroy the original deed if the debt is merged in the written contract. If the written contract is a negotiable instrument this should usually happen. But in the case of a simple bond the alteration prevents a suit being based on the bond and the question whether a suit would lie on the original debt depends on whether there is a separate contract which can be proved apart from the bond.

Per *Rankin, J.*:—An independent cause of action must be shown if the doctrine 'that no suit can be decreed on the basis of a bond' materially altered is not to take effect. (*Newbould and Rankin, JJ.*). DULA MEAH *v.* MANHAVI ABDUL RAHAMAN.

81 I.C. 641=28 C.W.N. 70=A.I.R. 1924 Cal. 452.

———*Evidence Act, S. 91—Claim based on a bond materially altered is untenable—But one based on an original contract, not merged in the bond, may be decreed.*

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Per *Newbould, J.* :—Where there is a material alteration of the bond the claim based on it should not be decreed. (1 Sm. L.C. 767, *Foll.*). An implied contract to repay money lent arises from the fact that the money is lent even though no express promise either written or verbal is made to repay it. The material alterations of a written contract destroy the original debt if the debt is merged in the written contract. If the written contract is a negotiable instrument this would usually happen. But in the case of a simple bond the alteration prevents a suit being based on the bond and the question whether a suit would lie on the original debt depends on whether there is a separate contract which can be proved apart from the bond.

Per *Rankin, J.* :—An independent cause of action must be shown if the doctrine 'that no suit can be decreed on the basis of a bond materially altered' is not to take effect. Verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not even admissible in evidence. Moreover where there is an express promise an implied promise will not be inferred. (*Newbould and Rankin, JJ.*). DULA MEAH *v.* ABDUL RAHAMAN. **81 I.C. 641= 28 C.W.N. 70=A.I.R. 1924 Cal. 452.**

———*Burden as to time of alteration lies on him who puts the same in evidence—Alteration in material particulars avoids the deed—Evidence Act, S.* 101.

A writing which is intended to be under hand only can be altered by erasure or interlineation or otherwise before it is signed but it lies upon the party who puts the instrument in suit to explain the alteration and show *when* it was made. An alteration made while the instrument is in the custody of one party although not made with his knowledge or consent has the same effect in avoiding the instrument as if made by him, on the principle that he who has the custody of an instrument made for his benefit is bound to preserve it in its original state. (*Kinkhede, A.J.C.*). KANNAYALAL TARACHAND *v.* SITARAM TUKARAM. **81 I. C. 847=20 N.L.R. 76= A.I.R. 1924 Nag. 250.**

———*Non-material alteration does not vitiate document.*

Alteration which is not material does not vitiate a document. (*Broadway and Martineau, JJ.*). MADAN LAL *v.* LABHU RAM. **67 I.C. 431= A.I.R. 1922 Lah. 421.**

———*Alteration not material—Validity of deed is not affected.*

A document is not vitiated and deprived of its effect by an alteration which is not material. (*Hallifax, A.J.C.*). GANGA PRASAD *v.* MOTIRAM. **68 I.C. 268=A.I.R. 1922 Nag. 191.**

———*Material alteration must be one which changes legal effect of document.*

A material change or alteration of an instrument is one which causes it to speak a language different in legal effect from what it originally spoke. Accordingly, any act which changes the legal effect of the instrument, that is, which changes the legal identity or character of the instrument, either in its terms or in the relation of the parties to it, is a material change or technically an alteration. It is the effect of the act upon the instrument and not the particular manner in which it is done, that is material, and hence an alteration to be material must be an actual alteration, whether by erasure, interlineation, addition or substitution of material matter affecting the identity of the instrument or contract; it must

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also be in the material part of the instrument and must affect the rights and obligations of the parties thereto. To constitute an alteration material, it is enough that, if the instrument were genuine, it would operate differently from the original. (*Mookerjee and Buckland, JJ.*). KRISHNA KISOR *v.* NAGENDRABALA. **66 I.C. 694= 34 C.L.J. 33=25 C.W.N. 942=A.I.R. 1921 Cal. 435.**

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———*Parties to deed not accepting all terms—No claim for rectification by either—Deed must be given effect to as it stands.*

Neither of the parties to a document was content with it: one alleged that it was unauthorized in part and the other alleged that it was agreed upon through mistake, but no claim for rectification was made by either,

Held, that the deed must be construed and given effect to as it stood even if the result be that the document is found to embody a bargain intended by neither of the parties to it: *Stuart* v. *Kennedy* No. 2, 15 App. Cas. 108, *Rel. on.* (*Lord Blanesburgh*). SUNITIBALA *v.* MANINDRA CHANDRA. **A.I.R. 1930 P.C. 217.**

———A recital in a deed of recent date executed by a Hindu widow is no evidence of the fact recited. (*Sen and Niamatullah, JJ.*). GAJE SINGH *v.* MT. UCHHABA. **119 I.C. 514=1929 A.L.J. 309= 10 L.R.A. Rev. 138=A.I.R. 1929 All. 223.**

Kumaraswami Sastri, J.—It is usual, when more than one person execute a document alleging that money was borrowed to pay debts, for the lender to get a general statement that the debts were the debts of the executants and not to give room for future contention by stating what the debts of each of the executants were. (*Kumaraswami Sastri, Odgers and Jackson, JJ.*). KRISHNAYYA RAO *v.* RAJAH OF PITTAPUR. **116 I.C. 673=51 Mad. 893= 28 M.L.W. 422= A.I.R. 1928 Mad. 994=55 M.L.J. 894 (F.B.).**

———*Endorsement of Registering officer and recitals as to receipt of consideration is strong but rebuttable evidence of contents.*

The recital in a sale-deed that the vendor had already received an advance, before executing the sale, of a sum of Rs. 10,000, and a similar admission by him at the registration of the document incorporated in the endorsement made by the registering officer is of great weight and must prevail unless its effect is negatived by other circumstances such as absence of writing evidencing the payment, non-production of account books and the like. 29 All. 184 P.C. *Rel. on.* (*Wazir Hasan and Gokaran Nath Misra, JJ.*). SYED HASAN BOGAR *v.* SHEO NARAIN SINGH. **91 I.C. 917= 1 Luck. 7=3 O.W.N. 25=13 O.L.J. 178= A.I.R. 1926 Oudh 81.**

———*Recitals in a deed cannot be relied on except between parties to it for proving assertions containing them.*

Under ordinary circumstances and apart from Statute, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them cannot be relied on for the purpose of proving assertions of fact which they contain. 44 Cal. 186 (P. C.), *Foll.* (*Simpson, A. J. C.*). BHAGWATI PRASAD *v.* LALL BAHADUR. **90 I.C. 404=A.I.R. 1926 Oudh 33.**

———*Proof—Deed duly proved by attestors—All conditions therein must be deemed as proved—Party objecting to any condition therein must raise a plea and prove it.*

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Where a mortgage-deed was produced by the mortgagee and duly proved, all the conditions contained in the mortgage-deed must be taken to have been proved. If either party wants to impugn any condition contained in the mortgage-deed it is his duty expressly to raise a plea to that effect and to establish that plea. (*Jai Lal, J.*). RAM CHAND *v.* NANAK CHAND. **91 I. C. 762=7 L.L.J. 417=26 P.L.R. 299=A.I.R. 1925 Lah. 580.**

—The parties to a deed are bound by recitals in the deed. (*Mookerjee and Rankin, JJ.*). BANK OF BENGAL *v.* WILLIAM ARRATOON LUCAS. **81 I.C. 471=51 Cal. 185=28 C.W.N. 497=41 C.L.J. 1=A.I.R. 1924 Cal. 578.**

———*Hindu Law — Alienation—Legal necessity—Recital is evidence of representation—Recital without any other circumstances is not sufficient to support deed.*

In the case of a document of considerable antiquity, a recital in the document is clear evidence of representation to the lender and if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed the truth of the representation, then, when proof of actual inquiry had become impossible, the recital coupled with the circumstances, would be sufficient evidence to support the deed. But if other circumstances, besides recitals, are wanting, it must be held that the party on whom the burden of proof lay has failed to discharge the burden of proof of the legal necessity. (*Lindsay and Stuart, JJ.*). SURJU PRASAD *v.* MUHAMMAD SHAKUR. **66 I.C. 564=A.I.R. 1922 All. 126.**

—Rights of parties to.

—Whenever one person gives another something instead of what he has got, both parties take the risk of whether the thing that is given will keep, or lose, or enhance it value. (*Viscount Dunedin*). BOMANJI ARDESHIR *v.* SECY. OF STATE. **114 I.C. 1=31 Bom. L.R. 256=53 Bom. 230=56 I.A. 51=1929 A.L.J. 47=49 C.L.J. 179=33 C.W.N. 293=A.I.R. 1929 P.C. 34.**

———*Forfeiture clause in a deed illegal—Executant* pardanashin *lady made to sell her property on the strength of the clause—Clause must be enforced—Evidence Act, S.* 115—Pardanashin *lady.*

Where the executant is a *pardanashin* and uneducated lady and she is made to agree to sell her property on the understanding that a forfeiture clause will be operative in her favour and it is not explained to her that such a forfeiture was illegal and unenforceable, then if the defendant wishes to stick to the transaction he cannot be allowed to repudiate the forfeiture clause on the strength of which the executant's consent had been obtained. (*Sulaiman and Kendall, JJ.*). ALTAF BEGAM *v.* BRIJ NARAIN. **116 I.C. 855=51 All. 612=1929 A.L.J. 367=A.I.R. 1929 All. 281.**

———*Purchaser under sham transaction gets no interest.*

A person who claims under a sham transaction, which is not transaction at all, has no interest in the property conveyed to him. (*Devadoss, J.*). VELAYUDHAN PANDARAM *v.* NALLATHAMBI NADAN. **111 I. C. 690=A.I.R. 1928 Mad. 541.**

———*Transfer as guardian of person who is really major—Major is not bound by it.*

Where it was found that the appellants were majors at the time the deed of gift was executed and that they were wrongly described as minors in the deed of gift in question,

Held, that they never joined in executing the deed of gift and cannot be bound by any alienation

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effected in favour of the plaintiff-respondent's father without their permission and consent. (*Moti Sagar, J.*). CHHITRU *v.* CHHAJJU. **A.I.R. 1923 Lah. 611.**

———*Liability of parties are determined by terms of deed.*

A deed of compromise ran as follows:—

"As to the amount of Income Tax, Excess Profits Tax and Super tax for 1919-20 to be paid by Bakhsh Elahi and Co. and Karam Elahi Muhammad Shafi, after the tax has been deposited in Government Treasury, the liability will be shared by party No. 1 and party No. 2, among themselves in proportion to their shares for ¾th of a year or 9 months." Party No. 1 paid in November, 1920 a sum of Rs 1,22,500 as Excess Profits Tax for the year 1918-19; and they claimed that party No. 2, respondent should pay their share of this amount for 9 months,

Held, the liability of the respondents is circumscribed by the terms of agreement and that, that paragraph as it stands does not make them liable for payment of any portion of the Excess Profits Tax for 1918-19. The onus was on the appellants to prove that respondents were liable. (*Shadi Lal, C.J. and Abdul Qadir, J.*). MOHAMAD TAQI *v.* ABDUL RAHIMAN. **79 I.C. 281=A.I.R. 1923 Lah. 151.**

———*Successive mortgages—Right of parties must be governed from covenants as they finally stand—Covenants to pay earlier deed "along with" later deed 'means not before.'*

Where there are successive mortgages the later ones qualifying or restricting the terms and conditions entered into in the preceding one, the rights of the parties must be governed so far as may be by the covenants as they ultimately stand.

A covenant postponing the payment of earlier deeds till the last deed is paid does not prevent the payment of the latter after it falls due, before the earlier ones are paid.

Per *Ashworth, A.J.C.*:—In money deeds where it is provided that a deed of further charge shall be paid up along with an earlier deed the meaning is nothing more than that it shall not be paid up before. (*Kanhaiya Lal, J. C., Daniels and Ashworth, A.J.Cs.*). SARSUTI PRASAD *v.* EHTISHAM ALI. **77 I.C. 310=25 O. C. 349=A.I.R. 1923 Oudh 123 (F.B.).**

———*Stranger to deed cannot plead condition precedent—Evidence Act, S.* 92.

Per *Das, J.*:—A separate oral agreement constituting a condition precedent to the attaching of any obligation under the document could be proved only by the vendor or his representative-in-interest. 27 All. 271, *Foll.* (*Dawson Miller, C J., Das and Adami, JJ.*). BHONU LAL CHOWDHURY *v.* W. A. VINCENT. **65 I.C. 882=3 Pat. L.T. 653=A.I.R. 1922 Pat. 619 (F.B.).**

———*Landlord and Tenant—Tenant encroaching on landlord's adjoining waste—Landlord can either treat him as trespasser, or as tenant of the additional land—Provision in* kabuliyat *for paying additional rent for additional land found in tenant's possession does not disentitle landlord to eject the tenant.*

If a tenant encroaches upon the adjoining waste land of his landlord the landlord is entitled to treat him either as a trespasser or as a tenant. If the landlord treats him as a trespasser, the landlord is entitled to sue him in ejectment within 12 years from the date when he becomes aware of the encroachment. If the landlord treats him as a tenant, then he becomes liable to pay additional rent.

DEED—Rights of parties to.

Where a *kabuliyat* provided: "If the lands in my possession be surveyed at the instance of the landlord I shall abide by the same and I shall take settlement at the rate then prevailing of all excess lands of whatever kind, found to be in my possession as a result of that survey, whether lying inside or outside the boundaries mentioned in the *kabuliyat* and shall also pay the rent at the aforesaid rate for the period during which lands in excess of the lands mentioned in the *kabuliyat* have been enjoyed secretly."

Held, that the clause did not entitle the tenant to annex the adjoining land and retain possession thereof against the wishes of the landlord. (*Mookerjee and Panton, JJ.*). ABDUL HOSSAIN *v.* AFSARUDDIN. **67 I.C. 639=34 C.L.J. 481= A.I.R. 1921 Cal. 83.**

———*Landlord and tenant—Breach of covenant by tenant*—Kabuliyat *providing remedy by ejectment—Landlord is not deprived of right to compensation.*

Where the *kabuliyat* provides a remedy (by ejectment) in case of breach of covenant by tenant, that is not the only remedy and there is no hing to take away the right to compensation on breach of covenant under the general law. (*Chatterjea and Newbould, JJ.*). KRISHNA DAS ROY *v.* MOHENDRA CHANDRA SIL. **62 I.C. 779=25 C.W.N. 930= A. I. R. 1921 Cal. 62.**

—Validity.

———The mere defect in respect of the seal will not make a document for all purposes bad even if it was intended to be under seal. Where an agreement between a company and a banian was reduced to writing and though it was not under seal it was acted upon by the parties as a perfectly valid agreement.

Held: that the agreement was not rendered unenforceable. (*Rankin, C. J. and Buckland, J.*). PROBODH CHANDRA MITRA *v.* ROAD OILS, LTD. **34 C. W. N. 570.**

———Gift—Deed *farzi* and fictitious—No title passes to ostensible transferee—Property continues in donor and is liable to attachment—Transfer by member of joint Hindu family which he is incompetent to make—Transfer is voidable by other members but stands as long as not avoided—Transfer with intent to defeat or delay creditors—Transfer is voidable under T. P. Act, S. 53. (*Sulaiman and Kendall, JJ.*). MT. SARASWATI KUAR *v.* MAHABIR PRASAD. **109 I. C. 272= A. I. R. 1928 All. 476.**

———*Illiterate person making thumb-mark on document—Proof of mark insufficient for validity—Knowledge of contents cannot be inferred from fact of thumb-mark.*

In the case of an illiterate executant something more is required than proof that he made a mark on the document and knowledge of the contents of the document cannot be inferred from the fact that he marked the document: *Foster* v. *Mackinnon*, (1869) 4 C.P. 704, *Foll.* (*Wazir Hasan and Raza, JJ.*). MT. HUBRAJI *v.* CHANDRA BALI. **111 I. C. 829=5 O. W. N 677= A. I. R. 1928 Oudh 386.**

———*Deed involving extinction of rights and degradation of status of one party—Party not protected by notary—Transaction is bad.*

Where a notary was instructed by one party to a transaction involving not only the extinction and alteration of patrimonial rights, but also a degrading alteration of the status and moral life of others who were to be made parties to the deed, but he never suggested that it was a case for another notary being employed to protect the interest of the other party,

Held, that the transaction and the evidence by which it was supported are alike discreditable. It would require the very strongest evidence in such circumstances to prevent the respondents from being protected against such a transaction by a Court of law. (*Lord Shaw*). A. DINOHAMY *v.* W. L. BALAHAMY. **104 I.C. 327=4 O W N. 759= A.I.R. 1927 P.C. 185=54 M.L.J. 388.**

DEFENCE OF INDIA (Criminal Law Amendment) ACT (1915)—Commandeering order.

———*Setting aside—Transaction, sham from beginning, need not be set aside.*

When a party obtaining an advantage under a document voluntarily chooses to treat it as inoperative and of no effect, it is wholly unnecessary to come to Court seeking an idle relief. Where the transaction is from the very start a sham and a pretence there is no need to get such a transaction formally set aside. (*Venkatasubba Rao, J.*). K. SUBRAYA CHETTI *v.* NAGAPPA CHETTI. **103 I.C. 150=39 M.L.T. 182= A.I.R. 1927 Mad. 805=53 M.L.J. 311.**

———*Gift executed to vendee to make him co-sharer for the purpose of defeating pre-emption—Fictitiousness of gift cannot be presumed in absence of pleading and evidence—Practice—Plea.*

One R, executed a sale deed of his share in favour of S, and the plaintiffs brought the present suit against S, for pre-emption. After the summonses to the defendants had been issued and served, P, a co-sharer in the village executed a deed of gift in favour of S, in respect of a very small amount of the property in the village enabling thereby to resist, the claim of the plaintiffs on the ground that he (S.) was already a co-sharer in the village and therefore no suit for pre-emption was maintainable against him,

Held, that the circumstances that the donor was of a different caste to the donee, that the deed of gift was given after the institution of the suit and the smallness of the property gifted, did not justify the presumption of fictitiousness of the deed of gift. If the *Plaintiffs wished to challenge the deed of gift they should have said so in their pleadings and given evidence in support of their allegations, fictitiousness and fraud.* (*Rafique and Piggott, JJ.*). SHIB LAL *v.* BIDHA SINGH. **72 I.C. 140= 21 A.L.J. 329=4 L R.A. (Civ.) 375= A.I.R. 1923 All. 508.**

———*Inadmissibility does not mean invalidity.*

A document may be inadmissible in evidence but it does not follow that it is invalid. (*Prideaux, A.J.C.*). RAJE UDAJIRAM *v.* RAJESHWAR. **67 I. C. 310=A. I. R. 1923 Nag. 109.**

DEFAMATION.

See (1) PENAL CODE, SS. 499—500.
(2) TORT-DEFAMATION.

DEFAULT.

See C. P. CODE, O. 9.

DEFENCE OF INDIA (Criminal Law Amendment) ACT (4 of 1915).

—Commandeering order.

———*Contract—Commandeering order—Goods ordered by Government under—Contract is not ordinary commercial contract.*

In the case of commandeering order there can be no ordinary commercial contract for sale and purchase, because one of the parties may be unwilling to surrender his goods and yet may be compelled under the commandeering order to do so. He has no option once the order has been made and issued.

DEFENCE OF INDIA (Criminal Law Amendment) ACT (1915)—Rules under.

He is bound to place his goods at the disposal of Government when called upon to do so. The only right he has is that if he does not accept the price offered by Government he can have it settled by arbitration. The arbitrator's order is final. (*Chotzner, J.*). KESSORAM PODDAR AND CO. *v.* SECRETARY OF STATE. **107 I. C. 360=54 Cal. 969=A. I. R. 1928 Cal. 74.**

—Rules under—Chalan by Police.

———*Offence under R.* 25 (1)—*Police making chalan under District Magistrate's order—Chalan may be treated as complaint.*

Chalan by the Police are only possible in cases cognizable by them. But where a District Magistrate directs the Superintendent of Police to make an inquiry, complete the case and send it up for trial and in due course a subordinate Police Officer puts up a chalan, the chalan may be treated as a complaint. 26 Bom. 150 (F. B.), *Foll* 16 P. R. 1890 Cr.; 28 P. R. 1883 Cr.; 2 P. R. 1892 Cr.; 3 P. R. 1892 Cr.; 20 P. R. 1894 Cr. and 37 Cal. 467, *Ref.* (*Broadway, J.*). KHUSHAL SINGH *v.* EMPEROR. **67 I. C. 337=86 P. L. R. 1922=A. I. R. 1921 Lah. 345.**

—S. 5—Procedure.

———Section 360 applies to proceedings before Commissioners under Defence of India Act. (*Shadi Lal, C. J.*). TAJ MOHAMMAD *v.* EMPEROR. **107 I. C. 100=29 P. L. R. 14=29 Cr. L. J. 212=9 A. I. Cr. R. 505=A. I. R. 1928 Lah. 125.**

DEGRADED WOMAN.

See (1) HINDU LAW—MAINTENANCE.
(2) HINDU LAW—STRIDHANAM.
(3) HINDU LAW—SUCCESSION.

DEITY.

See HINDU LAW—RELIGIOUS ENDOWMENTS.

DEKHAN AGRICULTURISTS' RELIEF ACT (17 of 1879).

—S. 2—Agricultural income.

———Income from toddy juice is agricultural income. (*Macleod, C.J.*). KRISHNAJI *v.* GOPAL. **96 I.C. 415=28 Bom. L R. 676=A. I. R. 1926 Bom. 478.**

—S. 2—Agriculturist.

———"Agriculturist" includes agriculturist at any stage of the proceedings. It is not limited to judgment-debtor being an agriculturist at the date of the suit or of the decree. (*Kennedy, J.C., Raymond and Rupchand Bilaram, A.J.Cs.*). HIRIOMAL *v.* HAZARI SING. **78 I.C. 583=18 S.L.R. 19=A.I.R. 1925 Sind 49 (F.B.).**

———Income from lands not in a district, to which the Dekkhan Agriculturists' Relief Act applies, cannot properly be treated as income from agricultural sources, but must be treated as non-agricultural income for to constitute a person as "agriculturist" for the purposes of the Act he must earn his livelihood principally by agriculture carried on within the limits of a district to which the Act applies. (*Fawcett and Pratt, JJ.*). VAMANACHARYA RAMACHARYA *v.* GOVIND MADHAVACHARYA. **76 I.C. 1014=25 Bom. L.R. 826=A.I.R. 1924 Bom. 33.**

———An agriculturist is one who earns his livelihood wholly or principally by agriculture or who ordinarily engages personally in agricultural labour. (*Macleod, C.J. and Coyajee, J.*). D. RUBINE *v.* BALWANTRAI RAMNARAYAN TRIVEDI. **105 I.C. 795=A.I.R. 1923 Bom. 12.**

———The term "Agriculturist," as defined in S. 2 includes a person who derives a greater part of the income from the fruits of the mango trees, even though he bestows no care or attention and labour on them. The test seems to be whether the income is derived from the produce of the land and not what is the actual quantum of labour which has to be bestowed in getting in the crop. (*Macleod, C. J. and Shah, J.*). HIRALAL RAVCHAND SHAH *v.* PARBHULAL SAKHIDAS SHAH. **64 I. C. 117=46 Bom. 48=23 Bom. L.R. 796=A.I.R. 1922 Bom. 146.**

—S. 2—Applicability.

———The Dekkhan Agriculturists' Relief Act (XVII of 1879) is not applicable to an agriculturist who earns his livelihood wholly and principally by agriculture in Punjab. (*Raymond, A. J. C.*). FIRM OF AYARAM TOLARAM *v.* FIRM HITRAM BODRAJ. **66 I. C. 682=16 S.L.R. 76=A. I. R. 1921 Sind 82.**

—S. 2—Assignment and devolution.

———Privileges under the Act are personal—They cannot pass by assignment or devolution. (*Macleod, C. J. and Coyajee, J.*). MARTAND TRIMBAK *v.* AMRITRAO RAGHOJIRAO. **93 I. C. 924=49 Bom. 662=27 Bom. L.R. 951=A. I. R. 1925 Bom. 501.**

—S. 2—Firm.

———Definition of "agriculturist" applies to firm only if firm by itself, tenants or servants earns livelihood wholly or principally by agriculture, and in that case alone it can only be sued at place where firm carries on business—Mere fact that partners are agriculturists does not make the firm an agricultural firm. (*Fawcett, J.*). DHARAMSEY KHETSEY *v.* BALKRISHNA PANDURANG. **120 I.C. 839=53 Bom. 787=31 Bom. L.R. 984=A. I. R. 1929 Bom. 378.**

—S. 2—Interpretation.

———The definition agriculturist is repugnant to the construction of the word 'person' as given in General Clauses Act, S. 3 (39) unless it is taken in a limited sense regarding agricultural firm. (*Fawcett, J.*). DHARAMSEY KHETSEY *v.* BALAKRISHNA PANDURANG. **120 I. C. 839=53 Bom. 787=31 Bom. L. R. 984=A. I. R. 1929 Bom. 378.**

———"*This Act*" *means* "*This Act wholly or in part.*"

The words 'This Act' in S. 2 mean 'This Act wholly or in part' and the definition of an agriculturist refers to a person of the requisite agricultural qualifications within the limits of a district or a part thereof to which the Act "wholly or in part" may, for the time being, extend.

In other words it is sufficient to extend S. 2 of the Act to particular district in order to bring an agriculturist in that district of the qualifications mentioned in the Act within the definition of agriculturists as given in the section. (44 Bom. 217, *Overruled*). (*Marten, Pratt and Coyajee, JJ.*). GANPAT CHANDRABHAN *v.* TULSHI MARD RAMCHANDRA. **81 I.C. 284=48 Bom. 214=26 Bom. L.R. 118=A. I. R. 1924 Bom. 219 (F.B.).**

—S. 2—Joint family.

———Test is to see what is the joint income of the family derived from. Where some of the defendants (members of the joint family) appeared to have been in service, and the joint income from the earnings of the father and his sons was derived from their father's pension, a certain amount of rent from the theatre which had not been very successful and the annual income derived from 14 acres of land assessed at Rs. 29-8 which was found to be about Rs. 200.

DEKHAN AGRICULTURISTS' RELIEF ACT (1879)—S. 2—Rights of representatives.

Held, that the defendants were non-agriculturists. (*Macleod, C.J. and Crump, J.*). NARAYAN BAPULAL *v.* SOUNSINGH GHANSHAM SINGH.
76 I.C. 659=A.I.R. 1923 Bom. 383.

—S. 2—Rights of representatives.

———Legal representative of judgment-debtor can plead that he is agriculturist though it is already decided that judgment-debtor is not agriculturist. A.I.R. 1925 Sind 49 and Second Appeal 21 of 1926 (Sind), *Rel. on.* (*Barlee, J.C. and Aston, A.J.C.*). SHOWKOMAL *v.* JAGATMAL THAROOMAL.
118 I.C. 221=A.I.R. 1930 Sind 16.

———Legal representatives of judgment-debtor can prove their status of being agriculturists in execution proceedings. (*Macleod, C.J. and Coyajee, J.*). SHIDRAJ *v.* RENAKI. **92 I.C. 554=27 Bom. L. R. 1490=A.I.R. 1926 Bom. 140.**

—S. 3—Agriculturist.

———A Jahagirdar relying entirely upon the income derived from the assessment which would be recovered by the village officers from occupants or tenants is for an agriculturist earning his livelihood from agriculture and consequently if a part of his income is derived from assessment that is not agricultural income. (*Macleod, C.J. and Shah, J.*). MUKUND KRISHNA GOVIND KRISHNA *v.* MOHANLAL PARVATHISHANKAR. **83 I.C. 622=26 Bom. L. R. 620=A.I.R. 1924 Bom. 514.**

—S. 3—Award.

———Application to file award is not a suit within S. 3—Decree is passed on award—Judgment-debtor cannot plead status as agriculturist in execution. (*Fawcett and Madgavkar, JJ.*). LAXMAN *v.* RAMABAI. **95 I.C. 878=50 Bom. 236=28 Bom. L R. 736=A.I.R. 1926 Bom. 351.**

—S. 3—Ex-parte decree.

—Where owing to absence of pleas on the part of defendant the Court passes an *ex parte* decree without examining him and the plaintiff under Ss. 7 and 12, the Court must be deemed to have decided by necessary implication that the defendant is not an agriculturist and therefore in execution proceedings the defendant cannot plead that he was agriculturist at the time of execution of the decree. (*Rupchand Bilaram, A.J.C.*). LAWRENCE PHILLIPS & CO. *v.* M. R. F. NAZARETH.
78 I.C. 806=19 S.L.R. 247=A.I.R. 1925 Sind 86.

—S. 3—Several defendants.

———Section 11 preserves right of plaintiff to select venue when defendants agriculturists do not reside within jurisdiction of one Court. (*Percival, J. C. and Rupchand, A.J.C.*). TAHILRA *v.* MAGHANMAL. **117 I.C. 150=23 S.L.R. 365=A.I.R. 1929 Sind 170.**

—S. 3—Suit, what is.

———An application to file a reference under Cl. 17 of Sch. II, C. P. Code is not a suit and it is doubtful if an application under clause 20 to file an award even when an agriculturist is a party, can be called a suit; but in any case it is not a suit of the description mentioned in S. 3, Cls. (w), (y) or (z) of the Deccan Agriculturists' Relief Act and the Court can file the award to which an agriculturist is a party and on whose property a mortgage is created by the award, without adjusting accounts under Ss. 12 and 13 of the Act. (*Kennedy, J.C. and Madgavkar, A.J.C.*). HOTCHAND BALCHAND *v.* KISHINCHAND. **83 I.C. 548=17 S.L.R. 178=A.I.R. 1924 Sind 23.**

—S. 3—Surety.

—The words in Cl. (w), S. 3 "on a written or unwritten engagement for the payment of money not

DEKHAN AGRICULTURISTS' RELIEF ACT (1879)—S. 10-A—Object.

herein provided for" are wide enough to cover the case of a surety. Clause (x) does not refer to a contract of suretyship which falls within the purview of Cl. (w), so suit under S. 11 can be instituted in the Court within whose jurisdiction the sureties reside. (*Percival, J. C. and Rupchand, A.J.C.*). TAHILRAM *v.* MAGHANMAL. **117 I.C. 150=23 S.L.R. 365=A.I.R. 1929 Sind 170.**

S. 10-A—Applicability.

———The mere fact that one or more legal representatives of a deceased defendant has the status of an agriculturist since the death of deceased defendant or acquired that status subsequently will not oust the jurisdiction of the High Court in a suit which is properly instituted. (*Aston, A. J. C.*). GANGARAM SAMANDAS *v.* DEUMAL NIHALCHAND. **116 I.C. 587=A.I.R. 1929 Sind 163.**

———Section applies only when an agriculturist is party to suit. (*Macleod, C. J. and Coyajee, J.*). MARTAND TRIMBAK *v.* AMRITRAO RAGHOJIRAO. **93 I.C. 924=27 Bom. L.R. 951=49 Bom. 662=A.I.R. 1925 Bom. 501.**

———To claim the benefit of S. 10-A it is not necessary that a person should be an agriculturist both at the date of the suit and at the date of the transaction. It is enough if he was an agriculturist at the date of the transaction. (*Fawcett and Patkar, JJ.*). SUTAN RAHIM *v.* RANCHHODJI MULJI. **101 I.C. 140=51 Bom. 224=29 Bom. L. R. 249=A.I.R. 1927 Bom. 149.**

———Lease for 500 years—Section does not apply. 38 B. 18, *Foll.* (*Shah, Ag. C. J. and Crump, J.*). CHATURBHAI LALLUBHAI *v.* MOTIBHAI BAPUJI. **77 I.C. 952=24 Bom. L. R. 1315=A.I.R. 1923 Bom. 146.**

———Section 10-A of the Act applies to every suit where an agriculturist is a party and where the transaction in issue entered into by such agriculturist is of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part, under Chapter III of the Act. The section is not restricted to suits of the nature mentioned in S. 3, Cls. (*w*), (*y*) or (*z*). (*Macleod, C.J. and Coyajee, J.*). HALLAPPA KALLAPPA *v.* IRARAPA GIRIMALLAPPA. **67 I. C. 844=46 Bom. 843=24 Bom. L. R. 406=A.I.R. 1922 Bom. 415.**

—S. 10-A—Applicability of Proviso.

———Proviso 2—*Bona fide* transferee for value without notice holding under registered deed executed less than 12 years before suit is not protected.

Per *Macleod, C.J.*:—The object of the Legislature in enacting S. 10-A was to protect the mortgagor and not the transferee, if the mortgagor was sufficiently diligent in seeking to redeem the property.

Per *Heaton, J.*:—Where S. 10-A applies, S. 41 of the Transfer of Property Act ceases to have any application. It is replaced by the 2nd proviso to S. 10-A. If that is not the result, it cannot be conceived why S. 10-A was ever enacted. (*Macleod, C.J. and Heaton, J.*). PRANJIVENDAS NARSIDAS *v.* MIACHAND BAHADUR. **59 I.C. 418=45 Bom. 87=A.I.R. 1921 Bom. 426.**

—S. 10-A—Object.

The object of S. 10-A of the Dekkhan Agriculturists' Relief Act, namely, the decision as to the real nature of the transaction by admission of the oral evidence which otherwise would be excluded by the ordinary law, whether S. 92 or the like of the Evidence Act, is to override not merely Evidence Act, S. 92, but also where necessary S. 91: A.I.R. 1919 P.C. 44, *Ref.*; 15 Bom. L.R. 555, *Dist.*

DEKHAN AGRICULTURISTS' RELIEF ACT (1879)—S. 10-A—Object.

(*Madgavkar, J.*). BASAPPA GURUBASAPPA *v.* TAYAWA VIRUPAXAPPA. **31 Bom.L.R. 1266=54 Bom. 30=A.I.R. 1930 Bom. 79.**

———Whether S. 10-A which is in the nature of adjective law was intended to override the substantive provisions of the Indian Registration Act and the Transfer of Property Act. (*Marten, C.J. and Crump, J.*). DADA VAKU NIKAM *v.* BAHIRU HINGU. **105 I.C. 754=29 Bom.L.R. 1419=A.I.R. 1927 Bom. 627.**

—S. 10-A—Powers under.

———Court can go behind a document and inquire into real nature of the transaction. (*Marten, C.J. and Crump, J.*). DADA VAKU NIKAM *v.* BAHIRU HINGU. **105 I.C. 754=29 Bom. L.R. 1419=A. I. R. 1927 Bom. 627.**

———Sale or mortgage—Court can determine real nature of transaction in spite of Evidence Act, S. 92. (*Kennedy, J.C. and Raymond, A.J.C.*). HAMBIRKHAN *v.* MURIJMAL. **65 I.C. 356=15 S.L.R. 160=A.I.R. 1922 Sind 39.**

—S. 10-A—Retrospective effect.

———Section is retrospective in effect. (*Shah and Crump, JJ.*). GANPAT CHANDRABHAN *v.* T. M. RAMACHANDRA. **81 I. C. 284=48 Bom. 214=26 Bom. L.R. 118=A.I.R. 1925 Bom. 112.**

—S. 10-A—Sale as mortgage.

———Where a transaction is in form a sale between an agriculturist, and a purchaser from him, and he sues to redeem on the footing that it is in fact a mortgage, no setting aside of the sale is necessary. The plaintiff in fact accepts the transaction as a real transaction but says that it is in fact a mortgage and not a sale. (*Shah, Ag. C. J.*). SHIVBASAPPA NINGAPA *v.* BALAPA BASAPA. **81 I.C. 673=25 Bom. L.R. 1209=A.I.R. 1924 Bom. 172.**

—S. 11—Charge on property.

———Suit to enforce charge on property pledged does not fall under Cl. (w), S. 3, but under Cl. (x) and Court has jurisdiction even though defendant is agriculturist not residing in its jurisdiction. (*Rangnekar, J.*). GULAM HUSAIN LALJI SAJAN *v.* CLARA D'SOUZA. **120 I.C. 834=53 Bom. 819=31 Bom. L.R. 988=A. I. R. 1929 Bom. 471.**

—S. 12—Benamidar mortgagee.

———*Benamidar* can sue on mortgage even in cases governed by the Act—Provisions of Section 12 have to be observed. 46 Cal. 566 (P. C.), *Foll.* (*Fawcett and Madgavkar, JJ.*). NARAYAN KESHAV *v.* KAJI GULAM. **91 I. C. 353=49 Bom. 832=27 Bom. L. R. 1240=A. I. R. 1926 Bom. 115.**

—S. 12—Compromise.

———In a suit falling under S. 12 of the Act, parties are not precluded from entering into a compromise and the Court before it records it under Civil Procedure Code, O. 23, R. 3 can go into the question of suitability or correctness of the compromise: 34 Bom. 502, *Not foll.*; 35 Bom. 190, *Rel. on.* (*Percival, J. C. and Tyabji, A. J. C.*). PESSUMAL *v.* VALOO. **101 I. C. 844=A. I. R. 1927 Sind 197.**

———Where a compromise is entered into and the defendant admits the whole of the plaintiff's claim and asks the Court to pass a decree in accordance with that admission, O. 23, R. 3 does not oust the jurisdiction of the Court. Under S. 12, the Court can go behind the transaction, and is not bound to pass a decree. (*Macleod, C. J. and Shah, J.*). GOTU RAM RADHA KISHAN *v.* BARKU DHODU. **67 I. C. 253=46 Bom. 560=24 Bom. L. R. 88=A. I. R. 1922 Bom. 331.**

DEKHAN AGRICULTURIST'S RELIEF ACT (1879)—S. 13—Suit for past claim.

—S. 12—Taking accounts.

———Mortgagor asking account—Mortgagor is liable to pay sum found due on account though larger than sum due in terms of mortgage: A.I.R. 1922 Bom. 289;46 Bom. 384 and 46 Bom. 764; A. I. R. 1922 Bom. 201; 67 I. C. 151, *Overruled.* (*Madgavkar, Patkav and Wild, JJ.*). GOPALDAS SAMBHUDAS *v.* VITHAL MOHANJI, **118 I.C. 689=31 Bom. L. R. 915=A.I.R. 1929 Bom. 357 (F.B.).**

———Where in a suit brought for the recovery of the instalments found due under a mortgage instalment bond the account taken by the Commissioner under the Act, showed that the defendant owed a far larger amount than that due under the bond,

Held, that a larger amount than found due under the bond itself cannot be granted as a result of seeking relief under the Act. (*Macleod, C. J. and Shah, J.*). VITHALDAS BHAGWANDAS *v.* MURTAJA HUSEIN. **67 I. C. 151=24 Bom. L. R. 267=46 Bom. 764=A. I. R. 1922 Bom. 201.**

—S. 13—Absence of data.

———In most cases under the Act some guess-work has to be done in drawing up an account under S. 13 and if, in the absence of data showing exactly how much principal has been received, the Court forms a reasonable estimate from the amount of consideration stated in the bond as to the probable amount of actual principal, there is no legal objection to that estimate being accepted and acted on. (*Macleod, C. J. and Fawcett, J.*). KONDAN *v.* INDARCHAND BACHERAJ. **59 I. C. 576=45 Bom. 323=A. I. R. 1921 Bom. 393.**

—S. 13—Applicability.

———Fresh advances made and bonds taken while original mortgage not paid off—S. 13 applies and account should be taken as if they all formed one entire transaction. (*Macleod, C. J. and Fawcett, J.*). GURUNATH KESHAV *v.* SADASHIV BALKRISHNA. **59 I. C. 217=45 Bom. 216=A. I. R. 1921 Bom. 251.**

—S. 13—Calculation of accounts.

———Under S. 13 the Court ought to take accounts from the very beginning of the transactions notwithstanding any statement or settlement of account or any contract purporting to close the previous dealings and create a new obligation, and the aggregate of the interest on taking accounts, should not exceed the amount due on the principal account. (*Patkar and Baker, JJ.*). ANNABHAT *v.* SHIVAPPA. **110 I.C. 269=52 Bom. 376=30 Bom. L.R. 539=A.I.R. 1928 Bom. 232.**

—S. 13—Effect on decree.

———Mortgage—Accounts showing larger amount due than the Bond amount—No decree can be given for more than the bond amount. (*Macleod, C.J. and Shah, J.*). RAGHUNATH SHIVAJI KULKARNI *v.* RAMCHANDRA NARAYAN JOSHI. **64 I.C. 928=46 Bom. 384=23 Bom.L.R. 1098=A.I.R. 1922 Bom. 289.**

—S. 13—Mortgagee in possession.

———Transfer of Property Act, S. 60—Mortgage-money payable after 21 years—If money is not so paid, mortgagee to continue in possession and develop land by crops—There is no clog on redemption—Proper relief is under S. 13. (*Heaton, Ag. C.J. and Crump, J.*). GENU TUKARAM TAPKIR *v.* NARAYAN. **59 I.C. 258=45 Bom. 117=A.I.R. 1921 Bom. 51.**

—S. 13—Suit for past claim.

———Civil P.C., O. 2, R. 2—Three mortgages forming same transaction—Plaintiff suing on one only cannot subsequently sue on the others.

DEKHAN AGRICULTURISTS' RELIEF ACT (1879)—S. 13—Trading transactions.

(*Macleod, C.J. and Heaton, J.*). DALUCHAND BALARAM MARWADI *v.* APPI KOM KHEMA SASTE.
59 I.C. 347=45 Bom. 55=A.I.R. 1921 Bom. 282.

—S. 13—Trading transactions.

———It appears inequitable but it is the law, that if the defendants are *agriculturists*, the accounts even though they relate to trading transactions must be taken under the Act. (*Macleod, C.J. and Shah, J.*). NARAYAN LAXMAN AGHARKAR *v.* CHAPSI DOSA. **64 I.C. 1002=46 Bom. 419=23 Bom. L.R. 1186=A.I.R. 1922 Bom. 168.**

—S. 15—Applicability.

———Under the provisions of S. 15-B, instalments cannot be granted under a decree to a person who at the time the decree was passed was not but has since become, an agriculturist. (*Macleod, C. J. and Coyajee, J.*). DEVU JETIRAM GUJAR *v.* REVAPPA SATAPPA SHINTRE. **67 I.C. 840=24 Bom. L.R. 370=46 Bom. 964=A.I.R. 1922 Bom. 220.**

—S. 15-B—Assertion of right.

———Defendant can prove his status in execution proceedings even though he has not done so in previous executions. A.I.R. 1924 Bom. 305, *Appl.* (*Macleod, C. J. and Coyajee, J.*). NARAYAN *v.* DHANDO. **94 I.C. 76=28 Bom.L.R. 305=A.I.R. 1926 Bom. 246.**

—S. 15-B—Consent decree.

———Consent decree ordering payment in one sum cannot be altered making the sum payable by instalments on the application of one of the parties. 44 Bom. 544, *Expl.*; 37 Bom. 614, *Ref.*(*Macleod, C.J. and Shah, J.*). BADHAN BALAKRISHNA *v.* APPAJI VENKATESH. **62 I.C. 634=45 Bom. 1123=23 Bom. L.R. 503=A.I.R. 1921 Bom. 398.**

———Section 15-B does not make any exception in case of consent decrees. The fact that the decree is a consent decree should not be held to limit the powers of the Court. It is open to the Court in proper cases even when the decree is a consent decree to substitute system of instalments under S. 15-B to direct sale. (16 Bom. L. R. 668, *Dist. from*). But it is not open to the Executing Court to reduce the actual amount payable under the decree or the rate of interest, if such is awarded in the decree. What is open to it to do is to direct that the decretal amount be paid in instalments instead of being recovered immediately by sale. Those instalments must be calculated at such a rate that they would enable the capital and interest payable under the decree to be paid off in full during the period settled for the payment of instalments. (*Kennedy, J. C. and Madgavkar, A. J. C.*). SANGATMAL LILARAM *v.* JAN MAHOMED GULAM KHAN. **79 I.C. 553= 16 S.L.R. 260=A.I.R. 1921 Sind 102.**

—S. 15-B—Ex-parte decree.

———In execution proceedings of an *ex parte* decree defendant can show that he was an agriculturist at the date of the decree and claim instalments under S. 15-B. (*Macleod, C.J. and Crump, J.*). RUDRAPPA SANVIRAPPA *v.* CHANBASAPPA MALLAPPA. **80 I.C. 162=26 Bom. L.R. 153=A.I.R. 1924 Bom. 305.**

—S. 15-B—Final decree.

———A decree made under the provisions of S. 15-B of the Deccan Agriculturists' Relief Act, whether for redemption, foreclosure or sale is not a preliminary decree and therefore need not be made final. 46 B. 761; 40 B. 492, *Foll.* (*Shah and Crump, JJ.*). SUKLYA JAIRAM *v.* SUKLAL MOTICHAND. **81 I.C. 684=48 Bom. 172=25 Bom. L. R. 1214=A.I.R. 1924 Bom. 169.**

DEKHAN AGRICULTURISTS' RELIEF ACT (1879)—S. 21—Raising of Plea.

—S. 15-B—Limitation.

———The time fixed for the payment of the instalments under an instalment decree which is confirmed by the appellate Court should be allowed from the date of the confirmation of the decree. Limitation for an application under S. 15-B of the Act with reference to each instalment should be counted from the date when it is payable under the above calculation. (*Shah, Ag. C. J. and Kincaid, J.*). DARUBHAI MITHABHAI *v.* BECHAR DESAI. **86 I.C. 894=27 Bom. L. R. 196=49 Bom. 305=A.I.R. 1925 Bom. 270.**

—S. 15-D—Condition precedent.

———A suit under S. 15-D. will only lie on the presumption that there was a mortgage in existence by an agriculturist and an issue whether or not mortgage was in existence could not be entertained in a suit under the section. (*Macleod, C.J. and Shah, J.*). KRISHNAJI SONAJI *v.* SADANAND MAHADEO. **80 I.C. 763=26 Bom. L. R. 341=A. I. R. 1924 Bom. 417.**

—S. 15-D—Effect of sale.

———An agriculturist mortgagor who has sold his equity of redemption is not an "agriculturist whose property is mortgaged" within S. 15-D and therefore his suit for a mortgage account is not maintainable, nor can such a suit be said to be one under S. 16. (*Fawcett, Ag. C.J. and Mirza, J.*). JANKIBAI KESHAV BANDEKAR *v.* RAMCHANDRA JAIRAM BADELE. **113 I.C. 46=30 Bom. L. R. 1148=A. I. R. 1928 Bom. 475.**

—S. 15-D—Purchaser from mortgagor.

———In all cases where the mortgage-money is paid off by a person who is interested in the equity of redemption (purchaser from some co-mortgagors), there can be no question of his acquiring the rights of the mortgagee and being liable to be redeemed by the other co-mortgagors. The mortgage can only be redeemed once. A suit for accounts by such co-mortgagors under S. 15-D of the Dekkhan Agriculturists' Relief Act will not lie. Their remedy would be a suit for partition and possession of share on paying their quota of the redemption money. 40 Bom. 646; A.I.R 1926 Bom. 493, *Dist.*; 26 Bom. 500, *Rel. on.* (*Baker, J.*). SHANKAR MAHADEV JADHAV *v.* BHIKAJI RAMCHANDRA GHANEKAR. **116 I.C. 225=31 Bom. L.R. 129=53 Bom. 353=A.I.R. 1929 Bom. 139.**

—S. 20—Agriculturist after decree.

———Where the defendant is not an agriculturist at the date of the decree he cannot claim benefit of S. 20 if he becomes an agriculturist subsequently. (*Shah, Ag. C. J. and Crump, J.*). MULJI PURUSHOTTAM THAKKAR *v.* GOVERDHANDAS TRIBHUWANDAS. **76 I. C. 148=24 Bom. L. R. 1291=A. I. R. 1923 Bom. 36.**

—S. 21—Plea when available.

———A person is exempt under S. 21 if he is an agriculturist at the time of the arrest. A. I. R. 1923 Bom. 36, *Dist.* (*Macleod. C. J. and Coyajee, J.*). HIRA *v.* DAULA. **95 I. C. 259=28 Bom. L. R. 539=A.I.R. 1926 Bom. 287.**

—S. 21—Raising of plea.

———The material date for the determination of the status under S. 21 is the date of the attempted arrest. But by reason of the definition of "agriculturist" in S. 2 (2) that determination may also import the determination of the status at the date when the liability arose. Where no question of jurisdiction is involved the mere failure to appear and urge the status at the hearing of the suit does not preclude the defendant from urging that he is

DEKHAN AGRICULTURISTS' RELIEF ACT (1879)—S. 21—Raising of plea.

an agriculturist at the date of the arrest or imprisonment, and for the purpose of that plea he is not debarred from urging, if necessary, that he was an agriculturist at the date of the decree.

The words "passed, whether before or after the Act comes into force," were added merely to make the Act retrospective, and, thus, to avoid the decision in *Dipchand* v. *Gokaldas*, 4 Bom. 363 (F. B.). (*Case-law discussed*). (*Marten, C. J., Crump and Patkar, JJ.*). MANEKLAL GIRDHARLAL *v.* MAHIPATRAM MANSUKHRAM. **103 I. C. 898= 51 Bom. 454=29 Bom. L. R. 1109= A.I.R. 1927 Bom. 492 (F. B.).**

———The status of an agriculturist can be pleaded in execution proceedings by a judgment-debtor arrested in execution of the decree. A.I.R. 1923 Bom. 36, *Expl.* (*Macleod, C. J. and Coyajee, J.*). AMBANNA *v.* KALLAPPA. **96 I.C. 309=50 Bom. 239= 28 Bom. L. R. 567=A. I. R. 1926 Bom. 327.**

—S. 22—Agriculturist after decree.

———Judgment-debtor not agriculturist at trial of suit—Acquiring that status since passing of decree —He gets benefit of S. 22 at execution proceedings. A. I. R. 1927 Bom. 492 (F. B.), *Rel. on*: A. I. R. 1925 Sind 86, *Expl.* (*Percival, J. C., and Rupchand, A.J.C.*). KODUMAL *v.* BULCHAND. **119 I.C. 543=A. I. R. 1929 Sind 209.**

—S. 22—"Agriculturist" meaning.

———"Agriculturist" means agriculturist at the date of attachment or sale. (*Percival, J.C. and Rupchand, A.J.C.*). KODUMAL *v.* BULCHAND. **119 I.C. 543=A.I.R. 1929 Sind 209**

—S. 22—Appeal.

———Order under S. 22 falls under S. 47, Civil P. C.—Appeal lies. (*Fawcett, J.C. and Raymond, A.J.C.*). CHOITARAM KALINDAS *v.* LALBUX. **63 I.C. 310=15 S.L.R. 47=A.I.R. 1921 Sind 29.**

—S. 22—Applicability.

———The Court has no jurisdiction to direct the Collector to take possession of the immovable property falling into the hands of the heirs of the judgment -debtor for it would be entirely contrary to all canons of construction to read into the section "or his heirs" after the words "judgment-debtor": A.I.R. 1923 Bom. 190, *Foll.*: 15 S.L.R. 47, *Not foll.*; 24 Bom. L.R. 749 and 53 Bom. 463, *Ref.* (*Patkar and Baker, JJ.*). MATHURADAS TULJARAM *v.* MAHADU MARUTI KAVDE. **32 Bom. L.R. 320= A.I.R. 1930 Bom. 238.**

—A Court is not justified in saying that because a warrant under S. 386, sub-S. (3), Criminal P.C., is to be deemed a decree, therefore the exceptional provisions of S. 22 must be held applicable to such a warrant. 37 Bom. 614; 8 Bom. 20, *Rel. on*; 14 S.L.R. 217, *Appr.* (*Fawcett and Madgavkar, JJ.*). COLLECTOR OF SATARA *v.* MAHADU. **99 I.C. 310= 28 Bom. L.R. 1231=50 Bom. 844= A.I.R. 1926 Bom. 582.**

—In the case of the death of a judgment-debtor who was an agriculturist, his property in the hands of his heirs could not be taken possession of by the Collector under the directions of the Court, as that has not been specifically stated in the second para of S. 22. (*Macleod, C.J. and Crump, J.*). HIRACHAND MOTICHAND *v.* HANSABAI GANPAT RAO. **72 I.C. 62=25 Bom. L.R. 76=47 Bom. 527= A.I.R. 1923 Bom. 190.**

———The immovable property of an agriculturist is under the provisions of S. 22 immune from attachment and sale in execution of a money decree gaainst him. The immunity, however, ceases when the property descends on his death to his legal representatives who are not themselves agriculturists. (*Macleod, C. J. and Shah, J.*). MARUTI BABAJI TOTRE *v.* MARTAND NARAYAN KULKARNI. **69 I. C. 175=24 Bom. L. R. 749=47 Bom. 44= A. I. R. 1922 Bom. 213.**

DEKHAN AGRICULTURISTS' RELIEF ACT (1879)—S. 21—Validity of award.

—S. 22—Award.

———Section 15 of the Arbitration Act makes an award directly enforceable as a decree of Court, and therefore an application to execute the award is not an application in execution of an order within S. 22 of the Act. (*Fawcett, J. C. and Kennedy, A.J.C.*). UDHAV DAS *v.* UKAMAL FATAMAL. **60 I. C. 942=14 S.L.R. 217.**

—S. 22—Crops.

———Crops grown on judgment-debtor's lands after his death by his legal representatives cannot be attached. (*Fawcett, J. C. and Raymond, A. J. C.*). CHOITHRAM KALINDAS *v.* LALBUX. **63 I. C. 310=15 S. L. R. 47= A. I. R. 1921 Sind 29.**

—S. 22—Management by Collector.

———Inability to lease by Collector under a previous execution application long time ago is no bar to appoint Collector under another execution application. (*Fawcett, J.C. and Raymond, A.J.C.*). CHOITHRAM KALINDAS *v.* LALBUX. **63 I. C. 310=15 S. L. R. 47= A. I. R. 1921 Sind 29.**

———Civil P.C., S. 50—Collector can be appointed to manage the property of the judgment-debtor in the hands of his legal representatives after his death. (*Fawcett, J. C. and Raymond, A. J. C.*). CHOITHRAM KALINDAS *v.* LALBUX . **63 I. C. 310=15 S. L. R. 47= A. I. R. 1921 Sind 29.**

—S. 22—Mahomedan Agriculturist.

———The immovable property of a Mohamadan agriculturist which is not liable to attachment under S. 22, Dekkan Agriculturists' Relief Act does not become attachable when it comes to the hands of his heirs by devolution and the heirs are themselves agriculturists. (*Fawcett, J.C. and Raymond, A.J.C.*). CHOITHRAM KALINDAS *v.* LALBUX. **63 I.C. 310=15 S. L. R. 47=A.I.R. 1921 Sind 29.**

—S. 22—Raising of plea.

———An agriculturist can plead exemption in execution from attachment although the decree was not passed against him as an agriculturist, and even though it might have been decided in the suit that at the time the decree was passed he was not an agriculturist. A. I. R. 1923 Bom. 36, *Dist.* (*Macleod, C.J. and Coyajee, J.*). BALAKRISHNA *v.* SARUPCHAND. **95 I.C. 1017=28 Bom. L. R. 656= A.I.R. 1926 Bom. 389.**

—S. 22—Rent of land.

———Civil P.C.,S. 53—Decree against Hindu father —Although lands inherited by agriculturist son cannot be attached, the rents thereof are liable to attachment for satisfaction of the decree to extent of property inherited. 8 Bom. 220; 9 B.H.C.R. 116 and 2 W.R. 296, *Rel. on.* (*Patkar and Murphy, JJ.*). ANANT GOVIND JOG *v.* TUKARAM KUSHABA SHINDE. **119 I.C. 179=31 Bom. L.R. 442= 53 Bom. 463=A.I.R. 1929 Bom. 233.**

—S. 43—Validity of award.

———Parties orally agreeing to conciliator acting as arbitrator—Award in writing by conciliator— Award is not invalid though the agreement to refer is not in writing. (*Shah, Ag. C. J. and Crump, J.*). SAKHARAM MARUTI *v.* RAJMAL GIRDHARILAL. **79 I.C. 179=25 Bom. L. R. 52= 47 Bom. 298=A.I.R. 1923 Bom. 173.**

DEKHAN AGRICULTURISTS' RELIEF ACT (1879) —S. 44—Want of sanction.

—S. 44—Want of sanction.

———Where an award passed by the conciliator on a reference made to him by the parties, is not sanctioned by the Court under S. 44, the award is invalid and cannot be sued upon. Without the sanction of the Court anything done by the conciliator would have no final effect. Non-compliance with the procedure laid down in S. 44 would be fatal to the suit. (*Shah, Ag. C.J. and Crump, J.*). SAKHARAM MARUTI *v.* RAJMAL GIRDHARILAL. **79 I.C. 179= 25 Bom. L.R. 52=47 Bom. 298= A.I.R. 1923 Bom. 173.**

—S. 53—Additional evidence.

———The mere fact that S. 53 of Act does not give the District Judge express power to call for additional evidence such as an appellate Court has under O. 41, R. 28, Civil P.C., is not a sufficient basis for holding that the District Judge in his revisional jurisdiction has no such power. However, his revisionary powers under S. 53 depend upon satisfying himself that a particular finding of the Subordinate Judge is one wherein there appears to have been a failure of justice. 19 Bom. 116 (F. B.) and 19 Bom. 286, *Rel. on*; 15 Bom. 650, *Dist.* (*Fawcett and Mirza, JJ.*). RAOJI BHOGU *v.* RAGHUNATH. **109 I.C. 711=52 Bom. 349=30 Bom.L.R. 495= A.I.R. 1928 Bom. 187.**

—S. 63-A—Appearance before Sub-Registrar.

———An agriculturist executed and registered a compulsorily registrable document before the Sub-Registrar under S. 63-A. The *vahivatdar* who was the representative of the three executees signed the declaration required under R. 23 under S. 61.

Held, that all the three persons were not bound to appear before the Sub-Registrar and hence the registration was valid. (*Macleod, C.J. and Crump, J.*). SHRIPATI LAXMAN *v.* BALWANTRAO KRISHNA. **80 I.C. 274=26 Bom. L.R. 149= A. I. R. 1924 Bom. 345.**

—S. 63-A—Applicability.

———Section applies also to person holding power of attorney from agriculturist to execute documents. (*Macleod, C.J. and Coyajee, J.*). BHAGU *v.* NARAYAN. **94 I.C. 658=28 Bom.L.R. 428= A.I.R. 1926 Bom. 337.**

—S. 71—Award.

———Section 71 is not concerned with a decree passed on an award. (*Kincaid, J.C. and Kennedy, A.J.C.*). SAJHRO *v.* CHANGOMAL. **63 I.C. 238=15 S.L.R. 77= A.I.R. 1921 Sind 10.**

—S. 71—Uncertified compromise.

———Minor decree-holder—Compromise out of Court can be recognised but may be examined from point of view of minor's benefit—Compromise not sanctioned by the Court will not bind the minor. (*Macleod, C.J. and Shah, J.*). CHHAGUNLAL KALIDAS *v.* PARSEARAM KARNASHANKAR. **62 I.C. 219=45 Bom. 1128=23 Bom.L.R. 473= A.I.R. 1921 Bom. 142.**

DELAY.

See (1) ACQUIESCENCE.
(2) EVIDENCE ACT, S. 115.
(3) LIMITATION ACT, S. 5.
(4) SPECIFIC RELIEF ACT, S. 22.

DELHI LAWS ACT (7 of 1915).

—S. 2—Scope.

———The Transfer of Property Act does not apply to Delhi. It cannot be said to have automatically come into force in Delhi in 1912 (when Delhi was constituted into a separate province) in absence of any notification to that effect. (*Addison and Bhide, JJ.*). RALLI BROTHERS OF KARACHI *v.* PUNJAB NATIONAL BANK LTD. **A.I.R. 1930 Lah. 920.**

DELIVERY.

See (1) CONTRACT ACT, S. 108.
(2) MAHOMEDAN LAW—GIFT.
(3) RAILWAYS ACT, S. 72.
(4) T. P. ACT, S. 122.

DEMOLITION OF BUILDING.

See (1) ACQUIESCENCE.
(2) MUNICIPAL ACTS.

DEMONSTRATIVE LEGACY.

See (1) HINDU LAW—WILL.
(2) WILL.

DENIAL OF TITLE.

See T. P. ACT, S. 111.

DEPOSIT.

See (1) C. P. CODE, O. 21, Rr. 84 AND 89.
(2) CONTRACT ACT, S. 73.
(3) T. P. ACT, S. 83.

DEPOSITION.

See EVIDENCE.

DEPOSIT OF TITLE-DEEDS.

See T. P. ACT, S. 59.

DEPOSITORY.

See LIMITATION ACT, ART. 145.

DESAI INAM.

See GRANT-INAM.

DESCENDANTS.

See (1) HINDU LAW—SUCCESSION.
(2) MAHOMEDAN LAW—SUCCESSION.

DESCRIPTION OF PARTY TO SUIT.

See C. P. CODE, O. 1, R. 10.

DESCRIPTION OF WITNESS.

See EVIDENCE.

DESHGAT VATAN.

See (1) BOMBAY VATAN ACT.
(2) C. P. CODE, S. 60.
(3) GRANT.

DETENTION IN CUSTODY.

See (1) CR. P. C., S. 344.
(2) CRIMINAL TRIAL.

DETENTION OF ACCUSED BY POLICE.

See (1) CR. P. C., S. 344.
(2) CRIMINAL TRIAL.

DETERMINATION OF TENANCY.

See (1) LANDLORD AND TENANT.
(2) LEASE.
(3) T. P. ACT, Ss. 105, 117.

DEVASTAVIT.

See (1) EXECUTOR.
(2) PROBATE AND ADMINISTRATION ACT, S. 146.

DEVASTHAN.

See HINDU LAW—RELIGIOUS ENDOWMENT.

DHARMA.

See (1) HINDU LAW—RELIGIOUS ENDOWMENT.
(2) MAHOMEDAN LAW—RELIGIOUS ENDOWMENT.
(3) TRUST.
(4) TRUSTS ACT.

DHARMADA.

See HINDU LAW—WILL.

DHARMAKARTA.

See HINDU LAW—RELIGIOUS ENDOWMENT.

DICTA.

See PRACTICE—PRECEDENT.

DIGWARI.

See LAND TENURE.

DILUVION.
See (1) ALLUVION AND DILUVION.
(2) BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825.)
(3) RIPARIAN RIGHTS.

DIRECTORS.
See (1) COMPANY—DIRECTORS.

DISAFFECTION.
See PENAL CODE, S. 124-A.

DISAPPEARANCE.
See EVIDENCE ACT, SS. 107 AND 108.

DISCHARGE.
See (1) CRIMINAL TRIAL.
(2) CR. P. CODE, SS. 209, 254.
(3) EVIDENCE ACT, SS. 102, 103 AND 114.

DISCHARGE OF ACCUSED.
See CR. P. C., S. 253.

DISCIPLINARY JURISDICTION.
See (1) CONTEMPT.
(2) LEGAL PRACTITIONER.
(3) LEGAL PRACTITIONER'S ACT.
(4) LETTERS PATENT.

DISCONTINUANCE OF POSSESSION.
See (1) ADVERSE POSSESSION.
(2) LIMITATION ACT, ART. 142.

DISCOVERY.
See C. P. CODE, O. 11.

DISCRETION.
See (1) PRACTICE.
(2) SP. REL. ACT, S. 22.

DISCRETIONARY RELIEFS.
See SP. REL. ACT, S. 42.

DISHONEST INTENTION.
See (1) EVIDENCE.
(2) EVIDENCE ACT, SS. 14 AND 15.

DISHONESTY.
See PENAL CODE.

DISHONOUR—HUNDI.
See NEG. INSTR. ACT, SS. 91—98.

DISMISSAL FOR DEFAULT.
See C. P. CODE, O. 9, R. 8.

DISMISSAL FROM SERVICE.
See MASTER AND SERVANT.

DISMISSAL OF COMPLAINT.
See CR. P. C., SS. 203, 247.

DISMISSAL OF SUIT.
See C. P. CODE, O. 9, R. 8.

DISPOSAL.
See PENAL CODE, S. 372.

——Of Dead Body.
See PENAL CODE, S. 318.

——Of Property.
See CR. P. C., S. 517.

DISPOSSESSION.
See (1) ADVERSE POSSESSION.
(2) LIMITATION ACT, ARTS. 142—144.

DISPUTE AS TO POSSESSION OF IMMOVABLE PROPERTY.
See CR. P. C., SS. 144—147.

DISQUALIFICATION.
See HINDU LAW—SUCCESSION.

——To give Evidence.
See EVIDENCE ACT, S. 118.

DISQUALIFICATION OF MAGISTRATE.
See PENAL CODE, SS. 526—528.

DISQUALIFIED HEIR.
See HINDU LAW—SUCCESSION.

DISSOLUTION OF MARRIAGE.
See (1) DIVORCE ACT.
(2) HINDU LAW—MARRIAGE—(*a*) DISSOLUTION. (*b*) DIVORCE.
(3) MAHOMEDAN LAW—DIVORCE.

DIVORCE ACT (1869) (As Amended by Act 25 of 1926)—Foreigner.

DISSOLUTION OF PARTNERSHIP.
See (1) CONTRACT ACT, CH. XI.
(2) PARTNERSHIP.

DISTANT KINDRED.
See MAHOMEDAN LAW, SUCCESSION.

DISTINCT OFFENCES.
See CR. P. C., SS. 35, 233.

——Magistrate—Revision by.
See CR. P. C., S. 438.

DISTINCT SUBJECTS.
See COURT FEES ACT, S. 17.

DISTRAINT.
See (1) B.T. ACT.
(2) DEKKHAN AGRICULTURISTS' REL. ACT.
(3) LANDLORD AND TENANT.
(4) MADRAS ESTATES LAND ACT.

DISTRESS.
See (1) B.T. ACT.
(2) DEKKHAN AGRICULTURISTS' REL. ACT.
(3) LANDLORD AND TENANT.
(4) MADRAS ESTATES LAND ACT.

DISTRICT BOARDS ACTS.
See LOCAL ACTS.

DISTRICT MUNICIPAL ACTS.
See LOCAL ACTS.

DIVERSION.
See (1) EASEMENTS.
(2) EASEMENTS ACT.

DIVESTING OF ESTATE.
See HINDU LAW—ADOPTION—SUCCESSION.

DIVISION.
See HINDU LAW—JOINT FAMILY—PARTITION.

DIVORCE.
See (1) DIVORCE ACT.
(2) HUSBAND AND WIFE.
(3) RESTITUTION OF CONJUGAL RIGHTS.

DIVORCE ACT (4 of 1869)—(As Amended by Act 25 of 1926).

—Burden of Proof.

——The entire burden of proving that the petitioner had changed his domicile lies on him: *Winans* v. *Attorney-General*, (1904) A.C. 287, *Foll.* (*Rankin, C.J. and Page, J.*). LINTON *v.* GUDERJAN.
120 I.C. 801=56 Cal.530=A.I.R. 1929 Cal. 599.

—Foreigner.

——Jurisdiction—Foreigner can be made co-respondent. (*Marten, J.*). MRS. ROSE HILL *v.* MR. LUKE C. HILL. **73 I.C. 304=25 Bom.L.R.289=47 Bom. 657=A.I.R. 1923 Bom. 284.**

——As under the Indian Divorce Act (1869) amended by Act (25 of 1926), the Courts in India cannot pass a decree for divorce in cases of persons resident in India but not domiciled therein, and as the Indian and Colonial Divorce Jurisdiction Act passed by the British Parliament in 1926 validates only decrees passed and confirmed under the Indian Divorce Act prior to 15th December, 1926, the Indian Courts cannot confirm, after the passing of the English statute and the amendment of the Indian Act, where the parties are residents in India but domiciled in England, a decree *nisi* though the decree *nisi* may have been passed prior to the passing of the English statute. A decree of dissolution of marriage confirmed or made absolute after 25th March, 1926, the date when the amendment of the Indian Act came into force, would be a nullity, as the order of confirming or making absolute is itself a decree of dissolution, and the making of it is prohibited by the Indian Act of 1926 in cases where the parties to the marriage are not domiciled in India at the date of presentation of the petition. As such a decree cannot be made

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—Proof of adultery.

under the provisions of the Indian Divorce Act, as amended by Act No. 25 of 1926, it would not be rendered valid by S. 3, Indian and Colonial Divorce Jurisdiction Act. (*Shadi Lal, C.J. and Broadway and Fforde, JJ.*). MRS. LYDIA AGNES WALLER *v.* SAMUEL JAMES WALLER. **110 I.C. 706= 10 Lah. 64=30 P.L.R. 250= A.I.R. 1928 Lah. 557.**

—Proof of adultery.

———Where adultery with a named person is alleged but not proved the divorce petition must be dismissed. Mere submission by the wife that she had become pregnant by some unknown person and had miscarriage would not furnish her ground for divorce. Every petition under the Act must contain an allegation that the parties are domiciled in British India.

Per *Marten, J.*—Spouses can deny sexual intercourse even when living together but such evidence must be scrutinised with great care. Where a petition for divorce alleges adultery with a named person and also with person or persons unknown, leave to dispense with the named co-respondent must first be given by the Court before grant of relief. (*Macleod, C.J., Shah and Marten, JJ.*). W. K. HEWSON *v.* ETHEL M. HEWSON. **85 I.C. 774=26 Bom. L.R. 467= A.I.R. 1924 Bom. 397.**

—Whether ultra vires.

—The Act is not *ultra vires* of the Indian Legislature. *Keyes* v. *Keyes*, 1921 P. D. 204, *dissented from.* The fact that the Parliament decided to legislate and got the Indian Divorces (Validity) Act (11 and 12 Geo. V., c. 18) enacted in order to validate the decrees granted in the past cannot be construed as implying an approval of the dictum in the judgment in *Keyes* v. *Keyes*, 1921 P. D. 204. (*Shadi Lal, C. J. Scott Smith, Le Rossignol, Harrison and Fforde, JJ.*). LEE *v.* LEE. **81 I.C. 686= 5 Lah. 147=A.I.R. 1924 Lah. 513 (F.B.).**

———Act is not *ultra vires* of the Indian Legislature. (*Macleod, C. J., Marten and Crump, JJ.*). ALFRED WILKINSON *v.* GRACE WILKINSON. **77 I.C. 654=25 Bom. L.R. 945= 47 Bom. 843=A.I.R. 1923 Bom. 321 (F.B.).**

—S. 2—Change of domicile.

———Domicile—Change of domicile means determination to make alleged domicile home, with clear intention of settling there and ending his days there. *Winans* v. *Attorney General*, (1904) A.C. 287, *Foll.* (*Rankin, C. J. and Page, J.*). LINTON *v.* GUDERIAN. **120 I.C. 801=56 Cal. 530=A.I.R. 1929 Cal. 599.**

—S. 2—Christian.

———*Schwabe, C. J.*—Although a person is excommunicated by the sect or the church to which he belongs he does not thereby cease to profess Christianity. The question of profession of Christianity is a question of his own action and not the action of his Church. (*Schwabe, C. J., Oldfield and Ramesam, JJ.*). PAKKIAM SOLOMAN *v.* CHELLIAH PILLAI. **75 I.C. 17=46 Mad. 839= 33 M.L.T. 231=A.I.R. 1924 Mad. 18= 45 M.L.J. 208 (F.B.).**

—S. 2—Different religions.

———Letters Patent (Bombay), Cl. 35 : 38 Bom. 125 ; 20 I.C. 492, *Overruled.*

While enacting the Divorce Act the intention of the legislature was to enact it in such a way as to remove the limitation contained in Cl. 35, Letters Patent. The Divorce Act intended it to be sufficient for one party to profess the Christian religion and did not require that both parties should do so. The Bombay High Court has, therefore, jurisdiction to entertain a suit for restitution of conjugal rights instituted by a lady, who is a Russian and a Christian, against her husband who is a Parsi : 38 Bom. 125 ; 20 I.C. 492, *Overruled*; 6 M.I.A. 348 (P.C.), *Dist.*; *Chetti* v. *Chetti*, (1909) P. 67, *Rel. on* ; *Other cases, Ref.* (*Marten, C.J., Mirza and Broomfield, JJ.*). NINA DALAL *v.* MERWANJI PHEROZSHAW DALAL. **32 Bom. L.R. 1046=A.I.R. 1930 Bom. 385 (F.B.).**

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 2—'Or respondent'.

—S. 2—Finding.

———Specific findings of material facts showing case to fall under S. 2 are necessary. (*Sanderson, C.J., Newbould and Rankin, JJ.*). W. H. THOMAS *v.* MRS. THOMAS. **86 I.C. 1018=52 Cal. 379= 29 C.W.N. 350=A.I.R. 1925 Cal. 585 (F.B.).**

—S. 2—Jurisdiction.

———Domicile in India at time of petition is essential for granting jurisdiction. (*Rankin, C. J. and Page, J.*). LINTON *v.* GUDERJAN. **120 I. C. 801=56 Cal. 530= A.I.R. 1929 Cal. 599.**

———The Indian Courts have no power to dissolve marriage of persons who are not domiciled in India and resident in India at the time of bringing the petition. A.I.R. 1929 Lah. 419, *Ref.* (*Shadi Lal, C. J. and Broadway and Fforde, JJ.*). J. W. PYATT SERGEANT *v.* MRS. M. G. PYATT. **115 I.C. 851= 30 P. L. R. 272=A.I.R. 1929 Lah. 555.**

———Residence is enough and domicile is not essential to confer jurisdiction—Jurisdiction is not beyond Indian Councils Act (1861), S. 22.

Keyes v. *Keyes*, (1921) P. 204, *not foll.* The Court is bound to pass a decree in such cases though it may not have any effect beyond British India. *Giordano* v. *Giordano*, 40 Cal. 215, *Foll.* (*Gregory, J.*). ISHARANI NIRUPOM DEVI *v.* VICTOR NITENDRA NARAIN. **53 Cal. 282=A.I.R. 1926 Cal. 871.**

———Mere residence confers jurisdiction on Court, to dissolve marriage.

The residence however as contemplated by the Statute means ordinary residence and not a mere temporary presence in a country such as that of a traveller, and such residence must be *bona fide* residence and not one acquired for a fraudulent or collusive purpose. The word "resides" in S. 2 is used in its ordinary sense and is not intended to mean "is domiciled." (*Shadi Lal, C. J., Scott Smith, Le Rossignol, Harrison and Fforde, JJ.*). LEE *v.* LEE. **81 I. C. 686=5 Lah. 147= A. I. R. 1924 Lah. 513 (F.B.).**

———Courts in India are not empowered to decree dissolution of the marriage between persons not domiciled within their jurisdiction. The provisions of S. 2 as to residence, no doubt apply to cases when the parties are domiciled in India, but where the parties are domiciled in England they cannot override the express provisions in S. 7 of the Act, Courts in India are bound by the provisions of S. 7 of the Act and give relief on the same principles namely, that jurisdiction depends on domicile. *Keys* v. *Keys and Gray*, 1921 P. D. 204, *Foll.* (*Robinson, C. J., May Oung and Beasley, JJ.*). A. H. D. JONES *v.* K. JONES. **76 I.C. 597= 2 Bur. L. J. 106=A.I.R. 1923 Rang. 223.**

—S. 2—' Or respondent.'

———*Effect—One of the parties being Christian and other Parsi—Petition for restitution of conjugal rights—Maintainability.*

In a petition for restitution of conjugal rights it is sufficient if one of the parties professes the

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 2—Procedure.

Christian religion. The Bombay High Court has jurisdiction to entertain a petition instituted by a Russian Lady who is a Russian and a Christian against her husband who is a Parsi, the marriage itself having been celebrated under the French Law. (Effect of word 'or respondent' inserted in S. 2 of the Divoree Act by Act XXX of 1927 considered). (*Marten, C.J., Mirza and Broomfield, JJ.*). DALAL *v.* DALAL. **32 Bom. L.R. 1046= A.I.R. 1930 Bom. 385 (F.B.).**

—S. 2—Procedure.

———It is the duty of the District Courts when a petition for dissolution of marriage comes before them to satisfy themselves that the parties to the marriage are domiciled in India at the time when the petition is presented. The Court should see that the petition itself contains a declaration, to that effect; and, before hearing the suit the Court should first satisfy itself that the parties are in fact domiciled in India. (*Fforde, Addison and Johnstone, JJ., afterwards Shadi Lal, C. J., Broadway and Fforde, JJ.*). MURPHY *v.* MURPHY.

113 I.C. 782=115 I.C. 849=10 Lah. 607= 30 P.L.R 622=A.I.R. 1929 Lah. 419.

—S. 2—Residence and domicile.

———Domicile of the parties to a marriage in practice means the domicile of the husband. *Landerdale Peerage Case*, (1885) 10 A. C. 692; *Udny* v. *Udny*, (1869) 1 H.L. (Sc.) 441; *Bell* v. *Kennedy*, (1868) 1 H. L. (Sc.) 307, *Ref.* (*Rankin, C. J. and Page, J.*). LINTON *v.* GUDERJAN. **120 I.C. 801= 56 Cal. 530=A.I.R. 1929 Cal. 599.**

———The question of domicile is one of intention, to be inferred from all the circumstances of a person's life, conduct, habits and so forth and a man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in His Majesty's civil or military service, or in the exercise of any profession or calling: *In re Macright*, (1886) 30 Ch. D. 165, *Rel. on.*

The mere expression of intention to acquire a new domicile is not enough to prove the change. There must be in addition such conduct on the part of the person claiming to have acquired the new domicile as to leave the Court in no doubt as to the reality and irrevocable character of his expressed intention: *Winans* v. *Attorney-General*, (1904) A.C. 287, *Foll.*

It is not that a person while serving in His Majesty's forces in India can never acquire a new domicile but that he must be deemed to retain his domicile of origin while so serving unless his conduct shows that he has intended to relinquish his original domicile for a new one: *In re Macright*, 30 Ch. D. 165, *Expl.* (*Fforde, Addison and Johnstone, JJ., afterwards Shadi Lal, C. J., Broadway and Fforde, JJ.*). MURPHY *v.* MURPHY.

113 I.C. 782=115 I.C. 849=10 Lah. 607= 30 P.L.R. 622=A.I.R. 1929 Lah. 419.

———Husband and wife were residing in India since their marriage in 1918. Husband said that he was domiciled in India and had no intention of returning to England. Wife also said that she intended settling in India and did not mean to go back to England,

Held, that there was no reason not to acccept their statements that they had made India their domicile. (*Rutledge, C. J., Maung Ba and Brown, JJ.*). E. W. BLACKMORE *v.* BLACKMORE NORA. **119 I.C. 220=7 Rang. 313= A.I.R. 1929 Rang. 216.**

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 3—Residence.

———Domicile of choice requires residence and intention of permanent residence. It takes far less to revive a domicile of origin than to acquire a domicile of choice. Where the domicile of petitioner was English.

Held: Rangoon High Court had no jurisdiction to grant divorce. (*Robinson, C. J., May Oung and Beasley, JJ.*). JONES *v.* JONES. **79 I.C. 719=1 Rang. 705= A.I.R. 1924 Rang. 193 (F.B.).**

—S. 3 (1)—Confirmation of decree.

———*By Court* (*Rupchand Bilaram, A.J.C. dissenting*)—The Court of the Judicial Commissioner of Sind can, since the amendment of the Criminal P.C. in 1923, under S. 17 read with S. 3 (1) of the Divorce Act, confirm a decree *nisi* of divorce passed by the Judicial Commissioner of Sind on the Original Side. The High Court of Bombay has no longer jurisdiction to confirm the decrees *nisi* of the Judicial Commissioner. (*Kennedy, J. C. Raymond, Aston, Rupchand Bilaram and Percival, A. J. Cs.*). WALTER JOHN BROOKS *v.* NEE BARWICK. **91 I.C. 99=A.I.R.1926 Sind 58 (F.B.).**

—S. 3 (1)—Interpretation.

———In this section the word "together" governs only the word "last resided" and not the word "reside." The Act therefore gives the petitioning spouse the choice of selecting his forum either as (1) the district where the parties had last resided together or (2) the district within the local limits of which, both the husband and the wife, though living separately "reside" at the date of the presentation of the petition: 47 P.R. 1911 (F.B.); 14 W.R. 416; 44 Bom. 924 and A.I.R. 1926 Oudh. 319, *Foll.* (*Tekchand and Currie, JJ.*). THELMA AGNES *v.* ARCHIBALD CYRIL. **A.I.R. 1930 Lah. 916.**

—S. 3 (1)—'Reside' meaning.

———Person who has an abode elsewhere, but who comes to a place for a short period and with a fixed purpose for being within the jurisdiction of a Court cannot be said to "reside" there; *Coombes* v. *Coombes*, 1 L.B.R. 222; 3 C.W.N. 250; 32 All. 203 and *Manning* v. *Manning*, (1871) 2 P. & D. 223, *Rel. on*; 36 Cal. 964 and A.I.R. 1921 Bom. 211, *Dist.*; 3 Bom. 227, *Ref.* (*Tek Chand and Currie, JJ.*). THELMA AGNES KERSHAW *v.* ARCHIBALD CYRIL KERSHAW. **A.I.R. 1930 Lah. 916.**

—S. 3 (1)—Residence.

———No permanent residence—Residence at a hotel within jurisdiction for nearly a month—Both parties within jurisdiction when respondent was served—There was sufficient residence. (*Marten, J.*). MABEL FLORA MURPHY *v.* J. L. MURPHY.

76 I C. 633=45 Bom. 547=A.I.R. 1921 Bom. 211.

———Though both parties to a petition for divorce are residing separately from each other, the Court has jurisdiction if they lived within the jurisdiction of the Court at the time of the presentation of the petition. (*Marten, J.*). BORGONHA *v.* BORGONHA. **59 I.C. 931=44 Bom. 924= 22 Bom. L. R. 361.**

—S. 3 (3)—Residence.

———"Reside" does not mean sexual intercourse. (*Marten, C. J. Fawcett and Percival, JJ.*). EDITH WALSH *v.* EDWARD WALSH. **101 I.C. 388= 29 Bom. L.R. 308=A.I.R. 1927 Bom. 230.**

———Parties need not have their own house. (*Marten, C.J., Fawcett and Percival, JJ.*). EDITH WALSH *v.* EDWARD WALSH. **101 I.C. 388= 29 Bom. L.R. 308=A.I.R. 1927 Bom. 230.**

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 3—"Together."

—S. 3 (3)—"Together."

———The word "together" does not govern the word "reside," but only the word "last resided." (*Marten, C. J., Fawcett and Percival, JJ.*). EDITH WALSH *v.* EDWARD WALSH.
101 I. C. 388=29 Bom. L. R. 308=A. I. R. 1927 Bom. 230.

———The word "together" in the section governs only the word "resided" and not "reside." (*Ashworth, J.*). R. H. LEADON *v.* E. M. LEADON.
94 I. C. 952=13 O. L. J. 236=3 O.W.N. 406=A.I.R. 1926 Oudh 319.

—S. 3—Major children.

———Children not minors cannot be provided. (*Phillips and Reilly, JJ.*). B. ISWARAYYA *v.* (SWARANAM) ISWARAYYA. **1929 M.W.N. 831=31 M.L.W. 97=A.I.R. 1930 Mad. 154=58 M.L.J. 29.**

—S. 4—Declaration of Marriage.

———The jurisdiction of the High Court in matters matrimonial is only such jurisdiction as is comprised within the provisions of the Indian Divorce Act. A suit therefore for a declaration that marriage was a valid and lawful marriage does not lie. (*Bucknill, J.*). ADELAIDE CHRISTIANA LISH *v.* DAVID LISH. **72 I.C. 657=1923 P.H.C.C. 127=1 Pat. L.R. 129=A.I.R. 1923 Pat. 301.**

—S. 4—Jurisdiction.

———Section 4 only continues the jurisdiction already possessed by High Courts at the date when the Act came into force. Section 10 confers jurisdiction on High Courts, and under this section the Oudh Chief Court has original jurisdiction in divorce cases, because where an Act says that a person may present a petition to a particular Court it must be inferred that it means that the Court shall have power to entertain and decide the petition. (*Ashworth, J.*). R.H. LEADON *v.* E.M. LEADON.
94 I.C. 952=13 O.L.J. 236=3 O.W.N. 406=A.I.R. 1926 Oudh 319.

—S. 7—Adultery.

———In Divorce and Matrimonial causes in England there is a definite established practice there that the evidence of the husband or the wife alone is never to be accepted without corroboration either by witnesses or at least by strong surrounding circumstances. Where charges of adultery are made against a known person that man must be made a co-respondent unless the Judge shall otherwise direct. (*Schwabe, C.J., Coutts-Trotter and Kumaraswamy Sastri, JJ.*). P. JOSEPH *v.* P. RAMAMMA.
68 I.C. 931=45 Mad. 982=16 M.L.W. 689=1922 M.W.N. 637=31 M.L.T. 416=A.I.R. 1923 Mad. 9=43 M.L.J. 441 (F.B.).

—S. 7—Appeal.

———Where the points involved were whether the High Court is justified in reading S. 37 as entitling the Court to order enhancement in alimony granted for maintenance to a wife judicially separated, and whether the High Court has power under O. 41, R. 33 of the Civil P.C., to order such enhancement where none was asked the petitioner-husband was granted leave to appeal to the Privy Council but the High Court acting under Divorce Act, S. 7 ordered the petitioner to deposit a sum of Rs. 3,000 for the expenses of wife. (*Jackson and Reilly, JJ.*). B. ISWARAYYA *v.* SWARNAM ISWARAYYA. **123 I.C. 603=31 M.L.W. 150=1929 M.W.N. 651=A.I.R. 1930 Mad. 159=58 M.L.J. 54.**

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 7—Intention.

—S. 7—Confirmation of decree.

———Decree *nisi* for dissolution of Marriage—Respondent not served with the petition—Uncorroborated testimony of petitioner in respect of the charges of adultery and cruelty—High Court will not confirm decree.

It is contrary to the principles and rules on which the Court for Divorce and Matrimonial Causes in England acts and gives relief, to act on the uncorroborated testimony of a petitioner either to establish adultery or cruelty. (*Schwabe, C. J., Oldfield and Phillips, JJ.*). K. L. A. PAYNE *v.* A. A. PAYNE. **70 I. C. 43=16 M. L. W. 16=A. I. R. 1922 Mad. 350=42 M. L. J. 562.**

—S. 7—Decree on admission.

———A decree for a dissolution of marriage cannot be made merely on admissions and without recording evidence: 17 Bom. 624, *Ref.* (*Addison, Abdul Qadir and Currie, JJ.*). ALLA RAKHA *v.* MT. BARKAT BIBI. **A.I.R. 1930 Lah. 771 (S.B.).**

—S. 7—Domicile of choice.

———A domicile of choice can only be acquired by residence coupled with an intention of permanent or definite residence. Mere residence by itself will not be sufficient. It takes far less to revive a domicile of origin than to acquire a domicile of choice.

Where the domicile of petitioner was English,

Held: Rangoon High Court had no jurisdiction to grant divorce. (*Robinson, C. J., May Oung and Beasley, JJ.*). JONES *v.* JONES.
79 I.C. 719=1 Rang. 705=A.I.R. 1924 Rang. 193 (F.B.).

—S. 7—Duty.

———In an *exparte* case it is not enough for one of the parties to come forward and say something exactly following the terms of the Act. The proper course, if there is no cross-examining pleader, is for the District Judge to ask sufficient questions to make it reasonably clear what the precise facts are on which the petitioner relies for the relief he claims. (*Marten, C. J., Fawcett and Percival, JJ.*). EDITH WALSH *v.* EDWARD WALSH. **101 I.C. 388=29 Bom. L.R. 308=A.I.R. 1927 Bom. 230.**

—S. 7—Duty of Court.

———The Court, while exercising its discretion in matrimonial cases, must have regard not only to the rights and liabilities of the matrimonial person wronged, and of the wrong-doer respectively *inter se* but also to the interests of society and public morality. The Court should endeavour to promote virtue and morality and to discourage vice and immorality. It ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised: *English cases considered.* (*Mears, C. J., Walsh and Kendall, JJ.*). JAMES PETER SHERRING *v.* SHAHZADI SHERRING JACKSON. **108 I.C. 117=50 All. 464=26 A.L.J. 153=A.I.R. 1928 All. 338.**

—S. 7—Intention.

———*Crump, J.* (contra *Marten, J.*)—There is the possibility of reading into S. 7 an intention on the part of Legislature to adopt whatever test the Court of Divorce in England might from time to time lay down upon the matter of divorce but that is a forced and unnatural construction. Also it would be necessary to omit the words "Subject to the provisions contained in this Act..." Indeed, had the Legislature intended, any such result, it would have been easy to say in express terms that the provisions of the Act must be read as subject to the rules and principles applied from time to time by

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 7—Principles and Rules.

the Matrimonial Courts in England... They have chosen to say precisely the contrary. Any such construction would introduce an element of uncertainty where certainty is essential. The doctrine of English Courts has varied from time to time upon this point. Since 1895 domicile alone is recognized as conferring jurisdiction.

S. 7 is a residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with in the Act. It is not unusual in statutory drafting to insert provisions of this nature *ex majore cautela* more especially where an attempt is being made to codify in this country an unfamiliar branch of English Law. The expression 'rules and principles' points rather to the rules and principles on which the Court deals with these matrimonial causes in requiring a certain degree of evidence and other cognate matters. (*Macleod, C. J., Marten and Crump, JJ.*). ALFRED WILKINSON *v.* GRACE WILKINSON. **77 I.C. 654= 25 Bom. L.R. 945=47 Bom. 843= A.I.R. 1923 Bom. 321.**

—S. 7—Principles and rules.

———The words "principles and rules" in S. 7 means principles and rules of law of evidence, of interpretation, of practice, and of procedure but not statutory provisions nor statutory rules. The principles and rules to be applied are by the words of the section made subject to the provisions of the Act; they can never run counter to the Act. (*Phillips and Reilly, JJ.*). B. ISWARAYYA *v.* SWARNAM ISWARAYYA. **1929 M.W.N. 831=31 M.L.W.97= A.I.R. 1930 Mad. 154=58 M. L. J. 29.**

———It is very doubtful whether the expression "principles and rules" mentioned in S. 7 of the Act is intended to include such an important matter as the rule defining the jurisdiction of the Indian Courts. The section is merely a residuary section and it seems that the Legislature, after making express provisions for various matters relating the matrimonial causes, intended by means of this section to apply the English Law to such matters of miscellaneous character as were not expressly dealt with by the Act. The opening words of S. 7 "subject to the provisions contained in this Act" expressly save the rule relating to jurisdiction contained in S. 2 of the Act. A, I. R. 1923 B. 321, *Ref.* (*Shadi Lal, C. J., Scott Smith, Le Rossignol, Harrison and Fforde, JJ.*). LEE *v.* LEE. **81 I.C. 686=5 Lah. 147= A.I.R. 1924 Lah. 513 (F.B.).**

—S. 7—Scope.

S. 7 deals with procedure and does not extend the grounds of dissolution. (*Costello, J.*). M. BARNARD *v.* G. H. BARNARD. **115 I.C. 572= 56 Cal. 89=32 C.W.N. 742= A.I.R. 1928 Cal. 657.**

—S. 7—Temporary residence.

———High Court can decree dissolution where parties are foreigners but temporarily reside in India—Dissolution is effective in India only. 40 C. 215, *Foll.*; A.I.R. 1923 Bom. 321 and A.I.R. 1924 Lah. 513, *Ref.* (*Pearson, J.*). MILLER *v.* MILLER. **89 I.C. 611=52 Cal. 566=A.I.R. 1925 Cal. 874.**

—S. 10—Admission by wife.

———The Court may act on the admissions of the wife although they are not supported by any other evidence. But to rely entirely upon such admissions is highly dangerous, as collusion between husband and wife is quite possible. In each case the question will be whether all reasonable grounds for suspicion is removed. Generally speaking it is desirable to insist upon evidence corroborative of the admissions. (*Shah, Ag. C. J., Marten and Fawcett, JJ.*). JOHN OVER *v.* MURIEL A. I. OVER. **91 I.C. 20= 49 Bom. 368=27 Bom. L. R. 251= A.I.R. 1925 Bom. 231.**

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 10—Cruelty.

—S. 10—Adultery.

———If a husband or wife contracts a venereal disease during the marriage but fails to show that the origin of the disease was innocent, adultery is established if it is proved that the wife or husband was free from that disease and could not possibly have communicated the same to him or her. *Gleen* v. *Gleen*, (1900) 7 T. L. R. 62; *Mills* v. *Mills*, (1920) 36 T. L. R. 772 and *Stead* v. *Stead*, (1927) 71 S. J. 391, *Ref.*; *Anthony* v. *Anthony*, (1919) 35 T. L. R. 559 and *Gliksten* v. *Gliksten*, (1917) 33 T. L. R. 208, *Dist.* (*Tek Chand and Agha Haidar, JJ.*). MRS. ADA JOSE *v.* MR. CHARLES LEONARD JOSE. **A. I. R. 1930 Lah. 828.**

———Where it is found that the joint presence of the husband and another woman is not a mere farce staged for the purpose of allowing the wife to constitute divorce proceedings, but is an incident in the course of a liaison, adultery on the part of the husband may be held as proved. *Farnham* v. *Farnham*, 41 T. L. R. 543, *Rel. on.* (*Costello, J.*). M. BARNARD *v.* G. H. BARNARD. **115 I.C. 572= 56 Cal. 89=33 C.W.N. 742= A.I.R. 1928 Cal. 657.**

———Adultery condoned—Offence less than adultery again committed—Previous adultery is not revived.

At least the second offence, if it is not adultery, must be one of which a Court can take cognizance: *Collins* v. *Collins*, (1883) 9 A. C. 205, *Rel. on.* Mere familiarity does not revive adultery. (*Pullan, J.*). G. C. FOSTER *v.* A. B. FOSTER. **107 I.C. 184= 1 L.C. 685=A.I.R. 1928 Oudh 114.**

———In a suit for divorce the correspondence between the respondent and a co-respondent is always a very important piece of evidence. It is a fundamental rule that in a suit for dissolution of marriage it is not necessary to prove the direct fact of adultery. The Court may presume adultery when it is satisfied that a guilty attachment subsisted between the parties, and that opportunities occurred when a guilty intercourse might with ordinary facilities have taken place. (*Broadway and Abdul Raoof, JJ.*). S. I. DAVIDSON *v.* NORTH MACDONALD DAVIDSON. **62 I. C. 782=3 U. P. L. R. (L.) 66.**

—S. 10—Circumstances to be considered.

———All circumstances of married life, and particularly circumstances as to petitioner's adultery, must be considered. (*Mears, C. J., Walsh and Kendall, JJ.*). JAMES PETER SHERRING *v.* SHAHZADI SHERRING JACKSON. **108 I.C. 117= 50 All. 464=26 A.L.J. 153= A.I.R. 1928 All. 338.**

—S. 10—Cruelty.

———Where a husband who has a loathsome disease and knowing that, he compels his wife to sexual intercourse with him against her will, even though the forcible intercourse might not result in communicating the disease, cruelty must be held to be proved, *Foster* v. *Foster*, A.I.R. 1921 P. 438, *Ref.* (*Tek Chand and Agha Haidar, JJ.*). MRS. ADA JOSE *v.* MR. CHARLES LEONARD JOSE. **A.I.R. 1930 Lah. 828.**

———Cruelty may be defined as conduct of such a character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger. In order

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 10—Cruelty.

to establish a case of cruelty against her husband a wife must prove more than isolated acts of violence. The degree of violence varies in accordance with the status of the parties but merely proving certain isolated assaults, all of which arose on the spur of the moment and on some real or fancied provocation is not enough. (*Pullan, J.*). G.C. FOSTER *v.* A.B. FOSTER. **107 I.C. 184=1 L.C. 685=A.I.R. 1928 Oudh 114.**

———Threat of force to pregnant woman is legal cruelty—Adultery condoned by wife can be revived by legal cruelty. (*Walsh, J.*). (MRS. ALICE) KING *v.* MR. KING. **83 I.C. 167=47 All. 50=6 L.R.A. Civ. 16=A.I.R. 1925 All. 237.**

———The change of religion is no ground for a divorce: nor is mere change of religion coupled with adultery a ground for divorce; there has to be a change of religion coupled with a marriage with some other woman. Where the husband's general conduct towards the wife is of a character tending to degrade her, and subjecting her to a course of annoyance and indignity injurious to her health, the Court should hold the cruelty proved. 164 E.R. 1467, *Ref.* (*Young, Og. C.J., May Oung and Carr, JJ.*). NAUG MUN *v.* LABYA NAW. **80 I.C. 179=2 Bur. L.J. 9=2 Rang. 199=A.I.R. 1924 Rang. 262.**

—S. 10—Effect of judicial separation.

———Decree for judicial separation—Petition for divorce is not maintainable on the same facts.

Green v. *Green*, (1873) 3 P. & D. 121; *Mason* v. *Mason*, (1883) 8 P. & D. 21; *Fullerton* v. *Fullerton*, (1922) 39 T. L. R. 46; *Hall* v. *Hall*, (1879) 48 L. J. P. 57; and *Bland* v. *Bland*, (1866) P. & D. 237, *Dist.* (*Rankin, C. J. and C. C. Ghose, J.*). ENID IVY COLLINS *v.* W. G. COLLINS. **115 I.C. 599=56 Cal. 166=32 C.W.N. 932=A. I. R. 1928 Cal. 806.**

—S. 10—Jurisdiction.

———Cases under Divorce Act—Court should inquire into facts giving it jurisdiction to pronounce decree for dissolution of marriage. 14 W.R. 416, *Foll.* (*Tek Chand and Currie, JJ.*). THELMA AGNES KERSHAW *v.* ARCHIBALD CYRIL KERSHAW. **A. I. R. 1930 Lah. 916.**

———Where neither of the parties are proved to be domiciled in India and therefore for purposes of international law no divorce can be granted to the party but the Indian Courts are authorized under the Indian Divorce Act to grant a petition which will be valid for all purposes throughout British India where the parties are resident within the jurisdiction of the Court and the adultery complained of has been committed in India. (*Pullan, J.*). MRS. NAN GREENWOOD *v.* L. V. GREENWOOD. **106 I. C. 481=5 O. W. N. 163=A. I. R. 1928 Oudh 218.**

—S. 10—Proof of marriage.

———Divorce case—Marriage should be strictly proved and in general certificate of marriage should be produced. Parties domicile in India and their residence within Court's jurisdiction should also be proved—Adultery independent of wife's admission should be proved. (*Marten, C. J., Blackwell and Baker, JJ.*) *and afterwards remand* (*Marten, C. J., Crump and Blackwell, JJ.*). PREMCHAND HIRA *v.* BAI GALAL. **105 I. C. 871=51 Bom. 1026=29 Bom. L. R. 1336=A. I. R. 1927 Bom. 594.**

—S. 11—Discretion.

———In the matter of excusing a petitioner from naming an alleged adulterer, a co-respondent in a suit for dissolution of marriage, the Indian Courts have not the same discretion as the English Courts have. *Saunders* v. *Saunders*, (1897) P. 89, *Ref.* (*Findlay, J. C.*). CHARLES HENRY SMALLEY *v.* MRS. OLIVE MURIEL SMALLEY. **107 I.C. 667=11 N. L. J. 4=A. I. R. 1928 Nag. 117.**

DINORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 13—Collusion.

—S. 11—Knowledge of name.

———Where the petitioner has knowledge where his wife is residing and it is inconceivable to suppose that with due effort and enquiry he would not be able to discover the name of the alleged adulterer or adulterers, the case would not be covered by the second ground as given in S. 11. (*Findlay, J. C.*). CHARLES HENRY SMALLEY *v.* MRS. OLIVE MURIEL SMALLEY. **107 I.C. 667=11 N.L.J. 4=A.I.R. 1928 Nag. 117.**

———Adulterer's name not known. Court should not lightly excuse absence of enquiry. (*Shah, Ag. C. J., Marten and Fawcett, JJ.*). JOHN OVER *v.* MURIEL A. I. OVER. **91 I.C. 20=49 Bom. 368=27 Bom. L.R. 251=A.I.R. 1925 Bom. 231.**

—S. 11—Necessary parties.

———Adulterer has to be made co-respondent unless omission excused by Court—Wife's parents cannot be made parties. (*Addison, Abdul Qadir and Currie, JJ.*). ALLA RAKHA *v.* MT. BARKAT BIBI. **A.I.R. 1930 Lah. 771 (S.B.).**

———Adulterer must be made party in an application by the husband for dissolution of marriage. (*Rankin, C.J., C.C. Ghose and Pearson, JJ.*). GARUO SANGMA *v.* RANGJI MECHIK. **117 I.C. 837=56 Cal. 29=A.I.R. 1929 Cal. 276 (S.B.).**

—S. 11—Revision.

———High Court will not interfere in revision with an order refusing an application for addition of a party as a co-respondent in a suit under the Act. (*B. B. Ghosh and Mallik, JJ.*). MOTI LAL LYALL *v.* PREMI LYALL. **107 I.C. 475 (1)=54 Cal. 1038=A.I.R. 1928 Cal. 114.**

—S. 12—Duty of Court—Nature of proceedings.

———The proceedings under the Act are not a civil suit which can be compromised and under S. 12 it is for the Court to satisfy itself so far as it reasonably can, not only as to the facts alleged but also whether or not the petitioner has been in any manner accessory to or conniving at the adultery or has condoned the same and the Court has to enquire into any counter-charge which may be made against the petitioner. (*Addison, Abdul Qadir and Currie, JJ.*). ALLA RAKHA *v.* MT. BARKAT BIBI. **A.I.R. 1930 Lah. 771 (S.B.).**

—S. 13—Admission.

———An admission of adultery unsupported by corroborative proof should no doubt be received with caution, but if the Court, after scrutinizing it carefully believes it to be true it can grant divorce on the strength of that admission alone although there might be a total absence of other evidence to corroborate it: *Robinson* v. *Robinson*, 29 L. J. N. S. 178, *Foll.* (*Shadi Lal, C.J. and Zafar Ali, J.*). MRS. O'DONNELL *v.* C. E. O'DONNELL. **9 L. L. J. 315= =A.I.R. 1927 Lah. 491.**

—S. 13—Collusion.

———Collusion between the parties cannot be inferred from such ordinary acts between them as a solicitor would naturally regard as unoffensive and unobjectionable: *Churchward* v. *Churchward*, (1895) P. 7 and *Harris* v. *Harris*, (1862) 31 L.J. Pr. (N.S.) 160, *Ref.* (*Rankin, C.J. and Page, J.*). LINTON *v.* GUDERIAN. **120 I. C. 801=56 Cal. 530=A.I.R. 1929 Cal. 599.**

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 13—Delay.

—S. 13—Delay.

———It is not open to a party in matrimonial suit to choose his own time for coming to Court and asking for relief. The matrimonial jurisdiction of the Court is intended to afford relief to a husband or to a wife who feels that he or she has been grievously wronged by the other party, and, therefore desires to have the marriage dissolved and possibly to obtain compensation from the person who is responsible for the wrong which has been done. (*Costello, J.*). KING *v.* KING.

57 Cal. 215=A.I.R. 1930 Cal. 418.

———The question of delay in bringing matrimonial suit is always a matter for the discretion of the Court, and the Court ought not to exercise its discretion in favour of the petitioner who has slumbered in sufficient comfort for a space of a year or more, because the inaction, on the part of the petitioner, shows not that he was insincere in his complaint in the sense of not believing that his wife had committed adultery, but because there was an acquiescence by him in the injury which he knew he had suffered. (*Costello, J.*). KING *v.* KING.

57 Cal. 215=
A.I.R. 1930 Cal. 418.

———Petition for, divorce five years afterknowledge of adultery of wife—Petition should be dismissed even though adultery be established. (*Shadi Lal, C.J. and Bhide, J.*). ALLAN ROBERT SHAW *v.* MRS. EMYLY MAY SHAW. **107 I.C. 273=**
=A.I.R. 1928 Lah. 320.

—S. 13—Essentials for decree.

———Petition for divorce by wife unopposed—Mere evidence of adultery and cruelty is not enough for decree *nisi*—Want of connivance and explanation of delay in filing petition, is necessary—Necessary facts should be stated with precision. (*Mears, C.J., Boys and King, JJ.*). MRS. M.B. HARTLEY *v.* JACK FLEMING HARTLEY. **124 I.C. 465=**
A.I.R. 1930 All. 322 (S.B.).

—S. 13—Object.

———Object of insisting on no collusion is to ensure fair trial. It is to oblige them to bring all material and pertinent facts to the notice of the Court, to prevent their blinding the eyes of the Court in any respect; to oblige them so to act as will enable the Court to be in a position to do justice between the parties. (*Rankin, C.J. and Page, J*). LINTON *v.* GUDERIAN. **120 I.C 801=**
56 Cal. 530= A.I.R. 1929 Cal. 599.

—S. 14—Adultery by petitioner.

———Where the husband of the petitioner had deserted her for nearly six years and had not maintained her and her child and he had been guilty of habitual cruelty and adultery.

Held, that a decree for divorce should be passed and the fact that the petitioner had gone unchaste would not deprive her of the decree where the husband was to a great extent responsible for her unchastity. (*Sanderson, C.J., Panton and Graham, JJ.*). MRS. MARY REBERIO *v.* V. S. REBERIO.

98 I.C. 154=54 Cal. 80=
44 C.L.J. 25=30 C.W.N. 820=
A.I.R. 1926 Cal. 1014.

———In divorce cases, the Court is bound to act on the principles followed by the Divorce Courts in England. Adultery on the part ofthe petitioner is very rarely condoned by the Court. Where the adultery is committed in ignorance of fact, as where a petitioner whose wife had left him married again in the belief that his wife was dead, the Court may grant relief. Another ground recognised

DIVORCE ACT—(1869)—(As Amended by Act 25 of 1926)—S. 15—Alimony.

is, where a petitioner acts in ignorance of law, as, where a man marries again after decree *nisi* has been passed, but before it was absolute in the *bona fide* belief that his marriage had already been dissolved. Another class of cases in which discretion may be exercised is where the wife commits adultery in consequence of threats and personal violence by which she is coerced into committing a fault. The last case is where the petitioner commits adultery to the knowledge of the respondent but which the respondent long since pardoned and condoned. Cases are not to be decided on grounds of sympathy, but on the judicial exercise of the discretion which the law confides to the Courts. (*Robinson, C.J. and Maung Gyi, J.*). MA OHU MAY *v.* SUTHERLAND. **88 I.C. 1009=4 Bur. L.J.47=**
A.I.R. 1925 Rang. 257.

———The Court has a discretion to grant relief to a guilty party. But that discretion has to be exercised with exceptional care, and speaking generally, it is not open to a petitioner to bring a petition and deny that she has committed adultery and then after it is proved that she has committed adultery,to turn round and ask the Court to condone it and grant her a divorce. (*Marten, J.*). WILHELMINA CODD *v.* BERTIE ELIJAH. **84 I.C. 71=**
47 Bom. 664=25 Bom.L.R. 339=
A.I.R. 1924 Bom. 132.

—S. 14—Condonation.

———Condonation of past matrimonial offences is impliedly conditioned upon future good behaviour of offending spouse and so if after condonation offences are repeated, right to make condoned offence ground for divorce revives—Wife committing adultery—Then husband and wife living together for some months—Wife again deserting husband—Subsequent desertion is sufficient ground for making previous adultery ground for divorce and husband is entitled to decree for divorce. 47 Cal. 1068, *Rel. on.* (*Rutledge, C.J., Maung Ba and Brown, JJ.*). E. W. BLACKMORE *v.* BLACKMORE NOREA. **119 I.C. 220=7 Rang. 313=**
A.I.R. 1929 Rang. 216 (S.B.).

———Condonation is not absolute, but is only conditional, and if there is a subsequent matrimonial offence, then the condonation goes, and the original offence is revived. *Palmer* v. *Palmer*, (1860) 2 Sw. & Tr. 61, *Rel. on.* (*Marten, C.J., Blackwell and Baker, JJ.*) *and after remand* (*Marten, C.J., Crump and Blackwell, JJ.*). PREMCHAND HIRA *v.* BAI GALAL. **105 I.C. 871=51 Bom. 1026=**
29 Bom. L. R. 1336=A. I. R. 1927 Bom. 594.

———Condoned adultery is revived by the commission of a later matrimonial offence. (*Chatterjea, Ag. C. J., Walmsley and Page, JJ.*). C.E. STUART *v.* D.A.C. STUART. **96 I.C. 932=**
53 Cal. 436=A.I.R. 1926 Cal. 864.

—S. 14—Prostitution by Petitioner.

———Where the husband of the petitioner illtreated her and subsequently deserted her without providing for her maintenance and the petitioner lead a life of prostitution out of necessity and later gave it up, the Court ought to exercise the discretion vested under S. 14 in favour of the petitioner and pass a decree *nisi* for dissolution. *Burdon* v. *Burdon*, 1901 P. 52; *Humpson* v. *Humpson*, 1914 P. 104, *referred to.* (*Panckridge, J.*). ROZE *v.* ROZE.
57 Cal. 891.

—S. 15—Alimony.

———If a husband's suit for dissolution of marriage on the ground of his wife's adultery is dismissed on the ground that the adultery alleged

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 15—Proof of cruelty.

was not proved, the Court cannot as part of the decree in the suit grant permanent alimony to the wife. (*Krishnan and Ramesam, JJ.*). DEVASAHAYAM *v.* DEVAMONY. **69 I.C. 994= 17 M.L.W. 90=1923 M.W.N. 184= 46 Mad. 133=A.I.R. 1923 Mad. 211= 43 M.L.J. 763.**

—S. 15—Proof of cruelty.

———Proof of reasonable apprehension of bodily hurt is sufficient to prove cruelty. The Court is not to wait till the hurt is actually done but the apprehension must be reasonable—It must not be an apprehension arising merely from an exquisite or diseased sensibility of mind. *Evans* v. *Evans*, (1790) 1 Hagg Cons. 35, *Foll.*; *English cases cited.* (*Chatterjea, Ag. C. J., Walmsley and Page, JJ.*). C. E. STUART *v.* D. A. C. STUART. **96 I. C. 932= 53 Cal. 436=A. I. R. 1926 Cal. 864.**

—S. 15—Right to relief.

———Speaking generally, a guilty party cannot obtain relief by way of judicial separation any more than he or she can obtain relief by way of a divorce. 13 P. D. 141, *Foll.* Desertion by the husband, in order to be a ground for an order for Judicial separation must be a wilful abstention which is against the wishes of the wife. In a suit by wife it is competent to the husband to bring the cross-petition, not by a separate petition on a separate document, but by a further statement added to the original defence to the wife's petition. (*Marten, J.*). MRS. ROSE HILL *v.* MR. LUKE C. HILL.

73 I.C. 304=25 Bom. L.R. 289=47 Bom. 657= A.I.R. 1923 Bom. 284.

—S. 16—Death of petitioner.

———Where after the passing of the decree *nisi* either the husband or wife dies, the High Court cannot confirm the decree of dissolution. (*Sanderson, C.J., Woodroffe and Richardson, JJ.*). BUTTERFIELD *v.* BUTTERFIELD. **74 I.C. 250= 50 Cal. 153=A.I.R. 1923 Cal. 426.**

—S. 16—Interpretation.

———"During that period" means period from the date of decree *nisi* to the date of decree absolute.

It is not the intention of the legislature that no person can be heard to show cause why the decree should not be made absolute if he fails to apply within six months from the date of the decree *nisi*. (*King, J.*). D'CRUZ, F. A. *v.* D'CRUZ, MRS. W.E. **103 I.C. 512=1 L.C. 203=A.I.R. 1927 Oudh 310.**

———The words "not being brought before the Court" in S. 16 mean, "not being brought before the Court at any time up to the date of intervention"; 2 L.R. 357, *Foll.* (*King, J.*). D'CRUZ *v.* D'CRUZ, MRS. W. E. **103 I.C. 512=1 L.C. 203= A. I. R. 1927 Oudh 310.**

—S. 16—Intervention.

———The mere fact that the intervenor happens to be a near relative of the party is not *per se* a ground for refusing to allow him to intervene, where he is not acting at the instance of the party and the simple fact, that the intervenor is a close relation of the party and is living with him is no ground for inferring that the intervenor is acting at the instance of that party. *Howarth v. Howarth*, 9 P.D. 218, *Foll.*; 6 Bom. 416, *Dist.* (*King, J.*). D'CRUZ *v.* D'CRUZ, MRS. W.E. **103 I.C. 512= 1 L.C. 203= A.I.R. 1927 Oudh 310.**

—S. 16—Investigation.

———In England there is a King's Proctor whose duty is to investigate any charge of adultery brought against a petitioner and if necessary to move the Court to set aside the decree *nisi*. In India there is no King's Proctor, but the Court should of its own motion investigate into the matter.

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 19—Impotence.

In certain cases the law will not allow evidence to be given by husband or wife as to whether or not they have had sexual intercourse, and to bastardise his or her alleged child by stating, that there was no sexual intercourse between the spouses. But it is open to one of them to say that, by reason of absence abroad or for some other reason, there could have been no access between the parties during particular periods. (*Marten, J.*). WILHELMINA CODD *v.* BERTIE ELIJAH.

84 I.C. 71=47 Bom. 664=25 Bom. L.R. 339= A.I.R. 1924 Bom. 132.

—S. 16—Right to show cause.

———Witness in divorce case is not precluded from showing cause against decree absolute. (*King, J.*). D'CRUZ *v.* D'CRUZ, MRS. W.E.

103 I.C. 512=1 L.C. 203=A.I.R. 1927 Oudh 310.

—S. 17—Intention.

———Scope—Reference to High Court for confirmation of decree for dissolution—High Court must review entire evidence. (*Mears, C.J., Pigott and Walsh, JJ.*). A.A. GARLINGE *v.* I.R. GARLINGE. **77 I.C. 133=44 All. 745= A.I.R. 1922 All. 504 (F.B.).**

—S. 17—Notice.

———Dissolution of marriage—Proceedings to confirm decree *nisi*—Notice to respondent is not necessary. 8 Cal. 756, *Foll.* (*Scott-Smith, Le Rossignol and Abdul Raoof, JJ.*). HARRIS *v.* CAPT. C. P. HARRIS. **59 I.C. 89=10 P.L.R. 1921= A.I.R. 1921 Lah. 310.**

—S. 17—Want of evidence.

———Dissolution was refused for want of evidence of misconduct. (*Fforde, Addison and Bhide, JJ.*). V. W. A. EMILE *v.* N. G. A. EMILE. **A. I. R. 1930 Lah. 360 (S. B.).**

—S. 18—Procedure.

———Petition under S. 18—Prayer for custody of children inserted—Respondent not prejudiced by hearing the two issues together, nor taking objection—There is no irregularity in disposing of both matters together. *Langworthy* v. *Langworthy*, 11 P. D. 85, *Rel. on*; 19 I. C. 778, *Dist.* (*Kendall, J.*). ESME *v.* EDWARD JOHN ANDERSON. **111 I. C. 627= 1929 A.L.J. 65=A. I. R. 1928 All. 677.**

—S. 19—Fraud.

———Fraud apart from fraud in obtaining the consent is not a ground for dissolution of marriage. Non-disclosure of the fact that either party is suffering from incurable disease making co-habitation dangerous to the other is not such fraud. Where due to the wife suffering from syphilis the husband could not consummate the marriage without the very gravest risk to his health and to that of any offspring who might be born of the connection and where this state of things was likely to continue and be permanent,

Held, this amounted to impotency on the part of the wife. (*Greaves, J.*). BIRENDRA KUMAR *v.* HEMALTA BISWAS. **67 I. C. 949=25 C.W.N.706= A. I. R. 1921 Cal. 464.**

—S. 19—Impotence.

———Venereal disease in woman does not constitute impotency—(*Obiter*). A. I. R. 1921 Cal. 459, *Not appr.* (*Stuart, C. J. and Wazir Hasan, J.*). WYLIE *v.* RUTH SHATI WYLIE. **7 O.W.N. 17= A.I.R. 1930 Oudh 83.**

———Incurable syphilis is equivalent to impotence, and that a decree of nullity can be granted

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 19—Impotence.

to a petitioner who proves that the husband or wife, as the case may be, was suffering from such a disease at the time of marriage, even though the disease is not an absolute bar to copulation. Where a woman is discharged from hospital as cured and her blood test was negative it is much more likely that she was suffering from some curable form of venereal disease than that she was suffering from an incurable form. Syphilis in its early stage is not incurable and, therefore, it cannot be said that she is impotent and that her marriage cannot be set aside on that account. 48 Cal. 283, *Rel. on.* (*Pullan, J.*). E. A. WYLIE *v.* R. S. WYLIE. **117 I. C. 450= 6 O. W. N. 244= A.I.R. 1929 Oudh 238.**

———Husband impotent as regards his wife only—Decree of nullity can be pronounced. *C. (otherwise H.)* v. *C.*, (1921) P. 399, *Applied.* (*Marten, C.J., Crump and Blackwell, JJ.*). H. *v.* H. **110 I.C. 266= 30 Bom. L.R. 523=A.I.R. 1928 Bom. 279.**

—S. 19—Syphilis.

———*Existence of syphilis in one party to marriage is ground for rescission of marriage contract.*

Where syphilis is contracted, prior to but was not known to exist at the time the contract to marry was entered into, or where such disease was contracted subsequent to the making of the contract to marry, but through no wrongful act of the defendant, its existence furnishes a good defence to an action for breach of promise. The affliction is to be of a serious type, and perhaps, incurable, the rule may well be otherwise where the disease is such as to be easily curable and where the plaintiff assents to a postponement of performance.

The two principal ends of matrimony are, a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence. Permanent and incurable impotency existing at such time and such nature as to render complete and natural sexual intercourse between the parties practically impossible is recognised as a ground for the annulment of the marriage. Similarly incurable syphilis is a ground for annulling marriage. The existence of such diseases in either party at the time of the marriage renders the marriage voidable.

In such cases a divorce may be decreed on the ground of cruelty. To constitute such a ground of cruelty, it is usually required that the disease should have been actually communicated to the complainant, that the complainant should have been ignorant of the existence or nature of the defendant's disease at the time of its communication, and that the defendant should have infected the petitioner knowingly and wilfully. If all these facts are established no question can obviously arise as to the propriety of granting the divorce, unless there are facts showing a condonation of the offence.

Sound public policy would not permit an extension of the rule to cases where the disease is easily curable. It is the permanent or probably permanent character of the malady, rendering sexual intercourse impracticable throughout the continuance of the marriage, that furnishes the reason for the annulment, and the maxim should apply *cessante rationae cessat lex ipsa.*

The existence of syphilis in one of the parties furnishes a good ground for divorce to the other.

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926))—S. 32—Ordinary suit for.

Concealment of a loathsome and incurable form of syphilis is recognised as a fraud sufficient to warrant divorce or annulment, specially where the existence of the disease is discovered by the other party before the marriage is consummated and the parties immediately separate, that such disease must be actually or probably incurable.

There should be a proper medical examination of the person of the party alleged to be afflicted. Where a party refuses to attend for medical inspection, the Court may properly draw an unfavourable inference. The Courts naturally exercise a wide discretion in ordering physical examination and always do so, subject to such conditions as will afford protection from violence to natural delicacy and sensibility. (*Mookerjee, A.C.J. and Chaudhuri, J.*). BIRENDRA KUMAR *v.* HEMANTA BISWAS. **60 I.C. 362=48 Cal. 283= 33 C.L.J. 97=A.I.R. 1921 Cal. 459.**

—S. 22—Separation when justified.

———It is easy for a wife, who has some grievance against her husband, to say that she would rather take an allowance and live apart from him but it is not the object of the law to make such separations easy. They are merely a short road to prostitution and there are certain things which a wife must put up with. Where the husband has shown himself to be suspicious, jealous and occasionally violent but it is not proved that he is unfaithful or that he has failed to support her or her children in decency or that he is habitually cruel. It is neither for her advantage nor in the interest of justice that she should be given a separation from her husband under such circumstances. (*Pullan, J.*). G. C. FOSTER *v.* A. B. FOSTER. **107 I.C. 184=1 L.C. 685=A. I. R. 1928 Oudh 114.**

—S. 22—Subsequent co-habitation.

———*Decree—Execution—Decree for judicial separation and permanent alimany is rendered void by subsequent co-habitation.*

There cannot be any such thing as a conditional resumption of co-habitation. Either the wife accepts her decree for judicial separation and lives apart from her husband under it or she does not accept it. There cannot be any intermediate stage between acceptance of the judicial separation and its non-acceptance. *Haddon* v. *Haddon*, (1887) 18 Q.B.D. 778, *Foll.* (*Beasley, J.*). ELLEN MA NOO *v.* WILLIAM PO THIT. **83 I.C. 566= 2 Rang. 163=A.I.R. 1924 Rang. 314.**

—S. 32—Different religions.

———Bombay High Court has jurisdiction to entertain suit for restitution of conjugal rights instituted by Christian lady against her Parsi husband—Both parties need not be Christian—Divorce Act, Ss. 2 and 4—Letters Patent (Bombay), Cl. 35 : 38 Bom. 125 ; 20 I. C. 492, *Overruled.*

While enacting the Divorce Act the intention of the legislature was to enact it in such a way as to remove the limitation contained in Cl. 35, Letters Patent. 38 Bom. 125 ; 20 I.C. 492, *Overruled* ; 6 M.I.A. 348 P. C., *Dist.* ; *Chetti* v. *Chetti*, (1909) P. 67, *Rel. on*; *Other cases, Ref.* (*Marten, C.J., Mirza and Broomfield, JJ.*). NINA DALAL *v.* MERWANJI PHEROZSHAW DALAL. **32 Bom.L.R. 1046= A.I.R. 1930 Bom. 385.**

—S. 32—Ordinary suit for.

———Suit for restitution of conjugal rights bought by Christian in ordinary way in High Court and not by petition under matrimonial jurisdiction—Judge has jurisdiction to pass decree for

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 34—Considerations in assessing damages.

relief prayed for. (*Blackwell and Kemp, JJ.*). (PETER PHILIP) SALDANHA *v.* (ANNE GRACE) SALDANHA. **32 Bom.L.R. 17=A.I.R. 1930 Bom. 105.**

—S. 34—Considerations in assessing damages.

———In assessing damages on the ground of adultery the Court should consider whether the wife was in the past a good wife and took good care of her husband's house and children, or whether she was a worthless wife, always out of the house and not attending to her duties. In the later case, the petitioner may not be entitled to any damages at all. (*Marten, C.J., Blackwell and Baker, JJ.*) *and after remand* (*Marten, C.J., Crump and Blackwell, JJ.*). PREMCHAND HIRA *v.* BAI GALAL.

105 I.C. 871=51 Bom. 1026=29 Bom. L.R. 1336=A.I.R. 1927 Bom. 504 (F.B.).

———Damages claimed by husband in a divorce petition—Demeanour of husband, happiness in life and position of the wife's partner in adultery are to be considered. *Comyn* v. *Comyn*, 32 L. J. Mat. 210, *Ref.* (*Kendall, J.*). D'CRUZ *v.* MRS. D'CRUZ.

98 I.C. 1019=3 O.W.N. 926=A.I.R. 1927 Oudh 34.

———The object of awarding damages against an adulterer is not to punish at all. All that the law permits to be given is compensation for the loss which the husband has sustained. That is the only guide to the amount of damages to be given. But if it is proved that a man has led a happy life with his wife, that she has taken care of his children, that she has assisted in his business, and then some man appears upon the scene and seduces the wife away from her husband, then those facts will be taken into consideration. If the adulterer did not seduce her away from her husband that makes a very material difference in considering the amount of damages to be given. In considering these questions the conduct of the husband must be looked to.

The means of the adulterer have nothing to do with the question. I.R. 11 P. D. 100, *Appr.* (*Sanderson, C. J., Newbould and Rankin, JJ.*). U. H. THOMAS *v.* MRS. THOMAS. **86 I.C. 1018=52 Cal. 379=29 C.W.N. 350=A. I. R. 1925 Cal. 585 (F.B.).**

—S. 34—Damages—Extent of.

———Where a decree was passed for the dissolution of marriage and though the Court found that a sum of Rs. 1,500 directed to be paid by the co-respondent would be sufficient compensation to the plaintiff it was decreed further that a sum of Rs. 12,000 should be paid into Court in the event of the co-respondent failing to marry the respondent within six months of the confirmation of the decree.

Held: that the further direction regarding Rs. 12,000 was in contravention of S. 34 of the Divorce Act and that the same should be disallowed. (*Broadway, Addison and Dalip Singh, JJ.*). P. *v.* P. **11 Lah. 303=31 Punj. L.R. 590=A.I.R. 1930 Lah. 321 (F.B.).**

—S. 34—Jurisdiction.

———Application for dissolution and damages—Court having no jurisdiction to grant dissolution—Damages alone can be granted—Damages will be different according as he is getting or not a decree for divorce : *Bernstein* v. *Bernstein*, (1893) P. 292, *Dist.*; *Monsell* v. *Monsell*, (1922) P. 34, *Ref.* (*Rankin, C. J. and Page, J.*). LINTON *v.* GUDERIAN. **120 I.C. 801=56 Cal. 530=A.I.R. 1929 Cal. 599.**

—S. 34—Legality of order.

———Damages to petitioner ascertained—Order to pay into Court additional amount if co-respondent does not marry respondent is bad. (*Broadway, Addison and Dalip Singh, JJ.*). PRINGLE *v.* W.L. PRINGLE. **A.I.R. 1930 Lah. 321 (S.B.).**

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 43—Procedure.

—S. 35—Fund for defence.

———Where a petition for the dissolution of marriage on the ground of adultery is filed by the husband and the wife enters an appearance and denies the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence and to obtain such assistance from counsel as is reasonable under the circumstances. (*Mears, C.J., Piggott and Walsh, JJ.*). A. A. GARLINGE *v.* I.R. GARLINGE. **77 I. C. 133=44 All. 745=A. I. R. 1922 All. 504 (F.B.).**

—S. 35—Order as to costs.

—The rule that a wife's costs in proceedings *bona fide* instituted against her husband are necessaries for which she can pledge his credit only means that the wife's attorney has a cause of action against her husband for his charges. It does not mean that the Court can in a suit for judicial separation at the instance of the wife under Cl. 12 of the Letters Patent direct the defendant to put the plaintiff in funds. (*Panckridge, J.*). SAMUEL *v.* SAMUEL. **34 C.W.N. 319.**

—S. 37—Enhancement.

———Court has power to enhance alimony ordered to be paid to wife judicially separated. (*Phillips and Reilly, JJ.*). B. ISWARAYYA *v.* (SWARNAM) ISWARAYYA. **1929 M.W.N. 831=31 M. L. W. 97=A.I.R. 1930 Mad. 154=58 M.L.J. 29.**

—S. 37—Marriage declared void.

———Section 37 limits the power of the Court to make an order for permanent alimony to cases in which a decree has been made declaring a marriage to be dissolved or where a decree for judicial separation has been obtained by the wife. The section omits to give such power to the Court where the decree declares the marriage null and void *ab initio* on the grounds mentioned in S. 19 (4). (*Sanderson, C. J., Woodroffe and Richardson, JJ.*). J.J. TURNER *v.* A.E. TURNER. **64 I. C. 924=48 Cal. 636=25 C. W. N. 710=A. I. R. 1921 Cal. 517. (F.B.).**

—S. 37—'On confirmation.'

———"On confirmation" means "at" or "within a reasonable time after." Fifteen years is not a a reasonable time. (*English cases applied*). (*Wallis, C.J. and Krishnan, J.*). ARTHUR MALCOLM LLOYD *v.* KATHLEEN LLOYD. **69 I.C. 746=44 Mad. 989=14 M.L.W. 196=1921 M.W.N.591=A.I.R. 1921 Mad. 230=41 M.L.J. 269.**

—S. 37—Subsequent co-habitation.

———There cannot be any such thing as a conditional resumption of co-habitation. Either the wife accepts her decree for judicial separation and lives apart from her husband under it or she does not accept it. There cannot be any intermediate stage between acceptance of the judicial separation and its non-acceptance. *Haddon* v. *Haddon*, (1887) 18 Q.B.D. 778, *followed.* (*Beaseley, J.*). ELLEN MA NOO *v.* WILLIAM PO THIT. **83 I.C. 566=2 Rang. 163=A.I.R. 1924 Rang. 314.**

—S. 43—Procedure.

———Petition under S. 18—Prayer for custody of children inserted—Respondent not prejudiced by hearing the two issues together, nor taking objection—There is no irregularity in disposing of both

DIVORCE ACT (1869)—(As Amended by Act 25 of 1926)—S. 43—Validity of order.

matters together—Divorce Act, S. 18. (*Kendall, J.*). ESME *v.* EDWARD JOHN. **111 I. C. 627= 1929 A.L.J. 65=A. I. R. 1928 All. 677.**

—S. 43—Validity of order.

———Chief consideration in passing orders must be the welfare of the children—Respondent taking advantage of discovery of illegal marriage to treat wife with less consideration than formerly — Respondent the party at fault as to the illegality of marriage—Respondent's work taking him away from home constantly—Reason not made out why mother be considered unfit for charge—Under the circumstances mother was held to be proper custodian. (*Kendall, J.*). ESME *v.* EDWARD JOHN. **111 I.C. 627=1929 A.L.J. 65= A.I.R. 1928 All. 677.**

—S. 44—Death of petitioner.

———Where the custody of the children was given to the petitioner, the wife, by the decree *nisi* till confirmation and the respondent was directed to pay Rs. 150 for their maintenance.

Held, after the death of the petitioner before confirmation of the decree, the High Court had no jurisdiction in the proceedings. (*Sanderson, C. J., Woodroffe and Richardson, JJ.*). BUTTERFIELD *v.* BUTTERFIELD. **74 I. C. 250=50 Cal. 153= A.I.R. 1923 Cal. 426 (F.B.).**

—S. 45—Security.

———The English authorities do not strike out a husband's petition for divorce or strike out his defence to his wife's petition, merely because he has failed to give security. What they do, is to stay the husband's petition, and as regards the wife's petition to proceed against the husband for contempt. if he is proved to be able to pay but contumaciously refuses to do so. The same procedure should be followed in India. (*Marten, J.*). WILHELMINA CODD *v.* BERTIE ELIJAH. **84 I.C. 71= 47 Bom. 664=25 Bom. L.R. 339= A.I.R. 1924 Bom. 132.**

—S. 45—Service.

———Party should not be lightly excused from effecting personal service of the petition, should circumstances render that course desirable in preference to the practice of service by registered post. (*Shah, Ag. C. J., Marten and Fawcett, JJ.*). JOHN OVER *v.* MURIEL A. I. OVER. **91 I.C. 20=49 Bom. 368=27 Bom. L.R. 251= A. I. R. 1925 Bom. 231. (F.B.).**

—S. 47—Evidence.

———*Viva voce* evidence should be taken although statements in petition may be referred to as evidence. (*Marten, C. J., Blackwell and Baker, JJ.*) *and after remand* (*Marten, C. J., Crump and Blackwell, JJ.*). PREMCHAND HIRA *v.* BAI GALAL. **105 I. C. 871=51 Bom. 1026= 29 Bom. L.R. 1336=A.I.R. 1927 Bom. 594 (F.B.).**

—S. 50—Discretion.

———Although under S. 50 the Commissioner has a discretion to dispense with the service in a proper case he must record proper order in the matter. (*Rankin, C. J., C. C. Ghose and Pearson, JJ.*). GARAO SANGMA *v.* RANGJI MECHIK. **117 I. C. 837=56 Cal. 29= A. I. R. 1929 Cal. 276 (S.B.).**

—S. 50—Mode of service.

———In an application for dissolution of marriage by husband steps should be taken as regards service both upon the wife and the co-respondent and where personal service is not possible it is desirable that an order should be recorded that the matter should be announced in the village by beat of drum and that the proper notice should be put up at the Court house. (*Rankin, C.J., C. C. Ghose and Pearson, JJ.*). GARAO SANGMA *v.* RANGJI MECHIK. **117 I. C. 837= 56 Cal. 29=A.I.R. 1929 Cal. 276 (S.B.).**

DIVORCE JURISDICTION (INDIAN & COLONIAL) ACT—(1926, 16 & 17 Geo. V, Ch. 40)—S. 1—Grounds for decree.

—S. 55—Procedure.

———All decrees and orders made by a Court in any suit or proceedings under the Divorce Act should be enforced and may be appealed from in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction and not by contempt proceedings even though it were the intent of S. 7 to bring into India all the rules of procedure in the Divorce Act in England. (*Costello, J.*). PAULINE WHITE *v.* S. W. WHITE. **107 I. C. 68= 32 C.W.N. 179=A.I.R. 1928 Cal. 513.**

—S. 56—Conditional leave.

———Where the points involved were whether the High Court is justified in reading S. 37 as entitling the Court to order enhancement in alimony granted for maintenance to a wife judicially separated and whether the High Court has power under O. 41, R. 33 of the Civil P.C., to order such enhancement where none was asked the petitioner-husband was granted leave to appeal to the Privy Council but the High Court acting under Divorce Act, S. 7, ordered the petitioner to deposit a sum of Rs. 3,000 for the expenses of wife. (*Jackson and Reilly, JJ.*). ISWARAYYA *v.* SWARNAM ISWARAYYA. **123 I. C. 603=1929 M.W.N. 651= 31 M.L.W. 150=A. I. R. 1930 Mad. 159= 58 M. L. J. 54.**

—S. 57—Validity of new marriage.

———Marriage during former spouse's lifetime and before expiry of the 6 months fixed by S. 57, is void.

Per *Woodroffe, J.*—Where a Minister licensed to solemnise marriage is made aware that there has been a previous marriage which has been dissolved he should require that the decree absolute should be produced before him so that he may see whether the period of six months prescribed by law has elapsed. (*Sanderson, C. J., Woodroffe and Richardson, JJ.*). J. J. TURNER *v.* A. E. TURNER. **64 I. C. 924=48 Cal. 636=25 C. W. N. 710= A. I. R. 1921 Cal. 517 (F.B.).**

—S. 61—Intention.

———Section 61, Divorce Act, is not intended to be anything more and does nothing more than preclude a civil suit for damages of the nature of the English common law action, for criminal conversation which lay at the suit of a husband to recover damages against an adulterer. There is no authority statutory or otherwise, warranting the view that S. 61 forbids the Crown to prosecute and punish an alleged adulterer under S. 497, I. P. C., when moved to do so by an injured husband. (*Coldstream, J.*). F. BWYE OF SIMLA *v.* KIRK. **108 I.C. 381=10 L.L.J. 250=29 Cr. L. J. 382= A.I.R. 1928 Lah. 50.**

DIVORCE JURISDICTION (INDIAN & COLONIAL) ACT (1926, 16 & 17 Geo. V, Ch. 40).

—S. 1—Grounds for decree.

———The words of Prov. (a), S. 1 (1), are intended to mean that the grounds on which a decree for the dissolution of marriage of a British subject domiciled in England may be granted by a High Court in India shall be those on which such a decree might be granted by the Divorce Court in England according to the law for the time being in force in England, *i. e.*, according to the law laid down in

DIVORCE JURISDICTION (INDIAN & COLONIAL) ACT—(1926, 16 and 17 Geo. V, Ch. 40)—S. 3—Validity of decree.

S. 176 of the Supreme Court of Judicature (Consolidation) Act of 1925, and therefore it is sufficient for a wife-petitioner domiciled in England to establish to the satisfaction of the Court in India the adultery of a respondent-husband: A. I. R. 1926 Cal. 871, *Held wrongly decided* and A. I. R. 1925 Cal. 874, *Doubted*. (*Costello, J.*). M. BARNARD *v.* G. H. BARNARD. **115 I. C. 572=56 Cal. 89=32 C.W.N.742=A. I. R. 1928 Cal. 657.**

—S. 3—Validity of decree.

——Parties resident in India but domiciled in England—Decree in Indian Court is valid. (*Costello, J.*). M. BARNARD *v.* G. H. BARNARD. **115 I.C. 572=56 Cal. 89=32 C.W.N. 742=A.I.R. 1928 Cal. 657.**

——As under the Act (1869) amended by Act (25 of 1926), the Courts in India cannot pass a decree for divorce in cases of persons resident in India but not domiciled therein, and as the Indian and Colonial Divorce Jurisdiction Act passed by the British Parliament in 1926 validates only decrees passed and confirmed under the Indian Divorce Act prior to 15th December, 1926, the Indian Courts cannot confirm, after the passing of the English statute and the amendment of the Indian Act, where the parties are residents in India but domiciled in England, a decree *nisi* though the decree *nisi* may have been passed prior to the passing of the English statute. A decree of dissolution of marriage confirmed or made absolute after 25th March, 1926, the date when the amendment of the Indian Act came into force, would be a nullity, as the order of confirming or making absolute is itself a decree of dissolution, and the making of it is prohibited by the Indian Act of 1926 in cases where the parties to the marriage are not domiciled in India at the date of presentation of the petition. As such a decree cannot be made under the provisions of the Indian Divorce Act, as amended by Act No. 25 of 1926, it would not be rendered valid by S. 3, Indian and Colonial Divorce Jurisdiction Act. (*Shadi Lal, C.J., Broadway and Eforde, JJ.*). MRS. LYDIA AGNES WALLER *v.* SAMUEL JAMES WALLER. **110 I.C. 706=10 Lah. 64=30 P.L.R. 250=A.I.R. 1928 Lah. 557 (F.B.).**

DOCTRINE OF FACTUM VALET.

See (1) HINDU LAW—ADOPTION.
(2) HINDU LAW MARRIAGE.

DOCUMENT.

See (1) DEED.
(2) EVIDENCE.
(3) EVIDENCE ACT.

DOCUMENTARY EVIDENCE.

See EVIDENCE ACT.

DOMICILE.

See also SUCCESSION ACT, 1925, PART II.

—Prize of war.

——Where every act of the claimant at the time of the breaking of the war was consistent with the intention to retain his commercial domicile at Constantinople and inconsistent with any intention to divest himself of it and he did his best to continue the voyage of the ship to a Turkish port although he was not able to show that there was any particularly pressing commercial object in sending her to Basra where there was no cargo engaged, or agent appointed, or trade expected,

Held, the claimant had not discharged the onus of showing that he was no longer commercially domiciled in Turkey as he had been before. The condemnation must therefore stand. (*Lord Sumner*). SOCRATUS ATYCHIDES *v.* SECRETARY OF STATE. **70 I.C. 156=46 Bom. 857=25 Bom.L.R. 116=32 M.L.T. 81=27 C.W.N. 557=18 M.L.W. 664=1923 M.W.N. 846=A.I.R. 1922 P.C. 371.**

EASEMEMT—Acquisition and Extinction.

DOMINANT AND SERVIENT OWNER.

See (1) EASEMENT.
(2) EASEMENTS ACT.

DONATIO MORTIS CAUSA.

See (1) HINDU LAW—GIFT.
(2) HINDU LAW—WILL.
(3) MAHOMEDAN LAW—GIFT.
(4) MAHOMEDAN LAW—WILL.
(5) TRANSFER OF PROPERTY ACT, SS. 122—128.
(6) WILL.

DONEE.

See GIFT.

DONOR AND DONEE.

See (1) EVIDENCE ACT, S. 115.
(2) HINDU LAW—GIFT.
(3) MAHOMEDAN LAW—GIFT.

DOWER.

See MAHOMEDAN LAW.

DRAIN.

See (1) EASEMENT.
(2) EASEMENTS ACT.

DRUGS.

See BOMBAY ABKARI ACT.

DUBASH.

See CONTRACT ACT, S. 182.

DUMBNESS.

See HINDU LAW—SUCCESSION.

DURESS.

See (1) CONTRACT.
(2) CONTRACT ACT, S. 16.

DURPATNIDAR.

See BENGAL TENANCY ACT.

DWAYAMUSHYAYANA.

See HINDU LAW—ADOPTION.

DWIRGAMMAN CEREMONY.

See HINDU LAW—WIDOW.

DYING DECLARATION.

See (1) CR. P. CODE, S. 164.
(2) EVIDENCE ACT, SS. 32 AND 33.

EARNEST MONEY.

See (1) CONTRACT ACT, S. 73.
(2) DAMAGES.
(3) T. P. ACT, SS. 54 AND 55.

EASEMENT.

Acquisition and extinction.
Light and air.
Overhanging trees.
Privacy.
Right against Government.
Right concerning water.
Right of way.
Right to bury.
Riparian Rights.
Use of land.
User.
Miscellaneous.

—Acquisition and Extinction.

——Neither registration nor a written instrument is necessary for the creation of an easement. 31 All. 612, *Foll.* (*Daniels, J.*). SURAJ PRASAD *v.* MAHESHWARI PRASAD. **96 I.C. 276 (All.).**

——Easements by prescription are acquired only by sufferance of the dominant owner. (*Greaves and B.B. Ghose, JJ.*). MAMIN KHAN *v.* MOIZUDDIN KHAN. **91 I.C. 348=A.I.R. 1926 Cal. 647.**

EASEMENT—Light and air.

——There must be complete unity of seisin, or the absolute ownership of the dominant and servient tenements must vest in the same person in order that easements may be extinguished. This doctrine has been so strictly construed that it requires the estates in the two tenements to be of an equally high and perdurable character. In other cases of unity the easement is suspended, not extinguished. (*Mukerji, J.*). DURGARAM DAS *v.* BHARAT RAM DAS. **85 I.C. 739=A.I.R. 1926 Cal. 92.**

——Acquisition—Co-owner cannnot acquire easement in joint property. (*Moti Sagar, J.*). HIRA NAND *v.* AHMAD YAR. **A.I.R. 1923 Lah. 608.**

—Light and air.

——Ancient light—Substantial privation rendering occupation discomfortable is necessary to constitute obstruction. 18 Bom. 474; 23 Bom. 786; 30 Bom. 319 and (1904) A.C. 479. *Foll.* (*Patkar and Baker, JJ.*). BHIMAJI VASUDEV *v.* YESWANT CHANGAGOUDA. **120 I.C. 365=31 Bom.L.R. 771= A.I.R. 1929 Bom. 338.**

——Light—Person selling house having windows overlooking his adjoining land—Vendor cannot obstruct light from coming to such windows by building on the adjoining land thus derogating from his own grant—Subsequent vendee of the land is also bound by the obligation.

The true principle underlying cases of this kind is that the vendee is entitled to have the enjoyment of the light and air of the ancient windows in the same manner as it was enjoyed during the unity of possession. (*Mitter, J.*). BRAJESHWARY DASI *v.* NITYANANDA DAS. **110 I.C. 720= 47 C.L.J. 583=32 C.W.N. 996= A.I.R. 1928 Cal. 365.**

——Injunction for the protection of the easement of light and air can only be granted when their closure amounts to an actionable nuisance. It is not enough that the light has been reduced. There must be a substantial privation of light enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the occupier from carrying on business as beneficially as before. *Colls* v. *Home and Colonial Stores*, (1904) A.C. 179; 8 P.R. 1909; 39 Cal. 59 and A.I.R. 1914 P.C. 45, *Ref.*

The existence of other sources of light should be taken into consideration. *Colls* v. *Home & Colonial Stores*, (1904) A.C. 179 and 13 Bom. 252, *Ref.* (*Bhide, J.*). SOHAN SINGH *v.* JAGAT SINGH. **114 I.C. 698=A.I.R. 1928 Lah. 980.**

——*Rankin, C.J.*—Where there has been an interference with ancient lights, the law refuses an action unless there has been a real interference with convenience or comfort of the dominant premises as regards their nature and situation. *Colls* v. *Home and Colonial Stores Ltd.*, (1904) A.C. 179, *Foll.*; *Kine* v. *Jolly*, (1907) 1 Ch. 480, *Expl.* (*Rankin, C.J. and C.C. Ghose, J.*). DEBENDRA NATH *v.* SURENDRA NATH. **102 I.C. 370=31 C.W.N. 419= 45 C.L.J. 474=A.I.R. 1927 Cal. 345.**

——Light, like air, is the common property of all, or, to speak more accurately, it is the common right of all to enjoy it and it is the exclusive property of none, and it is impossible that a person should be allowed to claim the stoppage of all buildings in the neighbourhood for the sake of the extremely small amount of light and air that he must at the best of times, have enjoyed through his windows: *Colls* v. *Home and Colonial Stores*, (1904) A.C. 179, *Rel. on.* (*Kincaid, J. C. and Lobo, A. J. C.*). BULCHAND *v.* ASSUDAMAL. **93 I.C. 444=A.I.R. 1927 Sind 115.**

EASEMENT—Privacy.

——Agreement not to block window—Effect is only to create an ancient light and not to preclude the servient owner from putting up any building which in the slightest degree would diminish the free ingress of light and air. (*Mears, C. J. and Piggott, J.*). GURPRASAD *v.* BISHUNLAL. **79 I. C. 349=5 L.R.A. Civ. 262= A.I.R. 1924 All. 816.**

——Obstruction to light and air—Injunction is proper relief—Compensation in money is not adequate relief. 9 I. C. 417, *Foll.* (*Moti Sagar, J.*). JAWAHAR SINGH *v.* SEWA SINGH. **79 I.C. 572=5 L.L.J. 487=A.I.R. 1924 Lah. 97.**

——Right to light and air—Measure of dominant owner's right—Rule of 45 degrees is not a definite rule recognised by Law.

There must be substantial privation of light enough to render the occupation of the house uncomfortable according to ordinary notions, which must differ considerably, *e.g.*, in the city of London and the country, and obviously differ very considerably in *abadis* or towns. (1904) A. C. 179, *Ref.* (*Walsh, J.*). MT. CHANDAN KUNWAR *v.* NARAIN. **73 I.C. 531= A. I.R. 1923 All. 542.**

—Overhanging trees.

——Trees overhanging for many years—No prescription is acquired. 19 Bom. 420 and 43 Bom. 164, *Foll.*; 44 Bom. 605, *Expl.*; *Lemon* v. *Webb*, (1894) 3 Ch. 1 and (1895) App. Cases 1, *Rel. on.* (*Pandalai, J.*). GURUSAMI RAJA *v.* PERUMAL RAJA. **1929 M.W.N. 726=A.I.R. 1929 Mad. 815.**

——*Right to go on neighbour's land to collect fruits, etc.*

Quaere.—Whether the owner of a Mahwa tree the branches of which overhang the defendant's wall can acquire a right of easement for collecting the fruit on the defendant's land. *Lemon* v. *Webb*, L. R. (1895) H. C. 11, *Ref.* (*Pullan, J.*). ABDUL HAQ *v.* SHAHMAT ALI. **114 I.C. 512.**

——Where there are trees overhanging the plaintiff's land, an injunction only should be granted and no pecuniary compensation: for in such cases the plaintiff's contention is not that his easement has been violated but that his property has been invaded, and will continue to be so invaded unless the invasion is removed. Hence compensation cannot be the proper remedy. 31 Cal. 944 and 43 Bom. 164, *Rel. on.* (*Pandalai, J.*). GURUSAMI RAJA *v.* PERUMAL RAJA. **1929 M.W.N. 726= A.I.R. 1929 Mad. 815.**

——It is impossible to have a custom in case of a thing, so indefinite, so vague and so changeful from day to day, and year to year as the shadow of overhanging trees. It is impossible either in any locality or throughout the country. (*Pandalai, J.*). GURUSWAMI RAJA *v.* PERUMAL RAJA. **1929 M.W.N. 726=A.I.R. 1929 Mad. 815.**

—Privacy.

——Right of privacy in N. W. P.—Custom—Interference is an actionable wrong and affords cause of action to person affected thereby. (*Iqbal Ahmad and Sen, JJ.*). FAZAL HAQ *v.* FAZAL HAQ. **107 I.C. 584=26 A.L.J. 49=A.I.R. 1928 All. 201.**

——Custom—Right of privacy is recognised as a custom of the country.

It does not depend on the caste or creed of the person owning house or on the fact, *viz.*, if it was used by the ladies. 10 All. 858 and 13 A. L. J. 361.

EASEMENT—Right against Government.

Ref. (*Gokul Prasad, J.*). BOHRA TARA CHAND *v.* MT. RAYAZI BEGUM. **73 I.C. 1040= A.I.R. 1923 All. 404.**

—Right against Government.

———Government is no doubt bound to supply water to wet fields but the ryots have no vested interest in the maintenance of any particular channels for their supply. The ryots cannot claim as against Government any right to take water to their fields by any particular channel. 32 Mad. 141; 34 M.L.J. 425, *Rel. on.* (*Wallace, J.*). A. VENKATASAMI NAIDU *v.* AGGARAM CHENGA REDDI. **A.I.R. 1930 Mad. 621.**

———Every ryot can acquire by prescription against Government. (*Devadoss, J.*). SECRETARY OF STATE *v.* K. SUBBA RAO. **99 I.C. 475= 38 M.L.T. 160=1927 M.W.N. 59= 26 M.L.W. 10=A.I.R. 1927 Mad. 382.**

———Where a ryot has had the benefit of an extra amount of water for a long time—Something more than he would ordinarily be entitled to as a ryot.

Held, that he is not entitled to insist that that extra supply should be continued. Other considerations would arise if it is proved that his enjoyment of this extra water was as of right. (*Odgers, J.*). MD. USAN ROWTHER *v.* SECRETARY OF STATE. **96 I. C. 317=1926 M.W.N. 404= A. I. R. 1926 Mad. 788.**

—Right concerning water.

———Evidence—Sufficiency of—Evidence that person has occupation of lands and that he takes water from tank to irrigate it is good evidence of fact that he has right to do so. (*Rankin, C.J.*). ISMAIL BISWAS *v.* EMPEROR. **124 I.C. 829= A.I.R. 1930 Cal. 289.**

———In a suit relating to right of easement claimed by a party in respect of overflow of water from one estate to another, it is absurd to expect proof of exact measurements of diminution at any particular moment of time. 73 P.R. 1905, *Dist.* (*Johnstone, J.*). DHARAM DAS *v.* A.V. VOLKERS. **A.I.R. 1930 Lah. 177.**

———*Zamindar's tank—Inamdar's user of.*

In a suit by a zamindar against several inamdars to recover compensation for the unauthorised use by the defendant of the water of the plaintiff's tank for the second crop on the defendant's inams the plaintiff admitted the defendant's right to use the water of the tank, for the 1st crop but denied their right for the second.

Held, that the right admitted by the plaintiff and claimed by the defendant was one of easement and that as the evidence established the defendant's user of the water of the suit tank for raising a second crop for twenty years and more the defendants were entitled to an easement by prescriptive right.

Held further, that as the whole decree was questioned in the revision petition and the finding of fact related to all the defendants the whole decree of the Court below against all the defendants, should, under O. 41, R. 4, Civil Procedure Code, be set aside though the revision petition itself had been preferred by only one of them. (*Ramesam, J.*). PITCHIAH *v.* ZAMINDAR OF VENKATAGIRI. **59 M.L.J. 111.**

———*Right to drain water.*

Water from the plaintiff's land was for nearly 25 years being discharged on defendant's land but as a Government channel divided the two the water was drained by means of a siphon sluice put up across the Government channel with the permission of the Government. The defendant obstructed the discharge. In a suit by the plaintiff to establish his right to drain off the water the Government was not a party but expressed its willingness to permit the plaintiff to continue to drain the water as before,

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Held, that the plaintiff was not suing as agent of the Government but in his own right. The person to sue would be the owner of the neighbouring servient heritage the Government, as that is the dominant heritage to the defendant's land. (*Jackson, J.*). SRINIVASA CHETTIAR *v.* ARAVAMUTHA IYENGAR. **1930 M.W.N. 611.**

———*Right to allow water to flow to lower land.*

Natural right to let rain water on to lower adjacent land—Right whether extends to letting it through particular openings—Proof of prejudice—Onus.

Before the partition two plots of land belonged to a common proprietor; the land on which the plaintiff's house stood was on a higher level than that of the defendant. Subsequent to the partition a wall was built between the houses jointly by the two owners. In that wall an opening was made at the time of the construction.

Held, that the plaintiff had a natural right to allow rain water on his land to flow out to the adjacent tenement, and that he would allow it to flow through the opening in the common wall because the defendant had not shown that such a course involved an additional burden. *Gibbons* v. *Lenfestey*, 1 B. L. T. 55 (P. C.), *applied.* (*Venkatasubba Rao and Madhavan Nair, JJ.*). SINNANA GOUNDAN *v.* VEERAPPA GOUNDAN. **1930 M. W. N. 133=A.I.R. 1930 Mad. 676.**

———Even quite apart from the provisions of the Easements Act it is safe to hold as a general principle of law that no claim can be made either as a natural right or as an easement by prescription to water which does not flow in a definite course but which should be regarded as surface water or surface drainage: 37 Mad. 304; *Rawstron* v. *Taylor*, (1855) 11 Ex. 369; A. I. R. 1923 Pat. 65, *Ref.* (*Heald and Myo Bu, JJ.*). MAUNG PWE *v.* MAUNG CHAN NYEIN. **170 I. C. 658=7 Rang. 487= A. I. R. 1929 Rang. 300.**

———Right to use water for certain lands—Water used for excess land—Right to water in respect of all the lands is not forfeited. (*Cuming and B. B. Ghose, JJ.*). BHUSAN SHAHANA *v.* UPENDRA NATH GHOSE. **96 I. C. 665= A. I. R. 1926 Cal. 1201.**

———Owner of higher land cannot pass to lower land flood water accumulating due to his fault—Adjoining occupier on lower level can raise high bunds to protect his own land.

The owner of the land on the higher level cannot claim an injunction to restrain him from doing so on the ground that his right to evacuate his normal drainage had been invaded where any such invasion was due to his own fault. 25 M.L.J. 276, *Foll.* (*Duckworth, J.*). MOKSODALI *v.* MA HIL. **76 I. C. 729=1 Rang. 427=A.I.R. 1924 Rang. 86.**

—Right of way.

———In India just as much as in England there are three distinct rights of way. First, there are private rights in the strict sense of the term vested in particular individuals or the owners of particular tenements and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of the city, tenants of a manner or the inhabitants of a parish village. Such rights commonly have

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their origin in custom. Thirdly, there are public rights in the full sense of the term which exists for the benefit of all the King's subjects and the sense of these is ordinarily dedication. 15 Cal. 460 (F. B.), *Foll.* (*Mukerji, J.*). PRAN NATH *v.* EMPEROR. **33 C.W.N. 915=A.I.R. 1930 Cal. 286.**

———A public right of way in the full sense of the term and as to all King's subjects is unconnected with dominant tenements. Such right of way may be acquired by user of or dedication to the public in general. In this connection the fact that there were no thoroughfares at the termini is not of much importance on the point of dedication, but the question whether public in general use the way as pathway or only the inhabitants of the village or some other village do, are questions of considerable materiality. For where the privilege to use a road is enjoyed by a particular section of the public community or by inhabitants of two or three villages and not by others the road is not a public road. 25 W. R. 233 and 9 All. 434, *Ref.* (*Mukerji, J.*). PRAN NATH *v.* EMPEROR. **33 C.W.N. 915=A.I.R. 1930 Cal. 286.**

———Ways permitted to be used by a section of the public or ways used by all in particular cases are private ways which have their origin in custom and such customary ways can be converted into an ordinary highway after user by the general public sufficient to raise the presumption of dedication, but the evidence in support of the public claim must be cogent. *Brocklebank* v. *Thompson*, 2 Ch. 344 ; *Furquhar* v. *Newbury Rural District*, 1 Ch. 12 ; *Bermondsay* v. *Brown*, L.R. 1 Eq. 204, *Ref.* (*Mukerji, J.*). PRAN NATH *v.* EMPEROR.

33 C.W.N. 915=A.I.R. 1930 Cal. 286.

———Houses on both sides of public road except temple built by plaintiff's ancestor, acquired by defendants—Defendants including road in their mill compound leaving separate passage for plaintiff to reach temple—Plaintiff has no absolute right of passage over road. (*Suhrawardy and Cammiade, JJ.*). MUDDEA MILLS CO., LTD. *v.* SIDHESWAR CHATTERJEE. **115 I.C. 515= 32 C.W.N. 1055= 56 Cal. 280=A.I.R. 1929 Cal. 33.**

———In order to establish a right of way it must be proved that the claimant has enjoyed it for the full period of twenty years and that he has done so as of right: but if it should be the case of the opposite party that the enjoyment was by violence or by stealth or by leave asked from time to time, it is for him to allege and establish that case. But where no such case is made by him the Court ought not to allow him to argue such a case. 8 C. W. N. 359, *Diss. from.* (*Das and Adami, JJ.*). NAZIR HUSSAIN *v.* AULAD HAIDER.

96 I. C. 1010=1926 P.H.C C. 264= A.I.R. 1926 Pat. 460.

———The right of the public to the enjoyment of land set apart from time immemorial for use of the public way stands upon a higher footing than a mere easement over property belonging to another. (*Spencer, Og. C.J. and Srinivasa Aiyangar, J.*). VENKATAKUMAR *v.* SECY. OF STATE.

85 I.C. 345=1925 M.W.N. 271= A.I.R. 1925 Mad. 415=47 M.L.J. 784.

———Easements of way must not be vague or indefinite, that is to say, they must be limited to a particular route over the servient tenement. An easement of way confers no right to wander at pleasure over any part of the servient tenement for whatever purpose.

The servient owner has the right to set out the line of way to be followed by the dominant owner, and if he fails to set it out, the dominant owner must take the nearest way he can. In any case, the selection of the road must be such as a person of reasonable and ordinary skill and experience would make, and if the road has to be made it must be made in such a manner as a reasonable and prudent person would adopt if he were making a road over his own land. (*Kinkhede, A. J. C.*). VASUDEO *v.* SHANKER. **85 I.C. 84= 7 N.L.J. 232=A.I.R. 1925 Nag. 168.**

———Pathway not regular and defined—Easement can be acquired. Pathway passing over waste land does not prevent easement if two termini stated. (*B. B. Ghosh, J.*). HARIDAS GHOSE MRIDHA *v.* GOURI CHARAN GHOSE MRIDHA. **71 I.C. 309= A.I.R. 1924 Cal. 359.**

———Sale-deed describing southern boundary of the land conveyed as pathway to be reserved—Vendee is entitled to right of way on the land forming southern boundary though no pathway might actually have been set apart by vendor—Deed—Construction—Easements Act, S. 13. (*Venkatasubba Rao, J.*). KUPPAKKAL, *v.* MATHAN CHETTIAR. **82 I.C. 430=A.I.R. 1924 Mad. 834= 47 M.L.J. 477.**

———Right of way for scavengers through dwelling house—Long User—User as of right and a legal origin may be presumed—Easements Act, S. 15—Other modes of acquisition are not excluded by section.

In the case of long enjoyment a legal origin is presumed in England until the contrary is shown. (1891) App. Cas. 228 ; (1882) 7 App. Cas. 633 ; (1904) 2 Ch. 534 ; 3 East 224; 4 L. W. 128, *referred to.*

In India there are conditions and circumstances such as nature and character of the servient land, the friendship or relationship of parties to be taken note of, before a Court can come to the conclusion that the exercise of a right of way can be held to have been as of right. 8 C.W.N. 359 ; 13 C.L.J. 316 ; 29 M.L.J. 685, *referred to.* (*Kumaraswami Sastri and Devadoss, JJ.*). KUNJAMMAL *v.* RATHNAM PILLAI. **66 I.C. 11=1922 M.W.N. 143= 15 M.L.W. 266=31 M.L.T. 150= 45 Mad. 633=A. I. R. 1922 Mad. 5= 42 M. L. J. 417.**

———A private right of way, not appurtenant to a dominant tenement like public rights of way, are not easements but rights in gross and can be enforced as such. (*Newbould and Buckland, JJ.*). BALAI CHAND PAL *v.* PANCHU GOPAL SEAL. **59 I.C. 319 (Cal.).**

—Right to bury.

———There is no easement known to law by which persons can acquire a title by prescription to bury their dead : A.I.R. 1924 Lah. 492, *Foll.* (*Dalip Singh, J.*). NATHU LAL *v.* NUR MUHAMMAD. **107 I.C. 769 (Lah.).**

———Right to bury the dead cannot be acquired by prescription. A.I.R. 1921 Cal. 569 ; A.I.R. 1924 Lah. 492, *Foll.* (*Zafar Ali, J.*). JIWAN SINGH *v.* KARAM DIN. **103 I. C. 678= A. I. R. 1927 Lah. 664.**

———Exclusive and continuous user by the public of a land as a graveyard with the owner's knowledge and acquiescence for the prescriptive period will raise a presumption of a dedication to the public. By the custom of the country the ground in which human remains are interred is regarded for ever as sacred, and though the ownership of the soil may be vested in others, the permission to bury in the land carries with it the right to per-

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form all customary rites. 78 P.L.R. 1908; 40 Cal. 297 (P.C.) and 26 Bom. 198, *Foll.* (*Campbell, J.*). RAM SINGH *v.* ALI BAKHSH. **95 I.C. 458 (Lah.).**

———An easement by which one person gets a right by prescription to bury the dead in land belonging to another is unknown to law. (*Martineau, J.*). MANGAT RAM *v.* SIRAJ-UL-HASAN.

78 I.C. 152=6 L.L.J. 130=A. I. R. 1924 Lah. 492.

—Riparian Rights.

———Plaintiffs claimed to erect permanent structures across a stream. It was found on evidence that they had no such right but from time to time there was an interruption of the water of the river through the erection of temporary structures. That right had been exercised for 20 years before the beginning of the litigation.

Held, that the right was a right to such interference with the water of the stream as has been effected by the continual use of what are described as temporary structures and plaintiffs should be given a declaration to that effect.

Held further: that it is possible that the use of these temporary structures has given a larger right than the natural right to the plaintiffs. (*Lord Buckmaster*). VIRABHADRAYYA GARU *v.* MAHALAKSHMAMMA GARU. **122 I.C. 305=31 M.L.W. 326=34 C.W.N. 512=32 Bom. L.R. 492=A.I.R. 1930 P.C. 42=58 M.L.J. 285.**

———*Obiter*—Even the rights of the riparian owners may be acquired by easement. (*Shadi Lal, C.J. and Le Rossignol, J.*). BALI RAM *v.* BELA SINGH. **83 I.C. 538=A.I.R. 1923 Lah. 594.**

—Use of land.

———An open space in which the houses of the parties open, it may generally be presumed is meant for the use of the owners and occupants of all the houses abutting on it. (*Zafar Ali, J.*). PRABHU MAL *v.* BANWARI LAL. **102 I.C. 432=9 L.L.J. 195=28 P.L.R. 230=A.I.R 1927 Lah. 351.**

———Constructing cattle troughs on another's land—12 years' user disentitles the owner to have them removed. 16 Bom. 338, *Dist.* (*Kanhaiya Lal, J.*). KAMLAPAT DUBEY *v.* RAM RAJ. **79 I.C. 450=4 L.R.A. Civ. 378=A.I.R. 1924 All. 103.**

—User.

———No minimum limit of time can be laid down which would justify the inference as to immemorial user; it depends on the evidence and the circumstances of each case. A.I.R. 1921 Bom. 430, *Ref.* (*Fazl Ali and Chatterji, JJ.*). KARTIC MANJHI *v.* BENAMALI CHATERJI. **A.I.R. 1930 Pat. 7.**

———The nature and character of the servient land, the friendship or relationship between the servient and dominant owners and the circumstances under which the user had taken place, may induce the Court to hold that the enjoyment was not 'as of right' although there is no direct proof that the enjoyment was had with the permission of the servient owner. The presumption of right from long user is not in India a presumption *de jures et de jure*. It only starts a party with a presumption in his favour which can be rebutted by proof of facts which are inconsistent with or which militate against the inference which, in the absence of evidence by the defendant, would entitle plaintiff to a decree. A. I. R. 1925 Mad. 5, *Foll.* (*Wazir Hasan, J. C.*). MAJID HUSAIN *v.* HUSAIN FAIYAZ. **91 I.C 987=A.I.R. 1926 Oudh 237.**

——— Prescription—Origin of user permissive—No easement is created. (*Banerji and Gokul Prasad, JJ.*). PANNA LAL *v.* BOHRA PANNA. **74 I. C. 481=21 A.L.J. 436=4 L.R.A. Civ. 274=A.I.R. 1924 All. 60.**

EASEMENTS ACT (1882), S. 2—Custom.

———Immemorial user—Grant may be presumed. (*Ghose, J.*). AMRITNATH BISWAS *v.* JOGENDRA CHANDRA BHATTACHARJEE. **69 I.C. 183=A.I.R. 1924 Cal. 369.**

———The incidents of a permanent tenancy in India are different from the incidents of a term or for years as they obtain in England and there is no substantial reason for holding that a tenant with permanent right has no rights of easement against another tenant enjoying the same rights. The user by the plaintiff without interruption peacefully, publicly and as of right for a period of over 30 years ought to be traced to a lost grant. (*C.C. Ghosh and B.B. Ghosh, JJ.*). KALI PADA BOSE *v.* FANI BHUSAN ROY. **70 I.C. 173=A.I.R. 1924 Cal. 363.**

———A mere user which had not ripened by prescription, would not give rise to any right upon which an action could be founded unless some kind of possessory title existed in the plaintiff's favour. (*Spencer and Ramesam, JJ.*). SIVANANJIAH *v.* SITHAY GOUNDER. **70 I.C. 367=14 M.L.W. 449=1921 M.W.N. 510=A.I.R. 1921 Mad. 627=41 M.L.J. 490.**

—Miscellaneous.

———Licensee with interest cannot be evicted unless the interest comes to an end. (*Cuming and Page, JJ.*). ASWINI KUMAR *v.* GOBINDA CHANDRA. **97 I.C. 395=A.I.R. 1927 Cal. 16.**

———Person not in enjoyment of easement cannot prevent by force servient owner from dealing with his land. (*Ashworth, A.J.C.*). LILA *v.* EMPEROR. **77 I.C. 1002=9 O.L.J. 291=25 Cr. L.J. 538=A.I.R. 1922 Oudh 228.**

———A mere finding that a *parnala* is old is no finding in law that an easement has been established with respect thereto. (*Wilberforce, J.*). AHMAD BAKHSH *v.* MT. PALI. **66 I.C. 922=3 L.L.J. 58=A.I.R. 1921 Lah. 171.**

EASEMENTS ACT (V of 1882).

—Applicability.

———Act does not apply to Punjab—Principles of English Law apply as rules of equity and good conscience. (*Addison, J.*). SHIV DAYAL *v.* RAM DAS. **96 I.C. 913=27 P.L.R. 375=A. I. R. 1926 Lah. 473.**

———Principles underlying the Easements Act are applicable to Berar though in Berar that Act is not in force. (*Kinkhede, Offg. A.J.C.*). DAYARAM *v.* DEORAO. **94 I. C. 923=22 N. L. R. 162=A. I. R. 1926 Nag. 376.**

—S. 1—Applicability.

———Act does not apply to Punjab—Principles of English Law apply to cases on easements. (*Zafar Ali, J.*). KARAM ILAHI *v.* GHULAM MUSTAFA. **102 I. C. 447=A. I. R. 1927 Lah. 492.**

—S. 2—Custom.

———A Court should not decide that a local custom exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it has been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things which it concerned. 17 A. 87, *Foll.*

Per *Kanhaiya Lal, J.*—There is no statutory period of enjoyment provided, during which, in order to establish a local custom, it must be proved that the right, claimed to have been enjoyed by local cus-

EASEMENTS ACT (1882), S. 2—Customary right.

tom, has been so enjoyed. (*Lindsay and Kanhaiya Lal, JJ.*). CHANNU DUTTA VYAS *v.* SWAMI GYANANDJI. **90 I.C. 976=A.I.R. 1926 All. 130.**

—S. 2—Customary right.

———A customary right is recognized by law and it may arise by agreement or prescription and may be deduced from long and open user. (*Lindsay and Kanhaiya Lal, JJ.*). CHANNU DUTTA *v.* SWAMI GYANANDJI. **90 I. C. 976= A.I.R. 1926 All. 130.**

——— Those rights which having their origin in custom belong to certain classes of persons on certain portions of the public such as the inhabitants of a village are customary rights. They are not easements in the legal sense of the term. A right based on custom is established by proof of the custom and it is not necessary that there should be evidence from which a lost grant may be presumed. Moreover it is not necessary that a custom should be traced back for the whole time necessary to make it immemorial, whatever that time may be. The evidence must be sufficient to show that the right "has been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise the usage had become customary law of the locality. The doctrine of the lost grant is applicable to private rights claimed by prescription. It is inapplicable to a right claimed on the basis of immemorial custom. It is inaccurate and slipshod to speak of the local understanding or agreement or practice which comes to be a local law or custom as a grant. The question of legal origin is only of importance where it is suggested that the right claimed might have originated within the time of memory, whatever that time may be. In the case of a custom its legality depends on such considerations as its reasonableness and its certainty. As to the length of user or enjoyment, which must be proved before a local custom may justifiably be inferred, perhaps no definite rule can be laid down. But if the existence of the custom depends on oral evidence, and the user or enjoyment is taken back as far as living memory can be expected to go, then in the absence of rebutting evidence it is not unreasonable to say *Proesumitur retro* or to infer immemorial enjoyment of the right. 17 All. 87; 20 Mad. 389; 23 Bom. 666, *Ref. to.* (*Richardson and Suhrawardy, JJ.*). ALI MOHAMED *v.* SHEIKH KATU.

70 I.C. 263=36 C.L.J. 280=A.I.R. 1923 Cal. 200.

—S. 4—Alternative claim.

———It is not inconsistent for a plaintiff to claim certain property as his own and in the alternative a right of easement over the same. (*Suhrawardy and Cuming, JJ.*). BEHARI LAL MUKERJI *v.* ASUTOSH BANERJEE. **87 I.C. 19=41 C.L.J. 379= A.I.R. 1925 Cal. 788.**

—S. 4—Co-sharers.

———Co-sharer—Easement—Two plots held exclusively by two co-sharers severally—Holder of one plot cannot claim easement over the other plot as such exclusive possession is not ouster of the other co-sharer. (*Ross and Kulwant Sahay, JJ.*). KAMESHWAR NARAIN SINGH *v.* JANARDHAN PRASAD NARAIN SINGH. **87 I.C. 736= 3 Pat. L.R. 81=A.I.R. 1925 Pat. 492.**

—S. 4—Essentials for existence.

———Easement implies tenements belonging to different persons. No different owners, no easement. (*Barlee, J. C. and Kalumal, A. J. C.*). GIRDHARIDAS RADHAKISHEN DAS *v.* TIRATH DAS GOKALDAS. **120 I.C. 497=A.I.R. 1930 Sind 34.**

EASEMENTS ACT (1882), S. 4—Well.

—S. 4—Passage to sweepers.

———Right to allow passage to sweepers may not be an easement. (*Suhrawardy and Garlik, JJ.*). RAMCHANDRA *v.* BHOLA NATH. **33 C.W.N. 189= A.I.R. 1929 Cal. 350.**

—S. 4—Public lane.

———Private persons who merely happen to reside in houses in public lane cannot sue for alleged encroachments in that lane, for no right of easement can be acquired over a public lane. A. I. R. 1924 All. 715, *Dist.* (*Bennet, J.*). BAHAL SINGH *v.* MOHAMMED YUSUF. **118 I.C. 520= A.I.R. 1929 All. 504.**

—S. 4—Public road.

———Right of passage on public road is not easement. (*Walsh and Dalal, JJ.*). MUNICIPAL BOARD, BENARES *v.* BEHARI LAL, **95 I.C. 1030= 48 All. 560=24 A. L. J. 682= A. I. R. 1926 All. 538.**

—S. 4—Question of Fact and Law.

———The question whether a party has an indefeasible right to do something on the land found to belong to another is a mixed question of law and fact. The witnesses are to prove facts or acts done, and it is for the Court to affirm or negative the existence of an alleged right on such facts being considered in relation to the rule of law applicable to the question. (*Niamatullah, J.*). MOHAMMAD YUSUF *v.* SURAJ BALI SINGH.

123 I. C. 377=A. I. R. 1930 All. 338.

—S. 4—Right of light.

———Suit by occupier of house only, relating to right of light is maintainable. (*Rupchand and Wild, A. J. Cs.*). KHUBCHAND KHUSHALDAS *v.* BULCHAND NARAINDAS. **123 I. C. 230= A.I.R. 1930 Sind 152.**

—S. 4—Right to bury.

———Land for use as a burial ground may be acquired through purchase or dedication. But law does not recognise that an easement by prescription can be created by the mere fact that dead bodies are placed in graves on the land of another and permitted to remain there for the prescriptive term.

The right to bury in a given tract of land cannot be deemed a right imposed for the beneficial enjoyment of land.

The Court will not create a new species of easement specially if the easement claimed constitutes a nuisance. (*Mookerjee and Panton, JJ.*). GOPAL KRISHNA *v.* ABDUL SAMAD.

66 I. C. 640=34 C. L. J. 319= A. I. R. 1921 Cal. 569.

—S. 4—User and ownership.

———To create an easement there must be a dominant and a servient heritage and the right acquired must be for the beneficial enjoyment of a dominant heritage. User under a claim of ownership of a tank, in and over which such user is had, and which is negatived, cannot operate to found a right of easement over the tank. 16 Bom. 592, *Ref.* (*Phillips and Odgers, JJ.*). PAKKIR MAHAMUD *v.* PICHAI THEVAN. **92 I. C. 465=A. I. R. 1926 Mad. 625.**

—S. 4—Well.

———Suit by *N* to restrain *M* from preventing *N* from using well water—Well situated in ground belonging neither to *M* nor to *N*—*N* proving right of easement to take water from well—*M* interfering with right of *N* by enclosing well with wall and preventing *N* from having access to well—House of *N* formed dominant tenement and ground in which well stood was servient tenement and *N* held entitled to decree ordering demolition of construction made by *M*.

EASEMENTS ACT (1882), S. 4—Well.

Held further, that it was not necessary for *N* to prove that the servient tenement was the tenement of *M* who had interfered with his right but it was sufficient for *N* to show that there was a dominant and a servient tenement and that he had the rights required by S. 4 in order that a right of easement should be established and *N* was entitled to a decree ordering the demolition of the construction made by *M*. (*Mears, C.J. and Bennet, J.*). RAMCHANDER *v.* SHER ALI. **118 I.C. 42=1929 A.L.J. 1120=A.I.R. 1929 All. 779.**

——A person who builds a well can claim from the grantor of the land on which the well is constructed what is necessary for a beneficial enjoyment of a well, but he cannot claim that he has obtained any easement in respect of any particular land in the neighbourhood except in so far as it is the land of the grantor. Hence where a person builds a well on the municipal land for the use of the public and the neighbour constructs a wall leaving a space of five feet in width surrounding the well, and also a passage leading to the public road, the latter cannot be asked to demolish the wall although it might have prevented the public from seeing the well from a distance. (*Pullan, J.*). MUSTAFA KHAN *v.* DWARKA. **116 I.C. 63=A.I.R. 1929 Oudh 401.**

—S. 5—Artificial water course.

——Artificial water courses or openings for taking water are apparent and continuous. 34 Mad. 487; 2 Mad. 46 and A.I.R. 1924 Mad. 108, *Ref.* (*Fazl Ali and Chatterji, JJ.*). KARTIC MANJHI *v.* BANAMALI MUKERJI. **A. I. R. 1930 Pat. 7.**

—S. 5—Drain.

——Where the drain through which the water flows is a masonry drain it is an apparent easement within the meaning of S. 5 of the Easements Act. The drain is continuous easement in so far as the flow of rain water is concerned. For the flow of rain water no act of man is needed. But the flow of water from the latrine requires the act of man and to that extent the easement to flow such water is not continuous easement. (*Mukerji, J.*). MT. SAJID-UN-NISSA *v.* SAYED HIDAYAT. **80 I. C. 896=22 A. L. J. 425=5 L.R.A. Civ. 291=A.I.R. 1924 All. 748.**

—S. 5—Fruit tree.

——Trees—Fruits falling on neighbour's land—Right to go to gather is not an easement. It is a creation of an express agreement or contract. (*Coutts-Trotter and Ramesam, JJ.*). C. D. SARANGAPANI IYENGAR *v.* SADAGOPA NAIDU. **68 I. C. 968=16 M.L.W. 98=1922 M.W.N. 421=31 M.L.T. 78=A.I.R. 1922 Mad. 398=43 M. L. J. 152.**

—S. 5—Staircase.

——Right to use staircase not being continuous does not come within S. 13 (*b*).

In order to bring a case within Cl. (*b*), S. 13, it must be established *inter alia* that the easement claimed is apparent and continuous. A.I.R. 1924 Lah. 488, *Rel. on.* (*Tek Chand, J.*). GHANI MAHOMED *v.* MT. LACHMI. **117 I. C. 381=A .I. R. 1929 Lah. 848.**

—S. 7—Applicability.

——Section 7, Illus. (*c*) applies to cases where the land is in natural condition and does not apply to land burdened with a building and there is artificial pressure by the building itself. In such cases S. 7 does not apply and the question of easement can be decided by applying S. 15. (*Bennet and Iqbal Ahmad, JJ.*). BHAGWAN DAS *v.* BIBI IQBAL SULTAN. **118 I. C. 715=1930 A.L.J. 340=A. I. R. 1929 All. 885.**

EASEMENTS ACT (1882), S. 7—Contiguous fields.

—S. 7—Artificial water course.

——The right to water flowing through artificial water courses is a right of easement, and must rest on some grant or some arrangement, either proved or presumed from, or with the owners of the land from which the water is artificially brought, or on some legal origin. It is quite distinct from the natural right, which, is a natural incident to the ownership of land, and entitles *prima facie* each successive riparian proprietor to the unimpeded flow of water of a natural channel in its natural course, and to its reasonable enjoyment as it passes through his land. In the case of artificial watercourse where no easement or customary right enjoyed by the plaintiff has been proved, but only diminution of supply (and not complete stoppage) the plaintiff is not entitled to an injunction restraining the defendants from interfering with his enjoyment. (*Campbell, J.*). BELA SINGH *v.* BALI RAM. **73 I.C. 489=A.I.R. 1923 Lah. 257.**

—S. 7—Contiguous fields.

——Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water that falls from the superior. If the water which would otherwise fall from the higher ground insensibly without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property. A. I. R. 1926 Mad. 449 (F. B.), *Rel. on*; A. I. R. 1929 Mad. 337 and *Gibbons* v. *Lengesty*, (1916) 113 L. T. 55, *Ref.* (*Venkatasubba Rao and Madhavan Nair, JJ.*). SINNANA GOWNDEN *v.* VEERAPPA GOWNDEN. **1930 M. W. N. 133=A.I.R. 1930 Mad. 676.**

——Owner of upper lands can discharge surplus rain-water as also irrigation-water brought on his land for agricultural operations into lower lands by opening vents in his bund provided no damage is caused. *Beard* v. *Moria Colliery Co., Ltd.*, 84 L. J. Ch. 158; *Gibbons* v. *Lengesty*, (1916) 113 L. T. 55; A. I. R. 1926 Mad. 449 (F. B.) and A. I. R. 1928 Mad. 52, *Ref.*; (1918) M. W. N. 167 (*Sadasiva Ayyar, J.*), *Not appr.* (*Waller and Madhavan Nair, JJ.*). KASIA PILLAI *v.* GANESAMUTHUKUMARASAMIA PILLAI. **118 I.C. 287=52 Mad. 426=29 M. L. W. 346=A. I. R. 1929 Mad. 337=56 M.L.J. 311.**

——Owner of land on lower level cannot prevent water flowing over his land in natural course from higher level. A.I.R. 1926 Mad. 449 (F. B.), *Foll.* (*Zafar Ali, J.*). PARTAB SINGH *v.* SURGAN SINGH. **108 I.C. 728=29 P.L.R. 440=A.I.R. 1928 Lah. 717.**

——Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement by which it is obliged to receive the water that falls from the superior. If the water which would otherwise fall from the higher ground insensibly without hurting the inferior tenement should be collected into one body by the owner of the superior in the natural use of his property for draining

EASEMENTS ACT (1882) S. 7 — Contiguous fields.

or otherwise improving it, the owner of the inferior is without the positive constitution of any servitude, bound to receive that body of water on his property. The lower heritor cannot object so long as the flow whether above or below ground is due to gravitation unless it has been unduly and unreasonably increased by operations which are in *aemulationem vicini*. But he is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means; and there is no distinction in principle between water raised from a mine below the level of the surface of either property and water artificially conveyed from a distant stream. One landowner cannot by altering the condition of his land deprive the owner of the adjoining land of the privilege of using his own as he might have done before. The distinction between rural and urban areas drawn in 29 Mad. 539 arises from the accident that illustration (*a*) to S. 7 of the Easements Act instances a case of land in an urban area because it wishes to safeguard the statutory rights of urban authorities to restrict unapproved methods of dealing with land and buildings. Really there is no such distinction. (*Coutts-Trotter. C. J., Krishnan and Beasley, JJ.*). SHEIK HUSSAIN SAHIB *v.* PACHIPULUSU SUBBAYYA.

94 I.C. 677=49 Mad. 441=1926 M.W.N. 370= 24 M.L.W. 641=A.I.R. 1926 Mad. 449= 50 M.L.J. 377 (F.B.).

———Owner of higher land is entitled to let rain water naturally flow into lower land—But the owner of upper land cannot do anything that will throw on lower land any water that would not have naturally gone there—If he does so, the owner of the lower land can protect himself and will not be liable if in so doing he keeps off also water naturally flowing. But where originally the owner of higher land used to maintain a bund to prevent water flowing into his land through a creek in the bund of neighbouring river but by his neglecting to do so the water flowing through that creek, flows down into the lower land from the upper land, and the owner of the former erects a bund to prevent this water, this flow is a natural flow and the lower owner can be prevented by injunction from resisting it unless he has acquired a prescriptive right that the upper owner should maintain his own bund against the creek in proper repair; but it is equitable that the upper owner should be required to give undertaking to keep in proper repair his own bund.

Per *Lentaigne, J.*—The fact that two adjoining owners are found to have a continuous bund erected in such a manner that the bund of each owner is necessary for the protection of the land of the other as well as of his own land raises a strong presumption of a mutual understanding that each owner will repair his portion of the continuous bund necessary for both their lands. (*Lentaigne and Carr, JJ.*). MA HLI *v.* MOKSODALI.

84 I.C. 924=3 Bur. L.J. 217=2 Rang. 450= A.I.R. 1925 Rang. 58.

———Easement—Owner of higher land cannot pass to lower land flood water accumulating due to his fault—Adjoining occupier on lower level can raise high bunds to protect his own land.

The owner of the land on the higher level cannot claim an injunction to restrain him from doing so on the ground that his right to evacuate his normal drainage had been invaded where any such invasion was due to his own fault. 25 M.L.J. 276, *Foll.* (*Duckworth, J.*). MOKSODALI *v.* MA HLI.

76 I.C. 729=1 Rang. 427=A.I.R. 1924 Rang. 86.

EASEMENTS ACT (1882). S. 7—Spring water.

———Every land-owner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and put it to such use as he may desire. He may also allow it to flow away in the usual course of nature upon the lower lands of his neighbour and cannot be bound to prevent it from so doing. He cannot do this, however, by an artificial discharge upon his neighbour's land unless he has acquired such an easement which his neighbour is bound to submit to. If he should acquire such an easement, the owner of the servient tenement acquires no reciprocal rights as against the owner of the dominant tenement with regard to the flow of surface water, that is, water not passing through a defined channel. (*Dawson Miller, C. J. and Mullick, J.*). MT. SARBAN *v.* PHUDO SAHU.

69 I.C. 947= 4 P.L.T. 81=1922 P.H.C.C. 303= 2 Pat. 110=A. I. R. 1923 Pat. 65.

—S. 7—Drainage.

———The natural right of drainage covers only the right to allow rain-water falling on land of a naturally higher level to drain off by surface flow along whatever lines the water may find its way to the neighbouring land; but it does not include a right to pass the water which has come artificially thereon. *Arkwright* v. *Gell*, (1839) 5 M. & W. 203 and *Young* v. *Bankier Distillery Co.*, (1893) A.C. 691, *Foll.* (*Kinkhede, A. J. C.*). RAMCHANDRA NAGOBA *v.* RETIRAM.

107 I. C. 203=24 N. L. R. 122= A. I. R. 1928 Nag. 184.

—S. 7—Mode of enjoyment.

———Where defendant opened new windows interfering with plaintiff's right to privacy and the plaintiff's right to obstruct the windows by a structure erected on his own ground was declared, but he was directed by the Court to erect a wooden structure,

Held, that the plaintiff cannot be restricted in his choice of the method he might adopt for the obstruction of the windows. (*Mookerjee and Chotzner, JJ.*). SAROJINI DEVI *v.* KRIATA LAL HALDAR.

72 I. C. 576=36 C. L. J. 406= A. I. R. 1923 Cal. 256.

—S. 7—Right to benefit.

———Easement—Benefit of, only for dominant tenement—No right of servient owner to insist on continuance by dominant owner.

If however water running through an artificial channel on a neighbour's land has all along been flowing to the plaintiff's land it is open to the plaintiff to insist on its continuance on the footing of a lost grant or old arrangement. (*Bucknill, J.*). FUDU SAHU *v.* SARBAN.

65 I.C. 84 (Pat.).

—S. 7—Right to drain water.

———The right which an upper owner has to allow rain water on his land to flow out to the adjacent tenement is a natural right under the Easements Act. (*Venkatasubba Rao and Madhavan Nair, JJ.*). SINNANA GOUNDAN *v.* VEERAPPA GOUNDAN.

1930 M.W.N. 133=A.I.R. 1930 Mad. 676.

—S. 7—Spring water.

———Where the obstruction by defendant of water began only fourteen feet from the sources of the springs,

Held, there is clear justification for presuming under S. 114 of the Indian Evidence Act that there is a direct and defined channel known to defendant by which the water sought to be tapped finds

EASEMENTS ACT (1882), S. 8—Permanent tenure.

its way to the adjacent springs, and to such cases. S. 7 does not apply. (*Pratt and Fawcett, JJ.*). BABAJI RAMALING *v.* APPA VITHAVJA.
77 I.C. 131= 25 Bom. L.R. 789= A.I.R. 1924 Bom. 154.

—S. 8—Permanent tenure.

———Holder of permanent tenure can create easements. (*Obiter.*) (*Courtney Terrell, C. J. and Jwala Prasad, J.*). NASIRUDDIN *v.* DEOKALI.
113 I.C. 884=A.I.R. 1929 Pat. 124.

—S. 8—Tenants.

———A tenant can acquire an easement against property held by another tenant. (*Mukerji, J.*). CHOTEY *v.* DAL CHAND. **118 I.C. 225= A.I.R. 1929 All. 862.**

—S. 12—Lambardar.

———*Lambardar* cannot acquire adverse possession nor easement over manure collected by the non-agriculturists—Adverse possession. (*Wazir Hasan and Pullan, JJ.*). GAYA PRASAD *v.* SAHDEO SINGH.
112 I.C. 123=5 O.W.N. 296= A.I.R. 1928 Oudh 257.

—S. 12—Tenant.

———Tenant can claim right of easement based on immemorial user but not on prescription. 6 Cal. 394 (P.C.); 4 Cal. 633 (P.C.) and 30 Cal. 281, *Ref.*; 29 Cal. 363, *Dist.* (*Fazl Ali and Chatterji, JJ.*). KARTIC MANJHI *v.* BANAMALI MUKERJI.
A.I.R. 1930 Pat. 7.

—S. 13—Condition.

———For claiming easement of necessity it must be shown that the land conveyed is surrounded on all sides by lands belonging to third persons and the only way of access is over the contiguous land of the grantor. (*B. B. Ghose and Panton, JJ.*). HINDUSTHAN CO-OPERATIVE INSURANCE SOCIETY *v.* SECRETARY OF STATE. **121 I.C. 737= 56 Cal. 989=A.I.R. 1930 Cal. 230.**

—S. 13—Easement of necessity.

———Where a purchaser could make a passage for himself by piercing a door, it could not be said that he had an easement of necessity of passing over his transferor's property. 33 All. 467, *Foll.* (*Mukerji and Bennet, JJ.*). ATA HUSAIN *v.* QADIR BAKSH. **123 I.C. 762=A. I.R. 1930 All. 560.**

———*Right of way—Dominant owner purchasing property through which he can reach dominant tenement—Effect.*

In considering questions of easement of necessity, convenience is not the best but absolute necessity, and in this matter S. 13 (*e*) is the same as the law in England. A right of way of necessity only arises when there is no other possible legal mode of getting at the land and an easement of necessity which arises by implication of law is a grant of a right of way until such time as the grantee may acquire the power from some other source of reaching the *quasi*-dominant tenement. Where he acquires by purchase the property through which he can reach the several portions of the dominant tenement the old easement ceases to exist. (English, Indian and American law reviewed.) (*Ananthakrishna Aiyar, J.*). VENKATAPATHIRAJU *v.* SUBBARAJU. **1930 M.W.N. 120.**

———An easement of necessity means an easement without which the property retained cannot be used at all and not one merely necessary to the reasonable enjoyment of that property: *Union Lighterage Co.* v. *London Graving Dock Co.*, 2 Ch. 557 and A.I.R. 1924 Mad. 108, *Ref.* (*Fazl Ali and Chatterji, JJ.*). KARTIC MANJHI *v.* BANAMALI MUKERJI. **A.I.R. 1930 Pat. 7.**

EASEMENTS ACT (1882), S. 13—Easement of Necessity.

———There cannot be an easement of necessity for enabling the dominant owner to enjoy another easement. An easement of necessity is not created merely when the easement is necessary, but when it is absolutely necessary for the beneficial enjoyment of the dominant property and the mere fact of the properties having come under a common owner for a period of a year or so does not convert a right, which otherwise could not have been considered absolutely necessary for the enjoyment of the property an easement of necessity.

The right of a person to go upon the land of his neighbour and erect a scaffolding thereon, for the purpose of plastering and white-washing his own wall, is in the nature of an easement, though it is not an easement of necessity. (*Taraporewala, J.*). OFFICIAL TRUSTEE *v.* SALEBHAI. **94 I. C. 673= 28 Bom. L.R. 403=A.I.R. 1926 Bom. 328.**

———An easement of necessity, means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property, but an easement apparent and continuous and necessary for enjoying the portions severed from the unity of ownership will pass to the transferee unless a contrary intention is expressed or implied in the instruments of transfer. (1902) 2 Ch. 557 at 572 and 3 Bom. L.R. 601, *Foll.*

Where the plaintiffs' plots were all along watered through the openings or vents,

Held, the existence of these vents is sufficient evidence of an apparent, continuous and necessary easement. The vents might be closed for the sake of convenience after irrigating the plaintiffs' fields as a temporary measure, just as a drain may be closed for clearing silt or for repairs, but this act being done for the proper enjoyment of the easement or in the course of enjoyment of an easement which is continuous would not make the easement a non-continuous one. (*Devadoss and Coleridge, JJ.*). M. GANGULU *v.* T. JAGANNATHAM.
76 I. C. 331=A.I.R. 1924 Mad. 108= 45 M.L.J. 724.

———Easement of necessity contemplates absolute necessity and it will not be granted merely for convenience. (*Kanhaiya Lal, J.C.*). KUNJ BEHARI *v.* BHULA. **72 I.C. 199=11 O.L.J. 5= A.I.R. 1923 Oudh 250.**

———Under Cl. (*e*) plaintiff has to prove that the easement claimed was necessary for the enjoyment of the property allotted to him by partition. Under Cl. (*f*) he has to prove that the easement was apparent, continuous and necessary for enjoying his share as it was enjoyed when the partition took effect and that no different intention was expressed or necessarily implied in the partition. There is no right of easement after partition on the mere ground that the easement is necessary for enjoying the share as it was enjoyed. (*Ashworth, A.J.C.*). BRIJ MOHAN LAL *v.* CHANDRIKA SING.
70 I.C. 930=25 O. C. 251=A.I.R. 1923 Oudh 57.

———An easement of necessity is one which the law creates according to the doctrine of implied grant in a particular case. It is one without which the dominant tenement cannot be used at all. A right of way of necessity ceases if the dominant owner can approach the place through his own land. (*Mukerji, A.C.J. and Fletcher, J.*). ABHOYA CHANDRA GHOSH *v.* RAJ KUMAR GHOSH.
60 I.C. 504 (Cal.).

———As a right of easement of necessity arising out of a severance by partition arises from a

EASEMENTS ACT (1882), S. 13—Flow of water.

presumed grant, no grant can be presumed where the rights of parties have been definitely settled in a partition suit. (*Newbould, J.*). SIBNATH SAHA *v.* MOHESH CHANDRA SAHA. **59 I.C. 89 (Cal.).**

—S. 13—Flow of water.

———Two adjacent plots one on higher level—Subsequent to partition joint wall with aperture built—Water from well existing before partition and used for washing can be allowed to flow from higher plot to lower through aperture as easement under S. 13 in addition to the natural right to drain off rain water through the said aperture. (*Venkatasubba Rao and Madhavan Nair, JJ.*). SINNANA GOWNDAN *v.* VEERAPPA GOWNDAN.

1930 M.W.N. 133=A.I.R. 1930 Mad. 676.

———*Quasi* easement—Property on slope—Partition—Person holding *quasi*-dominant position possesses easement to drain water through the lower portion as an apparent and continuous easement. (*Shadi Lal, C.J. and Broadway, J.*). CHANDAR *v.* BALA PERSHAD. **115 I.C. 758=A.I.R. 1928 Lah. 497.**

———Partition—No drain existing on either tenement—Level of dominant higher than that of servient—Right to easement arises as regards rain water but not as regards water for daily use as the former is in the nature of an apparent and continuous easement. (*Dalip Singh, J.*). BALA PARSHAD *v.* CHANDAR. **100 I.C. 939=9 L.L.J. 169=28 P.L.R. 334=A.I.R. 1927 Lah. 383.**

—S. 13—Implied grant.

———The doctrine of implied grant does not confer any title to easement which are not non-apparent and non-continuous. (*Fazl Ali and Chatterji, JJ.*). KARTIC MANJHI *v.* BANAMALI MUKERJI. **A.I.R. 1930 Pat. 7.**

—S. 13—Nature of easement.

———Question whether an easement is one of necessity is one of fact—C. P. Code, S. 100. (*Odgers, J.*). GOVINDA BHATTA *v.* M. RAMA BHATTA. **103 I.C. 862=A.I.R. 1927 Mad. 963.**

—S. 13—Quasi-easement.

———The term '*quasi*-easements' has been applied to those easements, which, not being easements of absolute necessity, come into existence for the first time by presumed grant or operation of law on a severance of two or more tenements formerly united in the sole or joint possession, or ownership, of one or more persons. The law relating to *quasi*-easements, arising on a division of joint property, is based upon the same principle which governs the conveyance of a part of the tenement held by a single owner or possessor. The principle is that on the grant by the owner of an entire property part of that property as it is then used and enjoyed there will pass to the grantee all those continuous and apparent easements, termed *quasi*-easements, which have been and are at the time of the grant in use for the benefit of the part granted. Such easements arise in favour of the grantee on several principles. As between co-parceners, mutual conveyances of the shares allotted to them respectively upon a partition of joint property, whether under the direction of Court of law or otherwise, will carry with them by presumption of law the right to such continuous easements as are necessary for the reasonable use and enjoyment of the premises respectively allotted. One of such easements is the right of support (including lateral support) which passes by implication of a law to a grantee, it is applicable to the case of a party wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other

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to have it maintained as a dividing wall between the two tenements. The mere fact that the price of the wall was taken into account in adjusting the value of the allotments does not in any way affect the applicability of the law. (*Suhrawardy and Chotzner, JJ.*). BHOLA NATH DUTTA *v.* RADHANATH BISWAS. **78 I.C. 908=51 Cal. 789=A.I.R. 1924 Cal. 844.**

—S. 13—Right of pasture.

———A customary right of pasture on landlord's land can be established by proper evidence if it is made out that from time immemorial the tenants have enjoyed it as of right, and if from the circumstances it could be gathered that the right was enjoyed by them customarily or might be due to a lost grant.

Where the rent was increased within living memory, within a few years and on every occasion on which the landlord granted permission to the tenants to graze the cattle the tenants had to apply for it and obtain such permission,

Held, that customary right cannot be held to exist. (*Coutts-Trotter, C.J. and Srinivasa Ayyangar, J.*). LAKSHMI KUMARA *v.* CHINNA NARAYANAPPA. **106 I. C. 195=A I. R. 1928 Mad. 799.**

—S. 13—Right of way.

———Easement of necessity—Right of way over another property cannot be claimed where other mode of access exists. 28 Mad. 495 and 33 All. 467, *Foll.*; 18 Bom. 616 and 48 I. C. 670, *Ref.* (*Kumaraswami Sastri and Walsh, JJ.*). NARAYANA GAJAPATHIRAJU *v.* JANAKI RATHAYYA MURAJI. **124 I.C. 593=1930 M.W.N. 225=31 M.L.W. 455=A.I.R. 1930 Mad. 609.**

———Continuous and apparent easement—Right of way is apparent but discontinuous easement even where road is formed and metalled—English cases are not applicable in face of the Act. 28 Mad. 495; 33 Mad. 327 and 15 All. 270, *Foll.* (*Case-law discussed.*) (*Kumaraswami Sastri and Walsh, JJ.*). NARAYANA GAJAPATHIRAJU *v.* JANAKI RATHAYYA MURAJI. **124 I.C. 593=1930 M.W.N. 225=31 M.L.W. 455=A.I.R. 1930 Mad. 609.**

———There cannot be an easement of necessity if there is an alternative route or way. But where the alternative route is extremely impassable, it means that the way which is claimed by the plaintiffs and which is claimed by them as a way of necessity is the only way available to them. (*C. C. Ghose and B. B. Ghose, JJ.*). KALI PADA BOSE *v.* FANI BHUSAN ROY. **70 I.C. 173=A.I.R. 1924 Cal. 363.**

———Right of way is not continuous easement. (*Martineau, J.*). GANGA RAM *v.* SITA RAM. **6 L.L.J. 176=A.I.R. 1924 Lah. 488.**

———Easement—Right of way—Sale-deed describing southern boundary of the land conveyed as pathway to be reserved—Vendee is entitled to right of way on the land forming southern boundary though no pathway might actually have been set apart by vendor—Deed—Construction. (*Venkatasubba Rao, J.*). KUPPAKKAL *v.* MATHAN CHETTIAR. **82 I.C. 430=A.I.R. 1924 Mad. 834=47 M.L.J. 477.**

———Where the owner of two tenements or of one tenement divided into two parts transfers one part, he puts an end by contract to the relation which he had himself created between the land sold and the land retained. He discharges the land so sold from any burden imposed upon it during his joint occupation: the condition of such

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land is thenceforth determined by the contract of alienation and not by the previous user of the former common owner during his common ownership. But where a man disposes of part of his land and that part affords an accommodation to the part retained, that accommodation will upon severance ripen into an easement, if it be such as to be absolutely necessary for the enjoyment of the part retained and the accommodation be such that it is capable of constituting the subject-matter of an easement. (*English case-law discussed.*) (*Mookerjee and Panton, JJ.*). TRUSTEE MONDUL *v.* KENURAM MONDAL. **65 I.C. 22=34 C.L.J. 518=A.I.R. 1921 Cal. 231.**

—S. 13—Right to drainage.

———Partition—Water from plaintiff's site draining off across defendant's land before partition—Plaintiff was held not entitled after partition to drain off his water in a narrow channel across the defendant's land causing greater burden on defendant's land.

Before the partition it was unlikely that water flowed in any channel across the defendant's land and it would be likely to be absorbed as it would be spread over the whole area. Now that the whole amount of the water was concentrated into a narrow channel it imposed a burden upon the defendants of a very different nature to that which was in existence before the partition. It could not therefore be said that it was necessary for enjoying the plaintiff's share as it was enjoyed when the partition took effect. The burden cast upon the defendants was a more onerous burden than it was before, and the plaintiff was not entitled to the easement. (*Phillips, J.*). SINNAN GOUNDAN *v.* VEERAPPA GOUNDAN. **90 I. C. 900=1925 M.W.N. 282=A.I.R. 1925 Mad. 681.**

—S. 13—Right to water.

———Suit for injunction restraining owner of intervening fields from interfering with flow of water from well further away—Question having arisen as result of partition of field and well—If flow across intervening field necessary for field in question, and was irrigating it before partition, party has right of easement and could rightly claim injunction. (*Mukerji and Bennet, JJ.*). CHHATARMAL *v.* JUGUL KISHORE. **A.I.R. 1930 All. 313.**

———Easement to take water for watering a field can be an easement of necessity. (*Odgers, J.*). GOVINDA BHATTA *v.* M. RAMA BHATTA. **103 I.C. 862=A.I.R. 1927 Mad. 963.**

—S. 13—Sale.

———Easements and *quasi*-easements pass with sale. 50 P.R. 1888, *Foll.* (*Moti Sagar, J.*). FAIZ MAHOMMAD *v.* LATIF. **78 I.C. 561=A.I.R. 1924 Lah. 724.**

—S. 13—Scope.

———The wide language used in the illustration varies the rule of law enacted in the main section itself. But only such easements are allowed under Cl. (*f*) as are continuous. If the easements be not continuous within the meaning of Cl. (*f*), it is difficult to see how the benefit of all the gutters and drains mentioned in Cl. (*h*) of the illustration can be enjoyed in respect of matters which require an act of man for enjoyment. Therefore illustration (*h*) cannot be accepted to modify the law itself. (*Mukerji, J.*). MT. SAJID-UN-NISSA *v.* SAYED HIDAYAT. **80 I.C. 896=22 A.L.J. 425=5 L.R.A. Civ. 291=A.I.R. 1924 All. 748.**

EASEMENTS ACT (1882), S. 15—Acquisition by prescription.

—S. 13—Transfer of easement.

———When a *quasi*-servient tenement is conveyed to the grantee, and the *quasi*-dominant tenement is retained by the grantor, *quasi*-easement cannot arise in favour of the grantor unless expressly reserved in his grant, inasmuch as the grantor by a grant for valuable consideration is, in the absence of such express reservation, taken to have relinquished all rights over the tenement granted, and to be thereby afterwards precluded from doing anything which derogates from his grant. *Wheeldon* v. *Burrows*, (1879) 12 Ch. D. 31, *Foll.*; *Pyer* v. *Carter*, (1857) 1 H. and N. 916, *Not foll.* (*Addison, J.*). SHIV DAYAL *v.* RAM DAS. **97 I. C. 913=27 P. L. R. 375=A. I. R. 1926 Lah. 473.**

———An apparent, continuous and necessary easement will pass to transferee unless contrary intention is expressed. (*Spencer, Offg. C. J.*). SOURIRAJA NAIDU *v.* RAJAGOPALAN. **81 I.C. 833=20 M.L.W. 245=1924 M.W.N. 678=A.I.R. 1924 Mad. 812=47 M. L. J. 302.**

———The provisions of S. 13 and illustrations may be regarded as enunciating the principles of justice, equity and good conscience Where the owner of an entire tract of land, or of two or more adjoining parcels employs a part thereof, so that one derives from the other a benefit or an advantage of a continuous and apparent nature, and sells the one in favour of which such continuous and apparent *quasi*-easement exists, the easement, being necessary to the reasonable enjoyment of the property granted, will pass to the grantee by implication. The principle has been applied to cases of transfer of two tenements, and it has been ruled that if the owner of an estate, part of which is *quasi*-dominant and part *quasi*-servient transfers the two portions to two different persons, the respective transferees will take the portions granted to them, burdened or benefitted, as the case may be, by those rights in the nature of apparent and continuous easements which the previous owner had the right to attach to them. This rule is held applicable where there are several grants not absolutely at the same moment, but so far at the same time that they are considered as one transaction. (*Mookerjee and Chotzner, JJ.*). SAROJINI DEVI *v.* KRISTA LAL HALDAR. **72 I.C. 576=36 C.L.J. 406=A.I.R. 1923 Cal. 256.**

—S. 15.

Acquisition by prescription.
Customary right.
Interruption.
Light and air.
Right against Government.
Right of Fishery.
Right of way.
Right to support.
Right to water.
User.
Miscellaneous.

—S. 15—Acquisition by prescription.

———Section 15 is of wider application and is not confined to rights of way or of support specially mentioned therein. The expression 'any other easement' includes a variety of rights similar to those illustrated in the section. Pasturage, fishery, ferry and similar rights of easements have been frequently upheld as those acquired by prescription and it is possible to acquire a right of prescriptive easement for storing, for threshing floor and for

EASEMENTS ACT (1882), S. 15—Acquisition by prescription.

using particular land as courtyard. 14 Bom. 213; 5 Cal. 945, *Ref.* (*Niamatullah, J.*). RAM PHAL SINGH *v.* BACHCHU RAM. **123 I. C. 757= A. I. R. 1930 All. 410.**

———Assertion of right of ownership does not preclude person from claiming right of easement. 16 Bom. 592, *Diss. from*; 62 I. C. 633 and 38 Mad. 1, *Ref.* (*Fazl Ali and Chatterji, JJ.*). KARTIC MANJHI *v.* BANAMALI MUKERJI. **A. I. R. 1930 Pat. 7.**

———*Interruption in enjoyment.*

Where the owner of a mahua tree complained of the construction of a wall by the defendant which prevented him from collecting the fruit of the tree, the branches of which overhang the wall but it was found on the evidence that the wall was constructed three years before the suit was brought,

Held, that assuming that the plaintiff had a right of easement he could not enforce it because of S. 15 of the Easements Act. (*Pullan, J.*). ABDUL HAQ *v.* SHAHAMAT ALI. **114 I. C. 512.**

———A title to easement is not complete merely upon the effluxion of the period mentioned in the statute, *viz.*, 20 years and however long the period of actual enjoyment may be, no absolute or indefeasible right can be acquired until it is so brought in question in some suit, and until it is so brought in question, the right is inchoate only and in order to establish it when brought in question, the enjoyment relied on must be an enjoyment for 20 years up to within two years of the institution of the suit. (*Cuming and Mallik, JJ.*). SITI KANTA PAL *v.* RADHA GOBINDA SEN. **119 I. C. 293= 33 C.W.N. 517=56 Cal. 927=A.I.R. 1929 Cal. 542.**

———Right to stock manure can be acquired by prescription. (*Daniels, J.*). DHANESHWAR TEWARI *v.* ANTU TEWARI. **98 I.C. 460= A.I.R. 1927 All. 115.**

———A riparian right is a natural right and is not acquired by immemorial user. It exists by law; it may be lost by the adverse enjoyment of another; but it has not got to be enjoyed to be kept up. Whatever the enjoyment at the date of the grant may be, the measure of the right that passes is determined only by configuration and the width of the river or stream. (*Kumaraswami Sastri and Ramesam, JJ.*). S. SUBBARAYUDU *v.* SECRETARY OF STATE. **105 I.C. 864=50 Mad. 961= 26 M.L.W. 513=1927 M.W.N. 854= A.I.R. 1927 Mad. 988=53 M.L.J. 868.**

———A prescriptive right to throw back water and keep it standing on the land of another exists only in the case of water flowing in a definite stream and cannot apply to surface-water not flowing in such a stream though it might ultimately, if not arrested, flow in a tank. 7 M.H.C. 37 and 11 Mad. 16, *Rel. on.* (*Odgers, J.*). RAGHAVALU NAYUDU *v.* SECRETARY OF STATE.

97 I.C. 832=1926 M.W.N. 652=25 M.L.W. 359= A.I.R. 1927 Mad. 144.

———Right in respect of the usufructuary mortgage property can be binding on mortgagee as well as mortgagor, but the act done must not be with mortgagee's express or implied consent. (*Devadoss, J.*). MANNATTIL KRISHNAN NAIR *v.* SIVARAMAKRISHNA PATTAR. **98 I.C. 619=24 M.L.W. 691= A.I.R. 1927 Mad. 73.**

———Acts referable to ownership cannot be basis for claim to easement.

An easement is a restriction in favour of one owner or occupier of immovable property of the

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rights of ownership of the immovable property of another owner. The restriction cannot be built up or asserted without consciousness of the rights which are restricted. If the right that a person is exercising is not with the consciousness that he is restricting another person's rights of ownership, he cannot be enjoying a right of easement. *Lyell* v. *Hothfield*, (1914) 3 K.B. 911, *Foll.* (*Kotwal, A.J.C.*). ABDUL KAYAM *v.* MOJIRAM. **104 I.C. 431= 23 N.L.R. 117=A.I.R. 1927 Nag. 334.**

———Easements by prescription are acquired only by sufferance of the dominant owner. (*Greaves and B.B. Ghose, JJ.*). MAMIN KHAN *v.* MOIZUDDIN KHAN. **91 I.C. 348=A.I.R. 1926 Cal. 647.**

———Mere assertion of ownership in litigation is not bar to acquiring easement; exercising acts of ownership is fatal to claim for easement. 38 Mad. 1, *Overruled*; *Lyell* v. *Hothfield*, (1914) 3 K. B. 911, *Foll.* (*Coutts-Trotter, C. J., Krishnan and Beasley, JJ.*). SUBBA RAO *v.* LAKSHMANA RAO.

96 I.C. 968=49 Mad. 820=23 M.L.W. 609= 1926 M.W.N. 1923=A.I.R. 1926 Mad. 728 (F.B.).

———Easement can be acquired only by a definite person or persons natural or juristic—A fluctuating and uncertain body of persons cannot acquire one *Lord Rivers* v. *Adams*, (1878) 3 Ex. D. 361, *Foll.* 14 Bom. 213, *Dist.* (*Phillips and Odgers, JJ.*). PAKKIR MAHAMUD *v.* PICHAI THEVAN.

92 I.C. 465=A.I.R. 1926 Mad. 625.

———In the absence of a finding that the tank is either private property or the property of the Government, a right of easement by prescription cannot be established. (*Phillips and Odgers, JJ.*). PAKKIR MAHAMUD *v.* PICHAI THEVAN.

92 I. C. 465=A. I. R. 1926 Mad. 625.

———The private nuisance caused by the overhanging boughs belonging to the trees of one neighbour to the owner of the land over which the boughs were overhanging does not create a "right" within the definition of "easement" in the Indian Easements Act, nor does the convenience to the owner of the tree, always changing in extent and position of space, become at any time so determinate that it could by any length of time be held to be enjoyed as "of right". There can be no such easement as can be acquired by prescription. 19 Bom. 420, *Foll.* (*Macleod, C.J. and Coyajee, J.*). KESHAV KRISHNA *v.* SHANKAR MAHADEO.

89 I.C. 191=27 Bom. L.R. 663= A. I. R. 1925 Bom. 446.

———The enjoyment necessary to qualify for a right of easement is something very different from actual user. In order to establish a right to an easement, the enjoyment of it must continue for twenty years; but in the case of discontinuous easements, this does not mean that the actual user is to continue for the whole period of twenty years. On the contrary, there may be days and weeks and months, during which the right may not be exercised at all, and yet during all those days and weeks and months, the person claiming the right may have been in full enjoyment of it when necessary. 30 Cal. 1077, *Foll.* (*Kanhaiya Lal, J.*). SRI RAM *v.* MANI RAM. **74 I.C. 922= 21 A. L. J. 569=5 L. R. A. Civ. 24= A. I. R. 1924 All. 97.**

———Where the plaintiffs claimed to have acquired an easement by prescription the Court should not convert the claim into one of customary easement. What may suffice to establish a customary easement may be wholly insufficient to establish an easement by prescription and *vice versa*. The

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two rights are different although the result may be the same. (*Broadway and Abdul Qadir, JJ.*). SITA RAM *v.* GHANNO. **69 I. C. 528= A. I. R. 1924 Lah. 275.**

———Under S. 15 (5) plaintiff has to show a period of 20 years continuing up to some point within 2 years before the institution of the suit. The 5th paragraph of S. 15 of the Easements Act seems to render it impossible to acquire statutory prescriptive title to an easement, unless and until the claim thereto has been contested in a suit, 10 A.L.J. 227; *Calls* v. *Home*, (1904) L.R.A. C. 179; *Hyman* v. *Van Don Borgh*, (1908) L. R. 1 Ch. 167, *Foll.* (*Simpson, A. J. C.*). BASDEO SING *v.* BHAGWAT PRASAD. **72 I. C. 909= A. I. R. 1923 Oudh 29.**

———A claim of higher right of ownership does not prevent another person from acquiring a right of easement, if he can show that he converts certain rights of enjoyment over the land in question for the benefit of another land of his own. A right once established by immemorial user, is not extinguished by non-user or interruption for more than two years. (*Mookerjee, A.C.J. and Fletcher, J.*). SURENDRA NATH *v.* GIRDHARI SINGH. **62 I.C. 633.**

—S. 15—Customary right.

———Tank water used by villagers for buildings without objection—Open and free user proved—Legal inference of the right for common benefit not dependent on the permission of the Malguzar arises from the acquiescence. A.I.R. 1928 Nag. 39 and A.I.R. 1928 Nag. 87, *Ref.* (*Kinkhede, A. J.C.*). GOVIND BAPU *v.* WARLU. **110 I. C. 823= A. I. R. 1928 Nag. 329.**

———In order to establish a customary right to do acts such as appropriating earth on another's property, the enjoyment must have been so acquiesced in by the owner as would give rise to the inference that originally by agreement or otherwise the usage (of which the repeated and open enjoyment is only a proof) had become a customary law of the place in respect of the persons and things which it concerned. The period of 20 years is sufficiently long to enable a Court to draw the legal inference that the exercise of the right to appropriate and carry away the earth for making pots must have had a lawful origin in a grant. A.I.R. 1924 Patna 303; 23 Bom. 666, *Foll.* (*Kinkhede, A. J. C.*). RUSHI BHIKU *v.* RUSHI SHEORAM. **107 I.C. 522= 23 N.L.R. 192=A.I.R. 1928 Nag. 87.**

—S. 15—Interruption.

———Where an easement to carry water in a channel across the defendant's land for purposes of irrigation was established, the mere failure to exercise the right for a period of two years prior to suit does not extinguish the right of easement, nor does the mere fact that for one year the plaintiffs irrigated one of their fields from another well affect their right of easement. 26 C. W. N. 121, *Ref.* (*Pullan, J.*). PARTAP SINGH *v.* HEMRAJ. **118 I. C. 521=A. I. R.1929 All. 497.**

———Mere obstruction is not sufficient but further acquiescence for one year must be proved. (*Ashworth, J.*). MUNICIPAL BOARD, PILIBHIT *v.* KHALIL-UL-RAHMAN. **116 I.C. 806= A.I.R. 1929 All. 382.**

———No easement can be claimed under S. 15, where it has been broken for a period of more than two years before the suit is brought. (*Pullan, J.*). ABDUL HAQ *v.* SHAHAMAT ALI. **114 I.C. 512.**

EASEMENTS ACT (1882), S. 15—Light and air.

———Suit by a servient owner before the expiry of twenty years requisite for the exercise of a prescriptive right by the dominant owner prevents the period of 20 years running in favour of the dominant owner. *Flight* v. *Thomas*, (1841) 8 Cl. & F. 231, *Dist.* (*Patkar and Baker, JJ.*). LALLUBHAI *v.* BHIMBHAI. **113 I.C. 525= 30 Bom. L.R. 873= A.I.R. 1928 Bom. 312.**

———Prescriptive right—Non-user for two years before suit by owner or dominant heritage amounts to cessation within two years within S. 15. A. I. R. 1922 Bom. 3; 12 A. L. J. 415; 33 I. C. 503 and 29 M. L. J. 685, *Foll.* (*Curgenven, J.*). RAMAKRISHNAYYA *v.* RATTAYA. **98 I.C. 886= A.I.R. 1927 Mad. 238.**

———Explanation 2 clearly relates not to the period after which the easement has ceased to be enjoyed but to any interval of non-user within the 20 years of enjoyment. (*Curgenven, J.*). RAMAKRISHNAYYA *v.* RATTAYA. **98 I.C. 886= A.I.R. 1927 Mad. 238.**

———Easement acquired before burning of a house—Re-building—Right to the same access of light and air is not lost—House burnt during the process of acquiring easement—Immediate re-building—Enjoyment will not be deemed to be interrupted—Delay in re-building may be evidence against the intention to resume user. (*Macleod, C.J. and Shah, J.*). RATAN LAL BHOLA RAM *v.* GULAM HUSEN ABDUL ALI. **67 I.C. 250= 46 Bom. 448=24 Bom. L.R. 83= A.I.R. 1922 Bom. 3.**

—S. 15—Light and air.

———Injunction for the protection of the easement of light and air can only be granted when their closure amounts to an actionable nuisance. It is not enough that the light has been reduced. There must be a substantial privation of light enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the occupier from carrying on business as beneficially as before. *Colls* v. *Home and Colonial Stores*, (1904) A.C. 179; 8 P.R. 1909; 39 Cal. 59. and A.I.R 1914 P.C. 45, *Ref.*

The existence of other sources of light should be taken into consideration. *Colls* v. *Home and Colonial Stores*, (1904) A.C. 179 and 13 Bom. 252, *Ref.* (*Bhide, J.*). SOHAN SINGH *v.* JAGAT SINGH. **114 I.C. 698=A.I.R. 1928 Lah. 980.**

———The owner of the domiant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or the business of the tenement according to the ordinary notions of mankind. The closing of the only ventilator of a room amounts to a nuisance whether the room is occupied by servants or others. 42 Cal. 46 (P.C.), *Rel. on.* (*Tek Chand, J.*). SHRI DWARKADHISHJI *v.* DEWASINGH. **108 I.C. 53=A.I.R. 1928 Lah. 735.**

———The mere existence of light from other sources to which the person has not acquired any prescriptive right is no answer to a suit for infringement of prescriptive right to light and air: 3 W.R. 29; A.I.R. 1914 P.C. 45; *Jolly* v. *Kine*, (1907) A.C. 1; *Colls* v. *Home and ColonialStores Ltd.*, (1904) A.C. 179; *Dyres Co.* v. *King*, (1870), 9 E. Q. 438 and *Jolly* v. *Kine*, (1905) 1 Ch. 480, *Dist.* (*Ross, J.*). MT. JADOOIE KAHARIN *v.* MT. KISUN BASI. **105 I.C. 39=A.I.R. 1928 Pat. 106.**

EASEMENTS ACT (1882), S. 15—Light and air.

———The owner of a dominant tenement does not obtain by his easement a right to all the light he has enjoyed during the period of prescription. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings. Further there is no infringement of the easement acquired by ancient lights unless the act which is done amounts to a nuisance.

The mere fact that the making of a room would block the plaintiff's window would not by itself entitle him to obtain a decree for perpetual injunction, in the absence of a definite and clear finding that the constructions contemplated by the defendants would amount to a nuisance. (*Iqbal Ahmed, J.*). DWARKA PRASAD *v.* BISHAMBHAR DAYAL. **99 I. C. 5=A. I. R. 1927 All. 191.**

———Joint property—Right does not arise. (*Macleod, C.J. and Coyajee, J.*). RAJUBAI MAHANBHAI *v.* LALBHAI MULCHAND. **97 I.C. 691=28 Bom. L. R. 1000=A.I.R. 1926 Bom. 545.**

———New and bigger windows constructed in place of old ones constitute new easement. 26 Bom. 374, *Foll.* (*Prideaux, A.J.C.*). BADRI *v.* JAFARBHAI. **96 I. C. 546=9 N. L. J. 136=A. I. R. 1926 Nag. 474.**

———No injunction should be granted to prevent obstruction to an easement unless the alleged obstruction causes such a diminution of light as to constitute a nuisance. There must be substantial privation of right enough to render the occupation uncomfortable according to the ordinary notions of mankind. (*Prideaux, A.C.J.*). BADRI *v.* JAFARBHAI. **96 I.C. 546=9 N.L.J. 136=A.I.R. 1926 Nag. 474.**

———There is no easement for the free access of wind. (*Mookerjee and Chotzner, JJ.*). SAROJINI DEVI *v.* KRISTA LAL HALDAR. **72 I. C. 576=36 C. L. J. 406=A. I. R. 1923 Cal. 256.**

———Long user may not always raise a presumption of grant. (*Hallifax, A. J. C.*). SONBA *v.* DATTATRAYA. **71 I.C. 831=6 N.L.J. 59=A.I.R. 1923 Nag. 192.**

———Access and use of light and air through certain opening—Enjoyment need not be as of right to create an easement by prescription. (*Macnair, A. J. C.*). HARI *v.* MAHADEO. **61 I.C. 569=A.I.R. 1921 Nag. 127.**

—S. 15—Right against Government.

———To apply 60 years rule Government ownership must exist on the date when easement is claimed. (*Ashworth, J.*). MUNICIPAL BOARD, PILIBHIT *v.* KHALIL-UL-RAHMAN. **116 I.C. 806=A.I.R. 1929 All. 382.**

———Where a ryotwari holder was found to use water from a Government channel for 50 years but the settlement records showed that his lands were dry lands,

Held, no presumption of an implied grant arise nor could a right by prescription be acquired. (*Ramesam, J.*). LAKSHMI NARAYAN *v.* SECRETARY OF STATE. **105 I.C. 84=39 M. L. T. 112=A.I.R. 1928 Mad. 96.**

———It is against the land, and thereby its owner, that a right of easement can be claimed. Sixty years user must be proved to acquire a right of way against Government whether the Government land is in occupation of Government or their lessee. A. I. R. 1924 All. 724, *Foll.* (*Pullan, J.*). JAGAN *v.* JAGDISH. **106 I.C. 305=4 O.W.N. 1035=A.I.R. 1928 Oudh 17.**

EASEMENTS ACT (1882), S. 15—Right of way.

———The common law of England on the subject of acquisition of preseriptive rights does not apply in India, and, assuming that it does, there would be no prescription against the Crown. 3 B. L. R. 18, *Foll.* (*Kincaid and Raymond, J.Cs.*). GANGARAM *v.* SECRETARY OF STATE. **86 I.C. 757=21 S. L. R. 195=A.I.R. 1927 Sind 270.**

———Sixty years user is necessary in case of Govt. land even where private person is in occupation as easement is a right which attaches to one property over another. (*Ryves, J.*). NARAIN DAS *v.* BEHARI KAHAT. **78 I.C. 844=A.I.R. 1924 All. 724.**

—S. 15—Right of Fishery.

———Limitation Act, Art. 144—Exclusive right of fishery is interest in immovable property and not merely "*profit a prendri*"—Adverse possession for 12 years against lawful owner creates such interest. 1 Pat. 674 and 14 C.L.J. 572, *Foll.* (*Sundaram Chetty, J.*). SECY. OF STATE *v.* DIST. BOARD OF TANJORE. **1930 M.W.N. 328=31 M.L.W. 508=A.I.R. 1930 Mad. 679.**

———Several fishery—No claim to soil itself—Applicability of Easements Act is doubtful. (*Marten, J.*). LAKSHMAN GOWROJI *v.* RAMJI ANTONE. **23 Bom. L.R. 939=A.I.R. 1921 Bom. 93.**

—S. 15—Right of way.

———User to be 'open' must raise presumption of servient owner's knowledge and acquiescence. (*Mirza and Baker, JJ.*). RAMCHANDRA TRIMBAK JOSHI *v.* HARI MARTAND. **116 I.C. 231=31 Bom. L.R. 120=A.I.R. 1929 Bom. 144.**

———In questions regarding a right of way the Court should consider the character of the ground, the space for which the right is claimed, the relations between the parties and the circumstances under which the user took place to decide whether the user was "as of right". A.I.R. 1922 Mad. 5, *Dist.*; 13 C.L.J. 316; 8 C.W.N. 359, *Foll.* (*Mirza and Baker, JJ.*). RAMCHANDRA TRIMBAK *v.* HARI MARTAND. **116 I.C. 231=31 Bom. L.R.120=A.I.R. 1929 Bom. 144.**

———Right of way for limited and special purpose not limited to special track—Change of track is not interruption as it is a discontinuous non-apparent positive easement not limited to a particular path. (*Courtney Terrell, C. J. and Jwala Prasad, J.*). NASIRUDDIN *v.* DEOKALI. **115 I.C. 884=A.I.R. 1929 Pat. 124.**

———Beginning under claim of right cannot be presumed from long user. 8 C.W.N. 359, *Rel. on.* (*Courtney Terrell, C. J. and Jwala Prasad, J.*). NASIRUDDIN *v.* DEOKALI. **115 I.C. 884=A.I. R. 1929 Pat. 124.**

———Passage for sweeper can be acquired, by prescription though sweeper is Municipal servant. (*Macleod, C.J. and Coyajee, J.*). RAMCHANDRA *v.* ANANT LAXMAN. **95 I.C. 170=28 Bom. L.R. 601=A.I.R. 1926 Bom. 282.**

———The right of easement in respect of a sweeper's passage for cleaning a privy through the land of another is acquired if the passage is used for 20 years as of right without interruption. (*Macleod, C.J. and Shah, J.*). YUSEF DAVID VARULKAR *v.* MOSES SOLOMON TALKER. **76 I.C. 754=24 Bom. L.R. 298=A.I.R. 1922 Bom. 79.**

———The mere fact that the land is waste does not necessarily show that no right can be acquired over such land. If that were so, the right of user over almost every pathway in the mofussil would be lost, inasmuch as almost every pathway lies over waste land. 18 C. W. N. 735, *Ref.* In determining the question whether an user of way over waste

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land was as of right or not, the Court would have to consider the character of the land, the relation between the parties and the circumstances under which the user took place. 8 C.W.N. 359, *Ref.* (*Chatterjee and Panton, JJ.*). MAHOMED NURAL HAQ *v.* BAKSU MANDAL. **65 I.C. 509 (Cal.).**

———Easement—Right of way for scavengers through dwelling house—Long user—User as of right and a legal origin may be presumed—Other modes of acquisition are not excluded by section.

In the case of long enjoyment a legal origin is presumed in England until the contrary is shown. (1891) App. Cas. 228; (1882) 7 App. Cas. 633; (1904) 2 Ch. 534; 3 East. 294; 4 L. W. 128, *Ref. to.*

In India there are conditions and circumstances such as nature and character of the servient land, the friendship or relationship of parties to be taken note of, before a Court can come to the conclusion that the exercise of a right of way can be held to have been as of right. 8 C. W. N. 359; 13 C. L. J. 316; 29 M. L. J. 685, *Ref. to.* (*Kumaraswami Sastri and Devadoss, JJ.*). KUNJAMMAL *v.* RATHNAM PILLAI. **66 I.C. 11= 1922 M. W. N. 143=15 M. L. W. 266= 31 M. L. T. 150=45 Mad. 633= A. I. R. 1922 Mad. 5=42 M. L. J. 417.**

———A suit to establish a right of way must be brought within two years of the interruption, otherwise his enjoyment for 20 years will be of no avail. (*Abdur Rahim and Oldfield, JJ.*). NACHIPARAYAN *v.* NARAYANA GOUNDAN. **60 I. C. 171= 12 M. L. W. 713=39 M. L. J. 574.**

———Right of way—Open user continued without interruption for long time and not attributable to permission or sufferance is *prima facie* evidence of enjoyment as of right. 14 W. R. 124, *Foll.* (*Macnair, A.J.C.*). HARI *v.* MAHADEO. **61 I.C. 569=A.I.R. 1921 Nag. 127.**

—S. 15—Right to support.

———*Cutting of drain causing damage to wall—Same which actionable.*

Where it was shown that the plaintiff's wall collapsed as a result of a deep drain cut close to the wall by the defendant but it was not shown that any portion of the soil on the plaintiff's land had fallen into the drain and it was also not proved that the period of 20 years had expired before the alleged encroachment,

Held, that S. 15 and not S. 7 applied to the facts of the case, and that the easement by prescription not having been established the plaintiff was not entitled to recover damages. (*Bennet and Iqbal Ahmad, JJ.*). BHAGWAN DAS *v.* KHURSHED. **1930 A.L.J. 340=A.I.R. 1929 All. 885.**

———Acquisition of easement to rest roof on neighbour's wall—Roof resting on neighbour's wall for more than 20 years—Injunction preventing interference with easement may be granted under Specific Relief Act, S. 54. 29 M.L.J. 685; 6 Cal. 394 (P. C.), *Rel. on*; 39 M.L.J. 574, *Dist.* (*Coutts-Trotter, C.J. and Ananthakrishna Ayyar, J.*). RAMAKRISHNA AYYAR *v.* RAMANATHA PATTAR. **1929 M.W.N. 528=A.I.R. 1929 Mad. 819.**

———Easement—Removal of support of wall before accrual of right of easement by prescription by neighbour is not actionable. *Guteley* v. *Marten*, 1 R. R. 269 and *Dalton* v. *Angus*, 6 App. Cases 740, *Foll.* (*Kinkhede, A. J. C.*). ABDUL RAHEMAN *v.* MULCHAND. **109 I. C. 281=10 N.L.J. 226= A.I.R. 1928 Nag. 91.**

EASEMENTS ACT (1882), S. 15—User.

———Lateral support can be obtained only by prescription. (*Ayling and Coutts-Trotter, JJ.*). ATHI AYYAR, *In re.* **68 I.C. 831= 14 M.L.W.728=A.I.R. 1921 Mad. 322.**

—S. 15—Right to water.

———Where a person is taking water during monsoon through an artificial channel for nearly 32 or 35 years into his own field for irrigation purposes by cutting an *ail* of another's field at a particular place during the monsoon, such user cannot be said to be of a temporary nature and the right to take such water can be acquired by prescription. *Beeston* v. *Weate*, (1856) 5 El. & Bl. 986, *Foll.* (*Rankin, C. J. and C. C. Ghose, J.*). BEPIN BEHARY *v.* RAMNATH GHALAK. **110 I.C. 422=56 Cal. 161= 47 C.L.J. 480=32 C. W. N. 1109= A.I.R. 1929 Cal. 286.**

———There can be no natural right at all with respect to water brought on artificially to the land and irrigation water is water that is brought on land by artificial means, by human effort. There may no doubt be a right to pass on such water also. But such a right can only be the subject of a grant or acquired by prescription. The natural right must be regarded as a right given to the owner of land having regard to the natural configuration and situation of the land. But when the right comes to relate to something that is brought on to the land artificially it will not be correct to describe it as a natural rights. *Sadasiva Iyer, J.*, in (1918) M.W.N. 167, *Diss. from.* (*Srinivasa Aiyangar, J.*). RAMAKRISHNA REDDI *v.* VENKATA REDDI. **108 I.C. 205=39 M. L. T. 373= A.I.R. 1928 Mad. 52.**

———Before the right to the use of water can be the subject of an easement by prescription or grant it must be water flowing through a defined and permanent channel. The essential features from which a grant or arrangement whereby the right claimed may be presumed to rest in some legal origin are that there should be a permanent channel, artificial or otherwise, or indeed a defined channel of any sort conducting the overflow of water and that the overflow should be controlled or directed in any particular course. 6 I.A. 33, *Foll.* (*Dawson Miller, C. J. and Mullick, J.*). MT. SARBAN *v.* PHUDO SAHU. **69 I.C. 947= 4 P.L.T. 81=1922 P.H.C.C. 305=2 Pat. 110= A. I. R. 1923 Pat. 65.**

———Although it is quite possible that the owner of one piece of agricultural land might acquire the right to drain his water on to the land of another, it would be more natural in hilly districts for the owner of the lower land to acquire a right to receive water which either falls on or flows into the higher land. It is only in such a way that cultivation in such districts can proceed; and nothing will prevent the owner of the land on the lower level from acquiring by prescription such a right against the owner of the land on a higher level. (*Macleod, C. J. and Shah, J.*). BASWANTAPPA IRRAPPA DESAI *v.* BHIMAPPA YELLAPPA KOPPAD. **64 I.C. 418=46 Bom. 115= 23 Bom. L.R.1004=A. I. R. 1922 Bom. 378.**

—S. 15—User.

———While the mere putting forward of a wider claim in legal proceeding is not conclusive against a right of easement, yet the question *quo animo egerit*, to what purported character are the acts of user to be described is one which the Court must answer. The question in each case is one of fact as to whether the acts of user are referable to a purported character of owner or to the claim to an-

EASEMENTS ACT (1882), S. 15—User.

easement. Even in the case of an enjoyment from time immemorial it would be equally necessary for the plaintiff to prove a user as of right as an easement as distinguishable from a right of ownership. 34 Cal. 51 and A. I. R. 1926 Mad. 728 (F.B.), *Ref.* (*Fazl Ali and Chatterji, JJ.*). KARTIC MANJHI *v.* BANAMALI MUKERJI. **A. I. R. 1930 Pat. 7.**

———Long user does not prove enjoyment as of right. (*Cuming and Mallik, JJ.*). SITI KANTA PAL *v.* RADHA GOBINDA SEN. **119 I. C. 293= 33 C. W. N. 517=56 Cal. 927= A.I.R. 1929 Cal. 542.**

———User as owner cannot be made basis of easement. (*Kotwal, A.J.C.*). TULSIRAM *v.* GANPAT. **104 I.C. 503=A.I.R. 1927 Nag. 386.**

———*Open user for long time is presumed to be as of right.*

An open user continued without interruption for a long time and not shown to be attributable to any permission on the owner's part is *prima facie* evidence of enjoyment as of right. The presumption is that the user is of right. (*Shadi Lal, C.J. and Le Rossignol, J.*). PIARE LAL *v.* ISHQU LAL. **95 I.C. 269=A.I.R. 1926 Lah. 522.**

———Lost grant—Evidence insufficient to prove long enjoyment under the Act cannot be sufficient to raise presumption of lost grant. (*Odgers, J.*). MD. USAN ROWTHER *v.* SECY. OF STATE. **96 I. C. 317=1926 M. W. N. 404= A.I.R. 1926 Mad. 788.**

———User connotes right. (*Martineau, J.*). ISHQ LALL *v.* PIYARI LAL. **86 I.C. 595= 7 L. L. J. 74=26 P.L.R. 110= A. I. R. 1925 Lah. 344.**

———An easement may be enjoyed as an ancient right or by immemorial user apart from S. 15 of the Easements Act, so that such ancient right may be proved, although by the right having been interrupted more than two years before the date of the suit, S. 15 of the Easements Act may not apply.

Per *Shah, J.*:—It would appear from the observations in the case of *Maharani Rajroop Koer* v. *Syed Abul Hossein*, 7 I.A. 240, that their Lordships did not lay any particular emphasis upon the number of years so long as it was in excess of twenty years. It seems that no such limit can be definitely laid down. It must depend upon the circumstances of each case. The question whether immemorial user or ancient right is established in any case must depend upon the evidence and the circumstances of that case. (*Shah and Crump, JJ.*). RAMBHAI DUBHAI *v.* VALLABHAI JAVERBHAI. **62 I. C. 65=45 Bom. 1027= 23 Bom. L.R. 422=A.I.R. 1921 Bom. 430.**

—S. 15—Miscellaneous.

———Section 7, Illus. (*e*) applies to cases where the land is in natural condition and does not apply to land burdened with a building and there is artificial pressure by the building itself. In such cases S. 7 does not apply and the question of easement can be decided by applying S. 15. (*Bennet and Iqbal Ahmad, JJ.*). BHAGWAN DAS *v.* BIBI IQBAL SULTAN BANU SHAHAR KHURSHED BEGAM. **118 I.C. 715=1930 A.L.J. 340= A.I.R 1929 All. 885.**

———A bye-law, passed by the Board and sanctioned by the Government, signifying the intention to let out the spaces at the sides of roads to hawkers, does not create Board's ownership to those sides but merely extends its power of user, the ownership being already created by S. 116, Municipalities Act of 1916, or a similar provision in the previous Act. (*Ashworth, J.*). MUNICIPAL BOARD, PILIBHIT *v.* KHALIL-UL-RAHMAN. **116 I.C. 806=A.I.R. 1929 All. 382.**

———Though Easements Act is not in force in Berar, Limitation Act, S. 26, is. (*Prideaux, A.J.C.*). BADRI *v.* JAFARBHAI. **96 I.C. 546=9 N.L.J. 136= A. I.R. 1926 Nag. 474.**

—S. 17—Applicability.

———S. 17 is intended to apply not to rights of irrigation in natural streams but to rights in the nature of profits *a prendre* which do not include a right to water. (*Mullick and Kulwant Sahay, JJ.*). THAKURJI SRI JUGAL SARKAR *v.* RAJ MANGAL PRASAD. **94 I. C. 929=7 P.L.T. 547= A. I. R. 1926 Pat. 187.**

—S. 17—Surface water.

———Act does not apply to Burma—Right of receiving surface water can be acquired by custom in absence of statutory prohibition. 2 U. B. R. 642 and 24 Cal. 865, *Dist.* (*Baguley, J.*). MAUNG CHAN NYEIN *v.* MAUNG PWE. **114 I. C. 519= 6 Rang. 615=A. I. R. 1929 Rang. 31.**

———Every landowner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and to put it to such use as he may desire. He may also allow it to flow away in the usual course of nature upon the lower lands of his neighbour and cannot be bound to prevent it from so doing, and it is for the other party to establish that they have acquired a right to compel the owner not to do so either by contract or by prescription. A.I.R. 1923 Pat. 65, *Foll.* (*Kulwant Sahay and Macpherson, JJ.*). ABDUL BAGI *v.* SHEO PRAKASH SINGH. **107 I.C. 542=A.I.R. 1928 Pat. 279.**

—S. 18—Access to tombs.

———*Conditions—Limits.*

A person can acquire a right of access to a spot in which some persons are buried and to worship the tomb provided he proves that the enjoyment of the right was not by leave granted or by stealth or by force, but that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned. 17 All. 87, *Foll.*

But the right of access to a tomb does not include the right to erect substantial structures over and round the tomb which amounts to an infringement of the owner's rights to the land. (*Rutledge, C.J. and Brown, J.*). L. DAWSON *v.* PRINCESS ROUNEE ZAMANI BEGAM. **112 I.C. 431= 6 Rang. 456=A.I.R. 1928 Rang. 268.**

—S. 18—Acquisition.

———There cannot be a customary easement in favour of an individual and so easement acquired under and by virtue of local customs can only be in favour of class and community. (*Staples, A. J. C.*). RAGHOBA *v.* ANANDA BAI. **119 I.C. 695= A.I.R. 1930 Nag. 40.**

———A village community in India can acquire a customary right. (*Devadoss, J.*). KUMARANDY KUDUMBAN *v.* VENKATASUBRAMANIA AIYAR. **101 I.C. 58=A.I.R. 1927 Mad. 645= 52 M.L.J. 641.**

———In order to find a customary right enjoyment for a period at least as long as would a prescriptive or easementary right require is necessary. (*Odgers, J.*). RAGHAVALU NAYUDU *v.* SECRETARY OF STATE. **97 I.C. 832=1926 M.W.N. 652= 25 M.L.W. 359=A.I.R. 1927 Mad. 144.**

EASEMENTS ACT (1882), S. 18 — Against landlord.

———A custom cannot be established by a practice of less than 20 years. (*Curgenven, J.*). ZAMINDAR OF BODOKIMIDY *v.* BUDANKAYALA BHIMAYYA. **98 I.C. 800=24 M.L.W. 677=A.I.R. 1927 Mad. 76.**

—S. 18—Against landlord.

———A tenant may acquire a customary right of using the water of a well against his own zamindar. 12 A.L.J. 963; A.I.R. 1924 All. 159, *Foll.*; 17 A.L.J. 672; 11 A.L.J. 990 and 14 All. 185, *Dist.* (*Dalal, J.*). PARTAP SINGH *v.* NAND KISHORE. **113 I.C. 729=9 L.R.A. Civ. 224=A. I. R. 1928 All. 591.**

———The first illustration to S. 18 expressly recognises that a tenant may have a customary right of easement against his landlord. A customary easement is not limited to easements of a kind which could not be recognised at all apart from special customs such as the right of pasturage and the right of privacy referred to in the illustrations. Any kind of easement recognised by custom of the provinces would surely fall within the meaning of the term. (*Daniels, J.*). KARAN SINGH *v.* DALCHAND. **74 I.C. 703=A. I. R. 1924 All. 159.**

—S. 18—Burying and cremating.

———In the absence of any evidence that the land was ever dedicated to the community, the mere fact that permission was given for one or two persons to be buried in a particular spot does not *ipso facto* invest the spot with a public character and give outsiders any rights over it. (*Rutledge, C.J. and Brown, J.*). L. DAWSON *v.* PRINCESS ROUNEE ZAMINI BEGUM. **112 I.C. 431=6 Rang. 456=A.I.R. 1928 Rang. 268.**

———*Recognition by Courts.*

Right to bury dead in a place privately owned is recognised by Courts and has been regarded by the Courts as a right partaking of the character of an easement and capable of acquisition by virtue of a custom. 23 B. 666, *Ref.* (*Po Han, J.*). MG. SHEW KYE *v.* MG, PO THA. **76 I. C. 588=2 Bur. L.J. 186=1 Rang. 702=A.I.R. 1924 Rang. 61.**

———*Customary right—Form of pleading.*

Customary right of user of land as burial or cremation ground must be specifically pleaded. A plaintiff setting up prescriptive right cannot be allowed to succeed on basis of customary right for the two are fundamentally distinct, for custom differs from prescription in the fact that prescription is the making of a right while custom is the making of a law. (*Mookerjee and Panton, JJ.*). GOPAL KRISHNA *v.* ABDUL SAMAD. **66 I.C. 640=34 C.L.J. 319=A.I.R. 1921 Cal. 569.**

—S. 18—Custom and prescription.

———*Distinction.*

Rights which are in the nature of customary rights which exist for the common benefit of certain communities or inhabitants of particular localities, and to establish which the law does not lay down any fixed period must be distinguished from prescriptive easements which can be acquired by 20 years user by specific individuals who alone can exercise them as against servient owners for the beneficial enjoyment of their own dominant heritages. 20 Mad. 389; 17 All. 87 and A. I. R. 1924 Mad. 197, *Foll.* (*Kinkhede, A. J. C.*). SHRIDHAR *v.* RAJABHAN. **105 I.C. 113=A.I.R. 1928 Nag. 39.**

EASEMENTS ACT (1882), S. 18—Privacy.

—S. 18—Cutting wood.

———*Nature.*

Villagers taking wood from landlord's jungle without his knowledge cannot acquire right to cut and appropriate wood—If such acts are with permission or acquiescence that amounts to license and cannot likewise confer a right as against him. (*Niamatullah, J.*). MOHAMMAD YUSUF *v.* SURAJ BALI SINGH. **123 I.C. 377=A.I.R. 1930 All. 338.**

—S. 18—Custom.

———*Recognition—Conditions.*

A Court should not decide that a local custom, such as cutting wood from a jungle exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned: 17 All. 87, *Rel. on.* (*Niamatullah, J.*). MOHAMMAD YUSUF *v.* SURAJ BALI SINGH. **123 I. C. 377=A. I. R. 1930 All. 338.**

—S. 18—Essentials of custom.

———The essential attributes of a custom are, that it must be immemorial, it must be reasonable, it must be continued without interruption since its immemorial origin, and it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the person whom it is alleged to affect. (*Mookerjee and Panton, JJ.*). GOPAL KRISHNA *v.* ABDUL SAMAD. **66 I.C. 640=34 C.L.J. 319=A. I. R. 1921 Cal. 569.**

—S. 18—Exercise of right.

———*Mode.*

Customary easement may be exercised intermittently. (*Fawcett, J. C. and Kemp, A. J. C.*). SHAH MAHOMAD *v.* RAMZAN. **66 I. C. 833=16 S. L. R. 17=A.I.R. 1921 Sind 155.**

—S. 18—Overhanging branches of trees.

———*Custom as to—Cannot be recognised.*

A custom in a village not to complain against the overhanging of cocoanut trees over neighbour's lands would not be reasonable and cannot be pleaded. It is indefinite and vague nor can there be customary easement under S. 18 of projecting the branches of trees growing on one's land over the land of another. 43 Bom. 164, *App.* (*Macleod, C. J. and Coyajee, J.*). KESHAV KRISHNA *v.* SHANKAR MAHDEO. **89 I.C. 191=27 Bom. L. R. 663=A.I.R. 1925 Bom. 446.**

—S. 18—Prescriptive and customary easement.

———*Distinction.*

Where the plaintiffs claimed to have acquired an easement by prescription the Court should not convert the claim into one of customary easement. What may suffice to establish a customary easement may be wholly insufficient to establish an easement by prescription and *vice versa*. The two rights are different although the result may be the same. (*Broadway and Abdul Qadir, JJ.*). SITA RAM *v.* GHANNO. **69 I. C. 528=A. I. R. 1924 Lah. 275.**

—S. 18—Privacy.

———*Right to—Recognition—Conditions.*

Where a custom of privacy existed in the locality in which the plaintiff lived and she sued the defendant that her right of privacy was infringed by certain construction made by defendant and where her house was already overlooked from

EASEMENTS ACT (1882), S. 18—Privacy.

another house and she did not show any reason why she did not object to being overlooked from that particular house and where she endured without protest the invasion of her privacy by the defendant for two years, she is not a person who is entitled to right of privacy although her suit is brought within limitation. 10 All. 358 and A. I. R. 1929 All. 676, *Ref.* (*Boys, J.*). MT. KARIMUNNISSA BIBI *v.* MIRA BAKHSH. **119 I.C. 834= A. I. R. 1929 All. 809.**

———*Enforcement—Facts to be proved.*

Plaintiff alleging infringement of right of privacy must prove customary right of privacy in neighbourhood and that he is individually entitled to take advantage of such custom. 10 All. 358, *Expl.* (*Boys and Young, JJ.*). BHAGWAN DAS *v.* ZAMURRAD HUSAIN. **119 I. C. 833= 1929 A. L. J. 1028=51 All. 986= A. I. R. 1929 All 676.**

———*Infringement.*

Right acknowledged in award cannot be infringed by the opening of a window not used for the legitimate purpose of obtaining light and air. 29 All. 582 ; A. I. R. 1926 Oudh 541 ; 5 O. W. N. 538, *Ref.* (*Pullan, J.*). SANGAM MADHO *v.* RAM NARAIN. **6 O. W. N. 854= A. I. R. 1929 Oudh 437.**

———The existence of a public lane in-between would not destroy the right of privacy in case where the right of privacy is proved to have been enjoyed. 6 B. H. C. R. 143 ; 13 A. L. J. 361 and A.I.R. 1923 All. 201, *Foll.* (*Sulaiman and Kendall, JJ.*). CHHEDI RAM *v.* GOKUL CHAND. **114 I. C. 732=50 All. 706=26 A.L.J. 537= A. I. R. 1928 All. 717.**

———*United Provinces—Judicial notice.*

A customary right of privacy exists in the United Provinces and is so well established that the Court is entitled to take judicial notice of the custom. A.I.R. 1926 Oudh 541 and A.I.R. 1926 Oudh 352, *Foll.*; 10 All. 358 and 7 O.C. 126, *Ref.* (*Raza, J.*). SARDAR HUSAIN *v.* AHMAD HUSSAIN. **110 I.C. 693= 5 O.W.N. 538.**

———*Interference—Good cause of action.*

Substantial interference with a right of privacy would afford a person whose right has been invaded a good cause of action. (*Raza, J.*). SARDAR HUSAIN *v.* AHMAD HUSSAIN. **110 I.C. 693= 5 O.W.N. 538.**

———*Nature.*

A customary right of privacy attaches to the property in respect of which it is claimed and is not a personal right. (*Raza, J.*). SARDAR HUSAIN *v.* AHMAD HUSSAIN. **110 I. C. 693=5 O.W.N. 538.**

———The fact that the houses are separated by a public road does not prevent the existence of a custom of privacy. (*Raza, J.*). SARDAR HUSAIN *v.* AHMAD HUSSAIN. **110 I.C. 693=5 O.W.N. 538.**

———*Infringement—Onus.*

Whenever a new wall is built overlooking the courtyard of another person, and such wall contains windows (not in existence in the wall before reconstruction), the initial burden of proof is on the person constructing the wall to show that the windows are not of such a character as to invade the privacy of the person into whose courtyard they look. This presumption that windows must cause an invasion of privacy can be rebutted by showing that no one can look out of the windows. (*Ashworth, J.*). BAQRIDI *v.* RAHIM BUX. **93 I.C. 332=13 O.L.J. 512= A.I.R. 1926 Oudh 352.**

EASEMENTS ACT (1882), S. 18—Use of land.

———*Roof of a house.*

The fact that the local custom mentioned in Illustration (*b*) to S. 18 refers to portions of a house "which are ordinarily excluded from observation," does not preclude a local custom of privacy extending to the roof of the house. (*Fawcett, J.C. and Kemp, A. J. C.*). SHAH MAHOMED *v.* RAMZAN. **66 I.C. 833=16 S.L.R. 17= A.I.R. 1921 Sind 155.**

———Illustration (*b*) to S. 18 affords statutory recognition of the validity of a custom of privacy in India which can be founded on custom and previous enjoyment of privacy in accordance with that custom. (*Fawcett, J.C. and Kemp, A.J.C.*). SHAH MOHAMAD *v.* RAMZAN. **66 I.C. 833= 16 S.L.R. 17=A.I.R. 1921 Sind 155.**

—S. 18—Right to worship.

———*Mode of acquisition.*

The right of going round a tree or worshipping a tree which is supposed to be the abode of a deity cannot be acquired by the inhabitants of a village merely by some people going round the tree or worshipping it. 12 L.W. 193, *Foll.* (*Devadoss, J.*). MANNATTIL KRISHNAN NAIR *v.* SIVARAMAKRISHNA PATTAR. **98 I.C. 619= 24 M.L.W. 691=A.I.R. 1927 Mad. 73.**

———A customary right of going over a particular plot of land belonging to another for the purpose of worshipping a pipal tree and the idol of Sri Ganeshji embedded in the tree, and a tulsi chabutra, all situate on that plot of land is valid. 19 Bom. 420, *Dist.* (*Das and Adami, JJ*). SHEIKH MANGREE MEAN *v.* BEHARI LAL. **61 I.C. 132= 2 P.L.T. 160=6 P. L. J.11= A. I. R. 1921 Pat. 90.**

—S. 18—Tank.

———*Customary right—Essentials.*

A customary right to be established must be reasonable and it must be definite or certain. A customary right to bathe in a tank can be acquired by the residents of a village, but in order to establish such a right the evidence must be clear; the enjoyment must be as of right for a long number of years and in considering the evidence regard must be had to the habits and customs of the people. A.I.R. 1924 Mad. 197, *Ref.* (*Devadoss, J.*). MANNATTIL KRISHNAN NAIR *v.* SIVARAMAKRISHNA PATTAR. **98 I.C. 619=24 M.L.W. 691= A.I.R. 1927 Mad. 73.**

—S. 18—Tarwad—Acquisition against.

———The fact that a junior member of a Malabar tarwad is either a consenting party to or was cognizant of the use of the family property in a particular way by strangers would not necessarily bind the family or the karnavan and strangers cannot acquire customary right of user against the family. (*Devadoss, J.*). MANNATTIL KRISHNAN NAIR *v.* SIVARAMAKRISHNA PATTAR. **98 I.C. 619= 24 M.L.W. 691=A.I.R. 1927 Mad. 73.**

—S. 18—Use of land.

———*Right as to—Essentials.*

Evidence showing that the suit land was used for the village cattle to gather in the early morning for over sixty years and also that people used to assemble on it during festivals in the adjoining temple, is not sufficient to deprive the revenue authorities of their right to deal with property under Dharkast Rules. In order to establish right to the property, there must be, besides such user, evidence that the land in question was dedicated or set apart as a cattle stand or for any purpose connected with the temple. 4 M. L. T. 440 and

EASEMENTS ACT (1882), S. 18—Use of land.

A. I. R. 1924 Mad. 197, *Foll.* (*Madhavan Nair, J.*). K. V. DESIKACHARIAR *v.* SECRETARY OF STATE. **115 I.C. 241=29 M.L.W. 229=56 M.L.J 38.**

———*Limits.*

A custom by which the villagers without interruption by the *malik* have been using the land for performing Ram-lilas, for putting up marriage processions, for keeping *Khalihans* and for tying cattle during the rainy season from time immemorial, is not invalid. A declaration of such right can be given. 23 B. 666; 17 All. 87 and 8 C. W. N. 425, *Ref.* (*Ross, J.*). RAM DAS SAH *v.* DAMODAR PRASAD. **72 I.C. 218=4 P.L.T. 223= A.I.R. 1923 Pat. 346.**

—S. 19—Applicability.

———S. 19 lays down only that when the dominant heritage is transferred the easement passes to the transferee. But where no easement at all existed while the two tenements belonged to the same person, S. 19 does not apply. (*Martineau, J.*). GANGA RAM *v.* SITA RAM. **6 L.L.J. 176= A.I.R. 1924 Lah. 488.**

—S. 19—Severance of tenements.

———*What passes.*

On a severance of tenements easements used as of necessity or in their nature continuous pass by implication but easements used from time to time do not pass unless expressly so stated. *Polden* v. *Bastard*, 1 Q.B. 156, *Rel. on.* (*Fazl Ali and Chatterji, JJ.*). KARTIC MANJHI *v.* BANAMALI MUKERJI. **A.I.R. 1930 Pat. 7.**

—S. 19—Succession.

———*Effect on the easement.*

A garden, over which an easement to enjoy it as a park, is created in favour of a community but the ownership and management of which is reserved to the owner descends in succession in the ordinary way, subject to the charge upon it. (*Kincaid and Raymond, A.J.Cs.*). LAKHAMBAI *v.* DEVIBAI. **59 I.C. 673=14 S. L. R. 132.**

—S. 21—Right of way.

———*Purpose and not person is the test.*

An easement of a right of way for the use of the sweeper can be acquired and the fact that the sweeper is a servant of the Municipality would not prevent the plaintiffs acquiring such a right. (*Macleod, C.J. and Coyajee, J.*). RAMCHANDRA *v.* ANANT LAXMAN. **95 I.C. 170= 28 Bom. L.R. 601=A. I. R. 1926 Bom. 282.**

—S. 22—Applicability.

———*Right of way—Alteration.*

When a line of way is once definitely set out, neither the dominant nor the servient owner can compel the other to give or accept a different and substituted way; the provisions of S. 22 of the Easements Act can only apply, when the exact way to be taken over the premises of the servient owner has not been ascertained. 61 L.T. 377, *Foll.* (*Macleod, C.J. and Coyajee, J.*). DHUNDIRAJ BALKRISHNA PHALINKAR *v.* RAMCHANDRA GANGADHAR KALE. **67 I.C. 413=24 Bom.L.R. 437= 46 Bom. 910=A.I.R. 1922 Bom. 407.**

—S. 22—Right of way.

———*Essentials.*

A right of way or other easement must be defined and not be so large as to destroy all the ordinary uses of the servient property and make it impossible that it should ever be used for any useful purpose.

A straggling right to the promiscuous use of the whole property for the purpose of driving cattle over it cannot be acquired as an easement. 15 W. R. 295, *Foll.* (*Rafique and Piggott, JJ.*). LAL BAHADUR *v.* RAMESHWAR DAYAL. **60 I.C. 990= 43 All. 345=19 A.L.J. 126= A.I.R. 1921 All. 206.**

—S. 22—Right to roof.

———*Limits.*

Where defendants had acquired the right to use the roof A and B as an open space in front of the room C as an easement it cannot justify their building over that portion. (*Abdul Qadir, J.*). HANS RAJ *v.* MALWA MAL. **69 I.C. 406= A.I.R. 1924 Lah. 387.**

—S. 22—Right to water.

———*Increase of area—Relief.*

A person entitled to water his lands from another's well does not forfeit his entire right by increasing the area to which the water would flow, and is entitled to a decree declaring his right to water the lands to which the water was already flowing. (*Walmsley, J.*). UPENDRA NATH *v.* BHUSAN SAHANA. **88 I. C. 970=A.I.R. 1926 Cal. 462.**

———*Directions of Court.*

An order that plaintiffs can cut opening in tank bund and take necessary water and close bund afterwards is explicit and that the objection that it virtually dispossessed the defendants from the entire tank is not sound. (*Suhrawardy and Cuming, JJ.*). BEHARI LAL MUKERJEE *v.* ASUTOSH BANERJEE. **87 I.C. 19=41 C.L.J. 379= A.I.R. 1925 Cal. 788.**

—S. 23—Conditions of enjoyment.

———A dominant owner may from time to time alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage. When a person acquires a right of easement for the outlet of water it may be of a limited kind. He should not be allowed to increase the extent or alter the mode of enjoyment so as to cast an additional burden on the servient heritage. (*Sulaiman and Mukerji, JJ.*). GAJADHAR *v.* KISHORI LAL. **97 I.C. 169=24 A.L.J. 810.**

—S. 23—Rain water.

———*Right to regulate—Burden not increased.*

If the owner of the higher tenement has the right to pass on to the lower tenement all the rain-water that falls on his land, the mere fact, that in the course of improving his tenement he carried out works of drainage or other works, the result of which is that instead of the water being allowed to flow imperceptibly to the lower tenement gets collected and is passed by an artificial channel, is the result of a natural user by the owner of the superior tenement of his own land and the works of improving and the draining by him on his land could not be regarded as any acts done on his part which would have the effect of either changing the right or increasing the burden of the obligation corresponding to the right. Conceivably, therefore, if it should be found in any case that by reason of such collecting of the water and passing it on through an artificial cutting in the bund the obligation on the servient tenement is increased in an appreciable degree or if it should be found that the damage done to the servient tenement by such artificial drainage is appreciably in excess of the damage done when the water was passed merely naturally, it would follow that the owner of the lower tenement is entitled to object to the draining of the rain-water in that manner. It is on the assumption that the obligation of the owner of the servient tenement is not changed either in quality

EASEMENTS ACT (1882), S. 23—Right of way.

or increased in degree that any changes by the owner of the higher tenement of his own property are allowed and regarded as not justifying any adjustment on the part of the owner of the servient tenement. A.I.R. 1926 Mad. 449 (F. B.), *Expl.* (*Srinivasa Aiyangar, J.*) RAMAKRISHNA REDDI *v.* VENKATA REDDI. **108 I.C. 205=39 M.L.T. 373= A.I.R. 1928 Mad. 52.**

—S. 23—Right of way.

———*Different purposes.*

Under S. 23 a right of way enjoyed for agricultural purposes may be used for other purposes provided no additional burden is thereby imposed on the servient heritage. 23 Bom. 595, *Foll.* (*Macleod, C.J. and Crump, J.*). MANCHARSHAH *v.* VIRJIVALLABHDAS. **98 I.C. 239=50 Bom. 635= 28 Bom. L.R. 1158=A.I.R. 1926 Bom. 537.**

—S. 27—Right of way.

———*Nature and Limits.*

An easement like a right of way over a tenement is a right running with the land and is not a personal right. Whether it is the owner or a trespasser who is in possession, the person who claims the right of way cannot claim more than that his right of easement should not be curtailed in any way. (*Dalip Singh, J.*). SHIMBU DAYAL *v.* GAJJU MAL. **108 I.C. 610=A. I. R. 1928 Lah. 709.**

—S. 27—Right to drop water.

———*Alteration of course.*

Where a person has acquired by grant from a Municipality a right to drop water on a public road the Municipality will be at liberty to permit another person to build a house, so that the water from plaintiff's house, instead of falling directly on the road will fall on the roof of that house and then fall into the street. (*Mukerji, J.*). RAGHUBIR SARAN DAS *v.* RAM DAS. **85 I. C. 608= 6 L. R.A. Civ. 122=A.I.R. 1925 All. 348.**

—S. 27—Right to water.

———*Servient owner's interference—Limits.*

Plaintiffs had a right to have their land irrigated by the water which passed through their land from the sluices which passed through defendant's land. The flow of the water to their land was obstructed by the channel which the defendant dug at right angles to the existing channel. The defendant was willing to construct a trough or aqueduct, which would carry the water to the plaintiffs' fields over the *nala* in dispute, but it was found that such construction did not give sufficient water to plaintiffs,

Held, that defendants could not be allowed to build.

The owner of the servient tenement must not so deal with the servient tenement as to render the easement incapable, or more difficult, of enjoyment by the owner of the dominant tenement. (*Baker, J. C.*). VENKATRAO *v.* BAPU. **87 I.C. 899= A.I.R. 1925 Nag. 389.**

—S. 28—Heavier burden.

———*What constitutes.*

Where an easement is claimed over another's property the servient tenement should not be saddled with a heavier burden than what the plaintiff has succeeded in proving. But when a particular mode of user is not heavier than the mode of user proved, the plaintiff may be allowed to use it in that particular way, *e.g.*, the user of a way for horses may include the right to lead smaller animals as well but not larger animals or loads. The user of a path for the passage of men, carts and palanquins, may also entitle the dominant owner

EASEMENTS ACT (1882), S. 30—Passing of easement.

to take cattle, processions and corpses along the path as the latter user does not add to the burden on the servient tenement. (*Suhrawardy and Cuming, JJ.*). RAM KUMAR MAZUMDAR *v.* MOHIM CHANDRA DUTTA. **65 I.C. 579 (Cal.).**

—S. 28—Injunction as to Light.

———An injunction to restrain the disturbance of an easement of light can only be granted where substantial damage is proved to have been caused. 29 All. 571, *Not foll.*; A.I.R. 1924 All. 394; 33 Mad. 327, *Foll.*; *Colls* v. *Home and Colonial Stores, Ltd.*, (1904) A.C. 179 and *Kine* v. *Jolly*, (1905) 1 Ch. 480, *Ref.* (*Ashworth, J.*). SURAJ NARAIN *v.* KALYAN DAS. **117 I.C. 618=A.I.R. 1929 All. 430.**

—S. 28—Pasture.

———*Extent.*

If the grazing area is larger than that required by the persons, a proprietor may use the excess for his own purposes. The persons having grazing rights cannot prevent him from developing any excess area and using it to its best purposes. 31 C. 503 (P.C.); 86 P.R. 1911, *Ref.* (*Wilberforce, J.*). KARTAR SINGH *v.* RALLA. **67 I.C. 306= 2 L.L.J. 44=77 P.L.R. 1922.**

—S. 28—Right of way.

———*Exercise of—Limits.*

While servient owners are entitled to make any use they choose of the premises provided they do not in any way interfere with the enjoyment by the dominant owner of his right of way within reasonable limits, the dominant owner entitled to the right of way cannot make an excessive user of the right, much less can he act arbitrarily and in a high-handed manner so as to render the bereficial enjoyment by a servient owner of his own premises impossible or fraught with many difficulties. (*Kinkhede, A.J.C.*). DADU *v.* EMPEROR. **90 I.C. 149=26 Cr.L.J. 1493=A.I.R. 1926 Nag. 221.**

———*Different kinds.*

A right of way of one kind, *e.g.*, for persons, cattle and carts, etc., does not include a right of way of another kind, *e.g.*, for sweepers removing night soil in the absence of evidence as to the probable intention of parties, and the purpose for which the right was imposed or acquired. (*Macleod, C. J. and Heaton, J.*). CHINTAMANI HARGOVAN *v.* RATANJI BHIMBHAI. **59 I. C. 426=22 Bom. L. R. 1131.**

—S. 28—Scope.

———Extent of an easement other than an easement of necessity as also the mode of its enjoyment must be fixed with reference to the purpose for which the right was acquired. (*Kanhaiya Lal, J.*). DURGA PRASAD *v.* LACHMI NARAIN. **78 I.C. 563=22 A.L.J. 314= 5 L.R.A. Civ. 221=A.I.R. 1924 All. 394.**

—S. 29—Overburdening.

———*Test.*

The discharge of foul effluent into a drain through which there may be a presumed grant of running water is not permissible in law as it imposes an overburden on the servient tenement. *Philimore* v. *Watford Rural Dist. Council*, (1913) 2 Ch. 434; *Hill* v. *Cook*, 26 L. T. 185; *Cawkwell* v. *Russel*, 26 L. J. Ex. 34, *Foll.*; *Clarke* v. *Somersetshire Drainage Commissioners*, 59 L.T. 670, *Ref.* (*Suhrawardy and Garlick, JJ.*). RAMAN CHANDRA *v.* BHOLA NATH. **33 C.W.N. 189= A. I. R. 1929 Cal. 350.**

—S. 30—Passing of easement.

———*Division—Respective rights.*

When a dominant heritage is divided between two or more persons the easement becomes annex-

EASEMENTS ACT (1882), S. 31—Obstruction.

to each of the shares provided that such annexation is consistent with the terms of the instrument under which the division was made. But there is no presumption that it wholly passed to one of such persons unless there is a specific agreement to that effect. (*Phillips and Devadoss, JJ.*). VEERABHADRAYYA *v.* RAMACHANDRA.
73 I. C. 66=18 M. L. W. 404=1923 M.W.N. 454=A.I.R. 1923 Mad. 674.

—S. 31—Obstruction.

———*Legality and Limit.*

Excessive user may be rendered impracticable but whole user cannot be obstructed. *Renshaw* v. *Bean*, 18 Q. B. 112, *Held modified*; *Tapling* v. *Jones*, 11 H. L.C. 290 and *Colls* v. *Home and Colonial Stores*, (1904) A.C. 179, *Ref.* (*Suhrawardy and Garlick, JJ.*). RAMAN CHANDRA *v.* BHOLA NATH.
33 C. W.N. 189=A.I.R. 1929 Cal. 350.

—S. 32—Construction of wall.

———*When amounts to an infringement.*

Where an award states that the wall of the servient owner shall not be constructed in such a way as to interfere with the rights of the dominant owner in respect of his existing constructions, the servient owner cannot construct eaves, or use the dominant owner's chabutra or do other acts infringing upon the dominant owner's rights. (*Pullan, J.*). SANGAM MADHO *v.* RAM NARAIN.
6 O.W.N. 854=A.I.R. 1929 Oudh 437.

—S. 33—Injunction.

———*Conditions.*

No injunction should be granted to prevent obstruction to an easement unless the alleged obstruction causes such a diminution of light as to constitute a nuisance. There must be substantial privation of light enough to render the occupation uncomfortable according to the ordinary notions of mankind. (*Prideaux, A. J. C.*). BADRI *v.* JAFARBHAI. **96 I. C. 546=9 N. L. J. 136=A. I. R. 1926 Nag. 474.**

———*Nuisance to be proved.*

The Court ought not to grant an injunction on the ground of nuisance unless the nuisance which is a question of fact is proved. (*Marten and Fawcett, JJ.*). SHA BULAKHIDAS JAMANDAS *v.* SHA GANPATRAM DALSUKRAM. **77 I. C. 412=A. I. R. 1923 Bom. 281.**

—S. 33—Right of suit.

—To give a right of suit there must be substantial infringement. 29 All. 571, *Not foll.* 13 A. L. J. 385, *Foll.* (*Mukerji, J.*). LACHHMI NARAIN *v.* RAM BHOROSEY. **97 I. C. 500=A. I. R. 1926 All. 764.**

—S. 33—'Substantial Damage'.

———What would be a substantial "damage" within the meaning of S. 33 in the case of an inhabitant of an open area, need not, necessarily, be a substantial damage to a person accustomed to living in a congested area: A. I. R. 1924 All. 392, *Rel. on.* (*Mukerji, J.*). LACHHMI NARAIN *v.* RAM BHOROSEY. **97 I. C. 500=A. I. R. 1926 All. 764.**

———Each case of disturbance of light and air must be decided on its own facts. Under Ss. 33 and 35 no damage is substantial unless it materially diminishes the value of the dominant heritage and interferes materially with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he might have done prior to the disturbance. (*Kanhaiya Lal, J.*). DURGA PRASAD *v.* LACHHMI NARAIN. **78 I.C. 563=22 A.L.J. 314=5 L.R.A. Civ. 221=A.I.R. 1924 All. 394.**

EASEMENTS ACT (1882), S. 35—Light.

—S. 35—Discretion of Court.

———*Considerations.*

To Courts governed by the Specific Relief Act, the question of injunction or no injunction presents itself in a different light to what it does to the English Courts and that to Courts subject to the Specific Relief Act the English decisions have no application. In India the Court has a discretion, it may—*not shall*—issue an injunction where the injury is such that pecuniary compensation would not afford adequate relief. The good sense of Judges might be relied upon for adequately protecting rights to light on the one hand and freedom from unnecessary burdens on the other. There must be consideration for both sides in all these controversies. (*Young, J.*). MAHOMAD AUZAM ISMAIL *v.* JAGANNAD JAMNADAS. **87 I.C. 800=3 Rang. 230=A.I.R. 1925 Rang. 327.**

—S. 35—Grazing right.

———*Limits and remedy.*

Where grazing rights are enjoyed by the plaintiffs in the *shamilat deh* wherein the defendants have proprietary rights and are entitled to cultivate the lands, the plaintiffs are entitled to have sufficient pasturage left for the use of their cattle and it should be stated in the decree that the defendant's right of cultivation will extend only to so much of the land as will leave plaintiffs a sufficient area for grazing purposes. The plaintiffs are also entitled to injunction restraining defendants from interfering with their rights. (*Moti Sagar and Martineau, JJ.*). KAUSHI RAM *v.* MUHAMMAD ABDUL.
92 I.C. 403=6 L.L.J. 336=A.I.R. 1925 Lah. 216.

—S. 35—Injunction.

———*Nature.*

An injunction is only an alternative within the discretion of the Court and is not an independent form of relief. (*Ashworth, J.*). SURAJ NARAIN *v.* KALYAN DAS. **117 I.C. 618=A.I.R. 1929 All. 430.**

———*Conditions.*

When injunction is asked for to restrain the threatened disturbance of an easement, the question for determination is whether the threatened disturbance of the easement would amount to a nuisance. A mere invasion of plaintiff's right of privacy is not sufficient to entitle him to an injunction. 30 Bom. 319, *Foll.*

There must be a threat of disturbance sufficient to cause substantial damage to the plaintiff, or in other words, it must amount to a nuisance, which in law implies substantial damage. The damage must not be merely sentimental or trifling: but in considering whether the property of the plaintiff is in fact injured or his comfort or convenience in fact materially interfered with, by an alleged nuisance, regard must be had to the character of the neighbourhood. (*Fawcett, J. C. and Kemp, A. J. C.*). SHAH MAHOMED *v.* RAMZAN. **66 I.C. 833=16 S.L.R. 17=A.I.R. 1921 Sind 155.**

—S. 35—Interpretation.

———The word "when" in S. 35 (*a*) must be construed to mean "when and where" because it would be useless to prescribe that an injunction could be granted when damages can be claimed under S. 33, if damages under S. 33 could not be claimed. (*Ashworth, J.*). SURAJ NARAIN *v.* KALYAN DAS.
117 I.C. 618=A.I.R. 1929 All. 430.

—S. 35—Light.

———*Relief—Substantial damage necessary.*

An injunction to restrain the disturbance of an easement of light can only be granted where substantial damage is proved to have been caused. 29 All. 571, *Not foll.*; A.I.R. 1924 All. 394;

EASEMENTS ACT (1882), S. 36 — Removal of obstruction.

33 Mad. 327, *Foll*; *Colls* v. *Home and Colonial Stores Ltd.*, (1904) A.C. 179 and *Kine* v. *Jolly*, (1905) 1 Ch. 480, *Ref.* (*Ashworth, J.*). SURAJ NARAIN *v.* KALYAN DAS. **117 I.C. 618=A I.R. 1929 All. 430.**

—S. 36—Removal of obstruction.

——— A person is not justified in taking the law in his own hands and removing the wrongful obstruction of an easement contrary to the provisions of S. 36 of the Easements Act. (*Fawcett and Patkar, JJ.*). ZIPRU TANOJI PATIL *v.* EMPEROR.

101 I.C. 604=29 Bom. L.R. 484=28 Cr.L.J. 476= 51 Bom. 487=8 A.I.Cr.R. 72= A.I.R. 1927 Bom. 363.

—S. 38—Release—Construction.

———Where the eastern wall of A's house contained ventilators which A was enjoying for more than 20 years but in 1902 A agreed with B, the adjoining owner, that he would allow the ends of rafters of the next storey which B might build, to be placed on the wall,

Held, that the agreement will not give B the right to so build the next storey as to obstruct the ventilators enjoyed by A. (*Martineau, J.*). NANDU SHAH *v.* SANT RAM. **A.I.R. 1923 Lah. 249.**

—S. 41—Grant—Construction.

———The scope of a grant of easement (right of way) must be determined by the terms of the contract between the parties. Where there is nothing in the terms of the grant that it was to continue only until such time as the necessity was absolute and there was no evidence in support of such agreement it must be held that the grant was not limited till the necessity for it existed. (*Srivatsava, J.*). HIRAJEE *v.* SURAJ BALI.

115 I.C. 303=A.I.R. 1929 Oudh 351.

—S. 41—Termination of necessity.

———In considering the questions of easements of necessity, convenience is not the test, but absolute necessity. They end with the necessity creating them. A way of necessity therefore is extinguished when the necessity terminates by the dominant owner acquiring adjoining property through which he can pass and repass to the old dominant tenement without reference to the servient tenement, and when once extinguished the dominant owner cannot revive it by any acts on his part. 33 All. 467; 19 Bom. 797; 4 C. L. J. 367; *Holmes* v. *Goring*, 2 Bing. 76 and 60 I. C. 504, *Rel on*; 28 Mad. 495, *Not appr.* (*Ananthakrishna Ayyar, J.*). (SARIPELLA) VENKATAPATHIRAJU *v.* (SARIPELLA) SUBBARAJU. **A. I. R. 1930 Mad. 789.**

—S. 43—Increase of burden.

———*Test.*

There was a parnala or a waterspout on the roof of the defendant's house to discharge water on to plaintiff's land. The defendant raised the height of the roof and along with it that of the waterspout by about 2½ or 4 feet,

Held, that no additional burden was thrown on the servient tenement and the easement was not destroyed: *Harvey* v. *Walters*, (1873) 8 C. P. 162, *Appl.* (*Zafar Ali, J.*). KARAM ILAHI *v.* GHULAM MUSTAFA. **102 I. C. 447=A. I. R. 1927 Lah. 492.**

———*Test and remedy.*

If, whatever steps the servient tenement can take, must necessarily interfere with the lawful enjoyment of the original arrangement and the additional burden cannot be reduced, then the easement is extinguished, but where the burden can be reduced without difficulty, to original limits, the easement is not extinguished.

At one time it was thought that the right to ancient light could be lost by pulling down the buildings having the right; that is not the law now. 91 Law Times 816, *Foll.*

The remedy open to the owner of the servient tenement is to proceed against the person who claims the wrongful enlarged user and on his refusal to desist to take the proceedings for an injunction. (*Mears, C. J. and Banerji, J.*). RAMESHWAR DAYAL *v.* B. MAHARAJ CHARAN.

65 I. C. 643=44 All. 343=20 A. L. J. 202= A. I. R. 1922 All. 28.

—S. 46—Extinction—Test—Revival.

———The unity of the dominant and servient estates in the same person extinguishes the easement appurtenant to the dominant estate, for no person can have an easement on land which he himself owns. But unity of title of the two estates will not extinguish an easement, unless the ownership of the two estates be co-extensive, equal in validity, quality and all other circumstances of right. If one estate is held in fee and the other for a term of years, there is no unity of possession that will extinguish an easement of one estate as against the other; but the unity of possession in such cases will only suspend the easement during the time of such unity of possession. Consequently, an easement may be revived, after it has been extinguished by the union of the dominant and servient tenements in one owner by their subsequent severance, provided the easement is apparent, continuous and essential to the enjoyment of the dominant tenement. If there has been unity of possession merely an easement which has been thereby suspended will revive on severance of the union but if there has been unity of seisin for estates in fee simple and not unity of possession merely, all easements are absolutely extinguished and will not revive, unless they are re-created on severance of the former dominant and servient estates. (*Mookerjee and Chotzner, JJ.*). TINKORI PATHAK *v.* RAM GOPAL. **70 I. C. 663= 36 C. L.J. 161=50 Cal. 356=A. I. R. 1923 Cal. 8.**

—S. 46—Joint ownership.

———Where the dominant owner had an easement right in respect of ventilators in a wall of his house the fact that the adjoining servient owner acquires by agreement a joint ownership in the wall will not operate to extinguish the easement. It would have been otherwise if he had acquired the joint ownership of the whole house of the dominant owner. (*Martineau, J.*). NANDU SHAH *v.* SANT RAM. **A.I.R. 1923 Lah. 249.**

—S. 47—Non-user.

———When an easement right to the water in a stream is not enjoyed for 20 years continuously, the right is extinguished. (*Phillips and Devadoss, JJ.*). VEERABHADRAYYA *v.* RAMACHANDRA. **73 I.C. 66=18 M.L.W. 404=1923 M.W.N. 454= A.I.R. 1923 Mad. 674.**

—S. 47—Right to water—Non-user—Extinction.

———The right to take a half share of the water from the well on another's land for irrigating one's own land, is an ordinary easement liable to be extinguished under S. 47 if not exercised for more than 20 years and not an easement of necessity. Such right does not of itself import ownership of half the well. (*Shah and Hayward, JJ.*). ANANTA *v.* GANU. **45 Bom. 80=A.I.R. 1921 Bom. 417.**

—S. 50—Exercise of right.

———*No right to compel.*

The owner of the servient tenement cannot compel the owner of the dominant tenement to con-

EASEMENTS ACT (1882), S. 51—Regrant.

tinue the exercise of his right even where that right has been exercised uninterruptedly for over 20 years and even if its exercise should be beneficial to the servient tenement. (*Dawson-Miller, C.J. and Mullick, J.*). MT. SARBAN *v.* PHUDO SAHU.
69 I.C. 947=4 P. L. T. 81=
1922 P. H. C. C. 305=2 Pat. 110=
A. I. R. 1923 Pat. 65.

—S. 51—Regrant.

———*Fresh user—Acquiescence.*

Where defendant had had a right to take water from the well on plaintiff's land for irrigating his (defendant's) land but this right was extinguished on account of non-user for more than 20 years, and plaintiff permitted defendant to repair the well which had fallen into ruin and defendant did accordingly and used the water of the well for the purpose of irrigation,

Held, that the plaintiff must be held to have regranted the easement to defendant and that he was estopped from questioning defendant's right on the ground of want of registered deed to support the grant of the easement. (*Shah and Hayward, JJ.*). ANANTA *v.* GANU. **45 Bom. 80=**
A.I.R. 1921 Bom. 417.

—S. 51—Revival.

———*Held*, that an easement which is once extinguished cannot be revived by any act on the part of dominant owner. (*Ananthakrishna Aiyar, J.*). VENKATAPATHI RAJU *v.* SUBBARAJU.
1930 M.W.N. 120.

—S. 52—Common privy.

———Where the landlord provides for the use of his tenants residing in a number of rooms, a privy which however is not expressly included in the lease of the rooms, the tenants are mere licensees in respect of the privy and the privy remains under the control of the landlord, both as regards user and repairs. (*Marten, C.J. and Kemp, J.*). LAKHIMCHAND KHETSEY *v.* RATANBAI.
101 I.C. 210=51 Bom. 274=
29 Bom. L R. 78=A.I.R. 1927 Bom. 115.

—S. 52—Cutting of wood.

———*When a licence.*

One or more inhabitants of a village taking wood from the landlord's jungle without the latter's knowledge cannot by so doing for any length of time acquire a right to cut and appropriate wood contrary to the wishes of the latter. Similar acts done with the permission or acquiescence of the owner being referable to a license express or implied cannot likewise confer a right as against him. (*Niamatullah, J.*). MOHAMMAD YUSUF *v.* SURAJ BALI SING. **123 I. C. 377=**
A. I. R. 1930 All. 338.

—S. 52—'Interest in the property.'

———The right to excavate the earth and to carry it away for the purpose of making pots is in the nature of a benefit arising out of land or amounting to an interest in land, and as such it will make the license irrevocable at the option of the owner of the land. (*Kinkhede, A.J.C.*). BUSHI BHIKU *v.* RUSHI SHEORAM. **107 I.C. 522=23 N.L.R. 192=**
A. I. R. 1928 Nag. 87.

—S. 52—'Interpretation.'

———*Fawcett, J.*—The words "an interest in the property" in S. 52 are presumably intended to cover cases where there might be a right in the property granted such as a lease, or a right of joint possession. (*Shah and Fawcett, JJ.*). JANARDAN MAHADEO *v.* RAMACHANDRA MAHADEO.
101 I.C. 393=29 Bom. L. R. 312=
A. I. R. 1927 Bom. 240.

EASEMENTS ACT (1882), S. 52—License and lease.

—S. 52—License and Easement.

———Where on a partition between two brothers, a house with a well fell to the share of one of them, while a house without a well to the other's share and in the partition deed, it was stated that the latter should, "out of brotherly affection be allowed to take the water of the well, and that he was asking (it), not as a matter of right but simply out of (brotherly) regard", the first brother put up a wall near the well to prevent water being taken out of it; in a suit the aggrieved brother to establish his right to take water from tho well,

Held, that the right acquired by the plaintiff under the deed was not an easement but was a license as defined in S. 52. (*Shah and Fawcett, JJ.*). JANARDAN MAHADEO *v.* RAMCHANDRA MAHADEO.
101 I.C. 393=29 Bom.L.R. 312=
A.I.R. 1927 Bom. 240.

—S. 52—License and lease.

———*Test.*

The main test for deciding whether a person is a licensee of a property or a lessee is that of exclusive possession. If the effect of the agreement is to give exclusive possession to the holder, though subject to certain reservations then it is a lease, if the agreement is merely for the use of the property in a certain way and on certain terms while it remains in the possession and control of the owner it is a license: *Glenwood Lumber Co.* v. *Phillips*, (1904) A.C. 405; A.I.R. 1923 Bom. 228, *Rel. on.* (*Mirza and Broomfield, JJ.*). SHERIF DADUMIYAJI *v.* EMPEROR. **32 Bom. L.R. 332=**
A.I.R. 1930 Bom. 165.

———The distinction between a lease and a license is "not a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land." *Glenwood, Lumber Co., Ltd.* v. *Phillips*, (1904) A. C. 405, *Foll.* (*Graham and Mitter, JJ.*). SECRETARY OF STATE *v.* BHUPAL CHANDRA RAY. **57 C. 655.**

———*Distinction.*

An agreement by which a certain quantity of grain is agreed to be paid to the owner every year on account of the damage to be sustained by him by his allowing the other persons to take their cattle or carts over a strip of land is lease and not a license nor an easement and the payment claimed is rent. (*Hallifax, A.J.C.*). INDAL *v.* DEBI.
92 I.C. 683=A.I.R. 1926 Nag. 174.

———*Construction.*

Where a plain piece of paper unstamped and unregistered recites that the plaintiff has been given permission to plant trees on a certain plot,

Held, that if the document is to be considered a mere license then, under S. 52 of the Easements Act, it cannot create any interest in the property; and that if it is to be treated as a lease it is invalid under the provisions of S. 107 of the Transfer of Property Act, and that in either case a person in actual occupation of the plot cannot be ejected by means of that document. (*Misra, J.*). GULAB KHAN *v.* LAL MAHOMED KHAN.
96 I.C. 410=A.I.R. 1926 Oudh 609.

———*Distinction.*

The difference between a lease and a license is that, in the case of a license there is no interest in immovable property transferred to the licensee: while in the case of a lease there is a transfer or

EASEMENTS ACT (1882), S. 52—License and lease.

carving out of such interest in favour of the person in whose favour the lease is granted. One chief consideration is whether there is any right of exclusive possession given. If the effect of the document is to give the holder an exclusive right of occupation of the land, it will be a demise of the land but it is not a mere question of words but of substance. The mere calling a document a license would not affect the question but in arriving at a conclusion where the terms are not clear, one has to see what the circumstances are to judge the intention of the parties. It is relevant to consider what the rights of the parties were and what the object of the agreement was. The mere fact that there are restrictive covenants would not by itself make a lease a license if the other terms are clear, but in considering what the intention of the parties was, it is relevant to see what control one party has over the property on which another party is allowed to do certain things.

Provisions that the grantor should have "free access at all times," that the grantee should not sub-let or transfer his rights without the grantor's consent, that upon the determination of the license the grantors might re-enter upon and re-take and absolutely retain possession, etc., do not establish a lease where the other terms and circumstances show that no interest in immovable property was transferred or that exclusive possession of land was not given. Conditions such as the ones referred to above, which restrict the licensee's rights and which, as the licensee cannot claim such rights even in absence of such provisions, are unnecessary in a license and would be natural in a lease, may be due to extra caution on the part of the parties and do not necessarily indicate that a lease was intended.

In this case, certain documents by which leave was given by a Railway company to stack coal on station yards were held to constitute a license and not a lease. (*Spencer, Offg. C. J., Kumaraswami Sastri and Krishnan, JJ.*). ACTING SECRETARY, BOARD OF REVENUE *v.* THE AGENT, SOUTH INDIAN RAILWAY CO. **86 I.C. 688=48 Mad. 368= A.I.R. 1925 Mad. 434=48 M.L.J. 161 (F.B.).**

———*Construction.*

It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a license, and not as a lease. Having regard to the rights of a lessee, which are specified in S. 108 of the Transfer of Property Act, in particular the rights to growing crops and to put up structures, it seems difficult to say that there could be a valid lease not of a definite area of immovable property but of an area the position of which varies from time to time. On the other hand, it may be said that "immovable property" (as defined in the General Clauses Act) includes not only land but benefits to arise out of the land so that there can be a lease of the benefit of keeping chattels, such as a car and carriage, within certain special limits although the place occupied by the chattels might vary from time to time. Ordinarily the law takes it that a case of that kind is not one of a demise, but that of a license. The mere fact that a person has had the exclusive use of a particular cubicle for two years and that it was the intention of the parties

EASEMENTS ACT (1882), S. 56—Interpretation.

that no one else should use that cubicle so long as the person kept his car on the premises is not in law sufficient to show that the agreement was a demise or a lease and not a license. (*Fawcett, J.*). THE INDIAN HOTELS COMPANY LTD. *v.* PHIROZ SORABJI, CONTRACTOR. **88 I. C. 316= 25 Bom.L.R. 84=A. I. R. 1923 Bom. 228.**

—S. 52—Rights of licensee.

———A licensee has no interest in property, and so cannot maintain a suit for possession. *Heap* v. *Hartley*, (1889) 42 Ch. D. 461, *Rel. on.* (*Iqbal Ahmad, J.*). MANHALAL RAI *v.* RAM GULAM. **103 I. C. 43=A.I.R. 1927 All. 633.**

—S. 54—Implied license.

———*Construction.*

A and *B* cotton mill companies owned adjoining lands and had common agents. On the land of *A* company a godown was built and a tank was excavated for the use of the *B* company by the common agents. Later on, the two companies were managed by separate agents. *A* company had never challenged the arrangement. In 1916 disputes arose between the agents and in 1923 A company sued to recover possession of the land,

Held, that under the circumstances there was a grant of a license implied from the conduct of the *A* company acting by its agents and that the *B* company was entitled to rely on the principle of *Ramsden* v. *Dyson*, (1865) 1 H. L. 129 to the effect that it had built upon *A* company's land in the expectation induced by the *A* company that it would be granted a permanent lease of that land. (*Marten, C.J. and Murphy, J.*). GUJERAT GINNING CO. *v.* MOTILAL HIRABHAI SPINNING CO.

123 I. C. 481=53 Bom. 792= 31 Bom. L. R.1310=A.I.R. 1930 Bom. 84.

———*What is.*

N had built a house on another's land with the permission of his predecessor-in-title. After *N*'s death two of his sons executed an agreement to pay ground rent for the land and to vacate in case of default. Afterwards it was found that *N*'s sons including the executants of this agreement and their descendants had abandoned the house, and that the house was in the occupation of *N*'s daughter and her son,

Held, that the agreement to pay ground rent was not binding on the latter and that they were licensees deriving title directly from *N* and not tenants. (*Kanhaiya Lal, J.*). AMJAD KHAN *v.* SHAFIUDDIN KHAN. **78 I.C. 215= A. I. R. 1925 All. 203.**

—S. 55—Rights of Licensee.

———A license to live for generation must be presumed to permit all enjoyments of life by the licensee without restriction. Eating meat or beef is such a reasonable enjoyment of life and it does not *per se* injure the rights of others.

Held, that a licensee has a right to slaughter cows at his residence. (*Sulaiman and Sen, JJ.*). NAUBAHAR SINGH *v.* QADIR BUX.

125 I. C. 14= 1930 A.L.J. 875.

—S. 56—Interpretation.

———*Fawcett, J.*—The words "save as aforesaid" in the second part of S. 56 bring in the words "unless a different intention is expressed or necessarily implied." (*Shah and Fawcett, JJ.*). JANARDAN MAHADEO *v.* RAMCHANDRA MAHADEO.

101 I. C. 393=29 Bom.L.R. 312= A.I.R. 1927 Bom. 240.

EASEMENTS ACT (1882), S. 56—Irrevocable license.

—S. 56—Irrevocable license.

———The becoming irrevocable of a license does not make it transferable. (*Walsh, Ag. C. J. and Ryves, J.*). KALLU SHAH *v.* RAHEEM BAKSH.

84 I. C. 284=5 L.R.A. Civ. 532= A. I. R. 1924 All. 825.

—S. 56—Partnership.

———The mere fact that a licensee enters into a partnership with others or another in respect of profits or losses of the business for the carrying on of which he has obtained a license does not necessarily involve either a sale, transfer or subletting of the license. (*Srinivasa Aiyangar, J.*). GANGADARA SAH *v.* SWAMINADA MUDALI.

92 I. C. 112=22 M. L. W. 679= A. I. R. 1926 Mad. 218.

—S. 56—Right of residence.

———The site of a hut in a grove in which a licensee is permitted to live belongs to the zamindar and neither the right of occupation of the huts nor the site can be transferred by the licensee. (*Dalal, J.*). BATUK PRASAD *v.* BHAGWAN DAS.

110 I.C. 465=A.I.R. 1928 All. 659.

—S. 56—Right to build.

———When, in a non-agricultural village, the zemindar grants leave to a person to build a kachcha house on parti land, the grantee becomes a mere licensee and a transfer by him or his right to build is not enforceable : A.I.R. 1925 Oudh 262 ; 29 All. 133 and 33 All. 757, *Dist.* (*Wazir Hasan, J.*). RAM BHAROSAY *v.* ZAMORI BEGAM.

103 I.C. 681=1 L.C. 238=A.I.R. 1927 Oudh 314.

—S. 56—'Riyayas.'

———*Right to transfer—Presumption.*

In case of riyayas occupying houses in cities and towns, it is to be presumed that they have a right of transfer, unlike those who inhabit agricultural areas, and so if a licensor sues to eject the transferee of a riyaya he has to prove not only his ownership but must also prove the existence of custom or terms of the grant under which the house in dispute was built which make the transfer thereof invalid, entitling him to recover possession of the site : 16 I.C. 353 and A.I.R. 1924 All. 112, *Rel. on.* (*Niamatullah, J.*). MOHAMMAD SHER KHAN *v.* AMJAD HUSSAIN.

117 I.C. 365= A.I.R. 1929 All. 494.

—S. 57—Duty of licensor.

———Under S. 57 the licensor is bound to disclose any defect in the property likely to be dangerous to the licensee of which the licensor was aware but the licensee was not. In other words the licensor is under a duty not to lay a trap either at the beginning of the license or during its continuance and if the licensor does not disclose any hidden risk in the use of the subject of the license to the licensee of which the latter is not aware that amounts to negligence and if any loss is caused due to such negligence, the licensor is liable for damages. *English Case-law referred to.* (*Marten, C.J. and Kemp, J.*). LAKHMICHAND KHETSEY *v.* RATANBAI.

101 I.C. 210=51 Bom. 274=29 Bom.L R. 78= A.I.R. 1927 Bom. 115.

———It is an elementary rule that the grantor of licence is under an obligation to put the licensee in a position to enjoy the licence. (*Mookerjee and Chotzner, JJ.*). FREDERICK THOMAS KINGSLEY *v.* THE SECRETARY OF STATE.

72 I.C. 270=36 C.L.J. 271= A.I.R. 1923 Cal. 49.

EASEMENTS ACT (1882), S. 59—Applicability.

—S. 59—Applicability.

———The transferee contemplated by S. 59 must be a person who was not the licensor himself. The section has no application to a case in which one of two joint licensors transfers his interest in the property, with respect to which the license has been granted, in favour of his co-licensor, (*Iqbal Ahmad, J.*). BHUKHAN SING *v.* JUGARDEO KOERI.

98 I. C. 814=A.I.R. 1929 All. 197.

—S. 59—Grant for consideration.

———*Not revoked on transfer.*

A grant for consideration of a right to build a pacca structure on the land of the grantor under the terms of the contract cannot be revoked by the subsequent transfer of the property. (*Wazir Hasan, A.J.C.*). RAGHO PERSHAD *v.* SECRETARY OF STATE.

74 I.C. 369=9 O.L.J. 629=27 O.C. 64= A.I.R. 1923 Oudh 114.

—S. 59—Permanent structure.

———*Transferee's right.*

Where a structure of a permanent character has been made in pursuance of a license the transferee has no greater right than that possessed by his transferor and is bound by the license : 37 All. 91, *Foll.* ; A.I.R. 1929 All. 140, *Dist.* (*Daniels, J.*). FAQIRULLAH *v.* WALIKHAN.

97 I.C. 337= A.I.R. 1926 All. 714.

—S. 59—Termination of license.

———Where the licensor transfers the property to another, the license ceases to exist by operation of law. (*Mears, C.J. and Gokul Prasad, J.*). BHOJ RAJ *v.* HARDEVA.

77 I.C. 140=44 All. 726= 20 A.L.J. 608=A.I.R. 1923 All. 140.

———*Licensor's death.*

When the grantor of a license dies, his heir can treat the licensee as a trespasser without giving notice of revocation of the license with respect to immovable property. (*Kotwal, A.J.C.*). KARSELAL *v.* BADRI PRASAD.

68 I.C. 107=18 N.L.R. 76= A. I. R. 1922 Nag. 162.

—S. 59—Transferee, rights of.

———Under S. 59, the transferee is not as such bound by the term of the license granted by the vendor. The wish expressed by the vendor in the deed of sale in favour of the licensee that license be respected by the vendee has no legal effect and in spite of it, according to the terms of S. 59, it is open to the transferee to withdraw the license. (*Wazir Hasan, Ag. C. J. and Raza, J.*). BHAJJA *v.* CHUTTAN.

7 O. W. N. 468= A. I. R. 1930 Oudh 203.

———S. 59 cannot be interpreted so as to give the transferee a right of revocation of a license which would not be exercisable by the transferor himself: 37 All. 91, *Foll.* (*King, J.*). THAKURPRASAD *v.* J. THOMKINSON.

102 I. C. 26= 1 L. C. 44= A. I. R. 1927 Oudh 206.

—S. 60—Applicability.

———Section 60 (b) applies equally to permanent works executed on the land of the licensor, or on the land of the licensee, provided the licensee has acted upon the license in executing the work. *Ramsden* v. *Dyson*, (1865) 1 H. L. 129; *Plimmer* v. *Wellington*, (1884) 9 A. C. 699; *Winter* v. *Brockwell*, (1807) 8 East 308; *Liggin* v. *Inge*, (1831) 7 Bing. 682 and 29 Bom. 580, *Ref.* and *Expl.* (*Marten, C.J. and Murphy, J.*). GUJRAT GINNING CO. *v.* MOTILAL SPINNING CO.

31 Bom. L. R. 1331= A. I. R. 1930 Bom. 70.

EASEMENTS ACT (1882), S. 60—Building license.

—S. 60—Building license.

———Where a license is granted to build houses on the site and the licensees have erected a work of a permanent nature on the site the license cannot in view of the provisions of S. 60 be revoked. (*Iqbal Ahmad, J.*). SHAHJAHAN BEGAM *v.* MUNNA.
100 I. C. 479=A. I. R. 1927 All. 342.

———Where land had been given to a licensee free of rent for building a house thereon and the licensee built a permanent structure the license became irrevocable and the licensor could not afterwards revoke the license, nor could he claim damages for use and occupation. (*Raza, J.*). RAM DAYAL *v.* NISAR HUSAIN KHAN.
91 I. C. 1031=13 O.L.J. 170.

—S. 60—Denial of title.

———The denial of title does not operate to a forfeiture of a license. 39 All. 621, *Foll.* (*Mukerji, J.*). TRIPATHI ANAND NATH TEWARI *v.* JOKHU KURMI. **113 I.C. 757 (All.).**

———A licensee in possession dees not, like the tenant, by denying title of the grantor of the license forfeit the license and become liable to ejectment. (1901) A.W.N. 157 and 39 All. 621, *Foll.* (*Stuart, J.*). MT. DURGA *v.* BABU RAM.
75 I.C. 596=A.I.R. 1923 All. 403.

—S. 60—Interpretation.

———*Fawcett, J.*—Section 60 (a) does not necessarily use the words "transfer of property" in the limited sense of a transfer as defined in the Transfer of Property Act. (*Shah and Fawcett, JJ.*). JANARDAN MAHADEO *v.* RAMACHANDRA MAHADEO. **101 I.C. 393=29 Bom.L.R. 312=A.I.R. 1927 Bom. 240.**

—S. 60—Revocability.

———Two companies owning adjoining lands managed by common agents erection of building and tank on premises of one for use of another—Rule in *Ramsden* v. *Dyson*, (1865) 1 H. L. 129 *held* to be applicable. License presumed to be granted and irrevocable under S. 60 (*b*). (*Case-law referred and discussed*). *Marten, C.J. and Murphy, J.*). GUJERAT GINNING & MANUFACTURING CO. LTD. *v.* MOTILAL HIRABHAI SPINNING & WEAVING CO., LTD. **123 I.C. 481=53 Bom. 792=31 Bom. L.R. 1310=A.I.R. 1930 Bom. 84.**

—S. 60—Revocation on compensation.

———The Indian Easements Act is a complete and self-contained Code, and in view of the provisions of Cl. (*b*) of S. 60, where a license has become irrevocable, the Courts cannot allow a licensor to revoke the license, on condition of his making compensation to the licensee for loss incurred by the revocation of the license. (*Iqbal Ahmad, J.*). BHUKHAN SING *v.* JAGARDEO KOERI.
98 I.C. 814=A.I.R. 1927 All. 197.

—S. 60—Right to revoke.

———*Partial execution.*

A license cannot be revoked even when part only of a work of a permanent character has been executed by the licensee: A. I. R. 1924 Nag. 254, *Rel. on.* (*Macnair, A. J. C.*). GUMAN SINGH *v.* PYARELAL. **117 I.C. 224=A.I.R. 1929 Nag. 141.**

———*Test—Limit.*

Where a licensee constructs permanent building on licensor's site under implied license, the license is irrevocable as to building and licensee cannot be ejected. The irrevocability is restricted to the portion covered by building. 8 All. 69, *Rel. on.* (*Subhedar, A.J.C.*). MT. MANBI *v.* KODU.
118 I.C. 676=A.I.R. 1929 Nag. 269.

EASEMENTS ACT (1882), S. 60—Right to revoke.

———A license to use the land of another unless coupled with a transfer of the property is revocable subject to the right of the licensee for damages if revoked contrary to the terms of any express or implied contract. A mere license is revocable at the will of the licensor unless it is coupled with a grant and in that case it will become a lease and would require compulsory registration. (*Shadi Lal, C. J. and Tapp, J.*), POHU RAM *v.* MT. TABO.
120 I. C. 673=30 P.L.R. 746.

———*Conditions.*

A mere license is revocable at the will of the licensor unless it is coupled with a grant, in which case it becomes a lease and requires compulsory registration. 16 Cal. 640, *Rel. on.* (*Shadi Lal, C. J. and Tapp, J.*). POHU RAM *v.* MT. TABO.
120 I.C. 673=30 P.L.R. 746.

———*Test.*

Where on partition one of the brothers is allowed to take water from the well of the other 'out of brotherly affection' and 'not as a matter of right'—it amounts to a license coupled with a transfer of property and irrevocable under S. 60(*a*) of the Easements Act. (*Shah and Fawcett, JJ.*). JANARDAN MAHADEO *v.* RAMCHANDRA MAHADEO.
101 I.C. 393=29 Bom.L.R. 312=A.I.R. 1927 Bom. 240.

———*Rule as to.*

A mere license is irrevocable when the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in so doing. In cases falling within this rule, if the licensor desires to be able to revoke he must expressly reserve the right when he grants the license, or limit it as to duration. (*Kinkkede, Offg. A. J. C.*). DAYARAM *v.* DEORAO. **94 I. C. 923=22 N. L. R. 162=A.I.R. 1926 Nag. 376.**

———A license cannot be revoked, if the licensee acting upon the license has executed a work of a permanent character unless the license is shown to have been granted under restrictive conditions of the nature set up, no revocation can be allowed to the prejudice of the licensee by whom a permanent structure has been built. (*Kanhaiya Lal, J.*). AMJAD KHAN *v.* SHAFIUDDIN KHAN.
78 I.C. 215=A.I.R. 1925 All. 203.

———Construction of a house by licensee acting on license makes license irrevocable. (*Walsh, Ag. C.J. and Ryves, J.*). KALLU SHAH *v.* RAHEEM BAKSH. **84 I.C. 284=5 L.R.A. Civ. 532=A.I.R. 1924 All. 825.**

———Transferees of one of the zemindars cannot sue occupiers of certain plots as licensees for storing manure, etc., where the occupiers on the strength of the license had been in possession for 12 years and had in pursuance of the licence erected constructions of a permanent character. (*Stuart, J.*). NATHU *v.* TULSI RAM. **78 I.C. 316=5 L.R.A. Rev. 98=A.I.R. 1924 All. 434.**

———Transfer by licensor of ownership does not revoke license. (*Prideaux, A.J.C.*). VITHALDAS MARWARI *v.* GOMA. **79 I.C. 173=20 N.L.R. 60=A.I.R. 1924 Nag. 254.**

———*Implied license to build.*

Acquiescence may be express or implied. In a large town (where ordinarily the *malguzar* permits persons who are not his tenants, to build on his *abadi*) the defendant started building a substantial house on a vacant site in the *abadi.* Soon after he started building, the *malguzar's* agent told the defendant not to build on that site. Defendant replied that he would go and see the malguzar and

EASEMENTS ACT (1882), S. 60—Work of permanent character.

settle the matter with him. The agent reported the matter to the malguzar who took no further action until he filed his suit seven years later for recovery of the land.

Held, that no inference was possible from the facts but that the plaintiff intentionally induced the defendant to believe that he might build on the site without any interference by the plaintiff or any fear of the plaintiff ever attempting to evict him and on the same terms as all the other holders of sites on the *abadi* and that the suit must be dismissed under S. 60 of the Easements Act. (*Hallifax, A.J.C.*). RAMRATAN *v.* SHIODATTARAI.
73 I.C. 137=A.I.R. 1921 Nag. 167.

—S. 60—Work of permanent character.

———*Test.*

Whether the building is a work of a permanent character depends on the nature of the building and not on the intention of the persons occupying it. At the same time the fact that it has been occupied as a residential house for considerable period is a fact which is to be taken into consideration in deciding whether it is a structure of a permanent character or not. (*Daniels, J.*). FAQIRULLAH *v.* WALIKHAN. **97 I. C. 337= A. I. R. 1926 All. 714.**

———*Kuchcha house.*

A kuchcha thatchcd house may be a work of a permanent character, where it has been used as a residence for a good many years and there is no evidence to indicate that it is only a temporary structure. (*Neave, J.*). GAURI SHANKAR *v.* MITHAI.
84 I. C. 264=5 L. R. A. Civ. 400= A.I.R. 1924 All. 750.

———*Mud building.*

A building which is meant for permanent residence, though built with mud and costing only a few rupees, is a building of a permanent character: 28 All. 741, *Foll.* (*Mukerji, J.*). TRIPATHI ANAND NATH TEWARI *v.* JOKHU KURMI. **113 I.C. 757.**

———*Railway sidings.*

A and *B* companies were managed by common agents. The agents acting on behalf of the companies applied to railway company to provide a private railway siding for the use of the companies which the railway company did. The rails leading to the *A* company's land passed through the *B* company's land. The expenses incurred in laying out rails and siding were borne by each company contributing its quota. Later on, the management passed on to separate agents. Disputes having arisen between the two companies, *B* company prevented the other company from using the railway line that passed through its land. *A* company sued to obtain a perpetual injunction restraining *B* company from obstructing the use of the railway line,

Held, that as the *A* company executed work of a permanent character and incurred expenses in the execution, the license could not be revoked under S. 60 (*b*). (*Marten, C. J. and Murphy, J.*). GUJERAT GINNING CO. *v.* MOTILAL SPINNING CO.
31 Bom.L.R. 1331=A.I.R. 1930 Bom. 70.

———*Kuchcha house.*

A Kuchcha thatched house may be a work of a permanent character and the fact that the thatch is renewed from time to time does not make it a work of a temporary character. (*Kanhaiya Lal, J.*). AMJAD KHAN *v.* SHAFIUDDIN KHAN.
78 I.C. 215=A.I.R. 1925 All. 203.

EASTERN BENGAL AND ASSAM DISORDERLY HOUSES ACT (1907), S. 2—Scope of power.

———*Kuchcha house.*

Even the construction of a kuchcha hut by the licensee may be treated as a work of permanent character: 28 All. 741; 29 All. 133; S.A. No. 500 of 1917; A.I.R. 1924 Nag. 254 and A.I.R. 1925 All. 203, *Ref.* (*Khinkhede, Offg. A. J. C.*). DAYARAM *v.* DEORAO. **94 I. C. 923=22 N.L.R. 162= A. I. R. 1926 Nag. 376.**

———*Kuchcha house.*

Buildings of mud walls and thatched roof built for the purpose of school and which were in existence and kept under regular repair for about 30 years were held to be a work of a permanent character. 28 All. 741, *Foll.* (*King, J.*). THAKURPRASAD *v.* J. THOMKINSON. **102 I.C. 26= 1 L.C. 44=A.I.R. 1927 Oudh 206.**

—S. 61—Implied revocation.

———*Remedy.*

An appropriation of the land licensed to any use inconsistent with the enjoyment of the license, works a revocation and the licensee may maintain an action for damages against the licensor for breach of contract in unlawfully revoking it.

Where the license was for valuable consideration, was accompanied by the grant of a profit *a prendre* and was consequently a licence coupled with an interest, and where the grant entitled the licensee to the exclusive right to catch elephants within the defined tracts and for the specified period but owing to accidental and departmental fires of the Forest Department the licensee was hindered in his operation,

Held, it does not follow as a matter of course that the licensee would be entitled to exclusive occupation of the entire territory during such time. It is impossible to award the licensee damages when the licensee fails as well from uncertainty of cause of damages as from uncertainty of extent of damages. (*Mookerjee and Chotzner, JJ.*). FREDERICK THOMAS KINGSLEY *v.* THE SECRETARY OF STATE.
72 I.C. 270=36 C. L.J. 271= A.I.R. 1923 Cal. 49.

—S. 62—Revocation—License—Consideration—Right to damages.

———Where the licence was for valuable consideration, was accompanied by the grant of a profit *a prendre* and was consequently a licence coupled with an interest and where the grant entitled the licensee to the exclusive right to catch elephants within the defined tracts and for the specified period but owing to accidental and departmental fires of the Forest Department the licensee was hindered in his operation,

Held, it does not follow as a matter of course that the licensee would be entitled to exclusive occupation of the entire territory during such time. It is impossible to award the licensee damages when the licensee fails as well from uncertainty of cause of damages when the licensee damages when the licensee fails as well from uncertainty of damages as from uncertainty of extent of damages. (*Mookerjee and Chotzner, JJ.*). FREDERICK THOMAS KINGSLEY *v.* THE SECRETARY OF STATE. **72 I.C. 270= 36 C.L.J. 271=A.I. R. 1923 Cal. 49.**

EASTERN BENGAL AND ASSAM DISORDERLY HOUSES ACT (2 E. B. & A. of 1907).

—S. 2—Scope of power.

———Under the Eastern Bengal and Assam Disorderly Houses Act the owner or occupier of disorderly houses may be ordered to discontinue the use of

EASTERN BENGAL AND ASSAM DISORDERLY HOUSES ACT (1907)—S. 3—Procedure.

a house as a disorderly house but not to vacate it. An order imposing daily fine on prostitutes for non-compliance with an order to vacate their houses is therefore not competent under Ss. 2 and 3 and is *ultra vires*. (*Cuming, J.*). KUSAM BAISTAMI *v.* EMPEROR. **A.I.R. 1930 Cal. 638.**

—S. 3—Procedure.

———Proceedings under S. 3 of the Act, (2 E. B. and A. of 1907) are not governed by Cr. P. Code. It is not necessary for the Magistrate to act only on legal evidence and he need not administer oath. But before passing an order he must satisfy himself that the house is used as described in S. 2, Cls. (a), (b) or (c) and he may do this in any way that does not violate the ordinary rules of fairness and propriety, but before he can pass an order under S. 3 he must not only be satisfied that the houses are used as brothels but he must further find an additional fact to bring it within the provisions of Cls. (a), (b) or (c). When the cases of a large number of houses are jointly considered, though it is not necessary to draw up separate proceedings and hold separate enquiries, yet in deciding the question whether annoyance was caused, the Magistrate should apply his mind to the case of each house separately. (*Newbould and B. B. Ghose, JJ.*). RAMA PADA *v.* BASANTA BAISHNABI.

91 I.C. 881=30 C.W.N. 91=27 Cr.. L. J. 145=A.I.R. 1926 Cal. 307.

EAST INDIA COMPANY.

See (1) GOVT. OF INDIA ACT.
(2) SECRETARY OF STATE.
(3) TORT.

EAVES.

See EASEMENT.

ECCLESIASTICAL LAW.

See CLERGY DISCIPLINE ACT.

EDUCATION, EXPENSES OF.

See HINDU LAW—JOINT FAMILY.

EJECTMENT.

See also (1) LANDLORD AND TENANT.
(2) LIM. ACT, ARTS. 142 & 144.

—Burden of proof—(*See also* EVIDENCE ACT SS. 101 AND 103.)

Damages and rent.
Joinder of parties.
Jus tertii.
Right to eject.
Title and possession.
Miscellaneous.

—Burden of proof.

———*Resumption—Unwillingness or inability to serve to be proved.*

In the absence of a notice to quit the land before the suit for ejectment for not rendering service was commenced,

Resumption could not be ordered unless and until it was clearly shown that the defendant was unwilling or incapable of doing the service required. 22 Cal. 938, *Ref.* (*Fazl Ali and Chatterji, JJ.*). NIRMAL KUMAR *v.* SURJAN DUSADH.

A.I.R. 1929 Pat. 433.

———A person suing in ejectment must establish his title. (*Greaves and B.B. Ghose, JJ.*). NEPALDAS *v.* PROBHAS CHANDRA. **90 I. C. 499=42 C. L. J. 221=30 C. W. N. 357=A.I.R. 1926 Cal. 460.**

———*Proof of title—Plea of tenancy—Onus on defendant.*

EJECTMENT—Burden of proof.

In a suit for declaration of title and possession, where plaintiffs establish their title to the land it is the duty of the defendant who sets up tenancy from one of the co-sharers to establish such a tenancy. If one of the plaintiffs is a purchaser from that co-sharer, defendant should show that the nature of the tenancy was such that it was binding upon the purchaser. Again, in order to make that lease binding against all the co-sharers, it is the duty of the defendant to establish satisfactorily that there was a partition between the co-sharers, before the alleged lease to himself under which his lessor obtained a complete title to deal with the land by way of a lease. If the defendant is successful in establishing a tenancy which would be binding against the plaintiff, the plaintiff would still be entitled to a decree declaring his title to the property and the liability of the defendant to pay rent to the plaintiff. (*Greaves and Chakravarty, JJ.*). ANU BISWAS *v.* GOPAL SHEIKH. **87 I.C. 642=A.I.R. 1926 Cal. 442.**

———Plaintiff must prove not only title but also possession within 12 years. (*Dawson-Miller, C. J. and Foster, J.*). KIRAT SINGH *v.* SHEORATAN SINGH. **96 I. C. 551 (Pat.).**

———*Suit for possession—Proof of title.*

Where plaintiff sued to recover immovable property on the ground that it formed part of the inheritance to which she succeeded,

Held, that as the defendants, though without title were in possession, the plaintiff could only recover that possession by establishing her own title as against them. (*Sir Lawrence Jenkins, J.*). HASHMAT ALI *v.* MT. NASIB-UN-NISSA.

88 I.C. 114=30 C. W. N. 196=26 P.L.R. 192=52 I.A. 172=6 Lah. 117=A.I.R. 1925 P.C. 99.

———In a suit framed in ejectment, the plaintiffs must rely upon the strength of their own title, and cannot succeed unless they prove that the legal title to the premises is vested in them, and that they have been in possession of the premises and have been ousted therefrom within 12 years before the suit was filed. (*Page, J.*). ADMINISTRATOR-GENERAL OF BENGAL *v.* BAL KISSEN MISSER. **84 I.C. 91=51 Cal. 953=A.I.R 1925 Cal. 140.**

———Where a suit is one substantially in ejectment the plaintiff is bound to establish the title on which he claims properties. (*Spencer, Offg. C. J. and Srinivasa Iyengar, J.*). RANGAPPA NAYAKKAR *v.* RANGASWAMI NAYAKKAR. **88 I.C. 249=1925 M.W.N. 232=A. I. R. 1925 Mad. 1005.**

———*Pattadar—Onus to prove title in grantor.*

Merely because Government have issued a Patta to somebody, there is no presumption that Government are entitled to the land of which they purported to make a grant, and it is always for the grantee to make out that the grantor, Government in this case, has any title. Unless the title of the Government at the time the grant was made is made out, the grantee cannot maintain a suit in ejectment against persons who were in possession at the time of the grant. (*Ramesam, J.*). ADINARAYANA *v.* K. VENKATASUBBAYYA.

87 I. C. 46=A. I. R. 1925 Mad. 752=48 M.L.J. 411.

———*Suit by a co-owner—Onus to show unrestricted authority to eject.*

When a lease is granted by one co-owner the other cannot maintain a suit for the ejectment of the lessee from the whole of the premises. In a suit by one co-owner for ejectment of a trespasser

EJECTMENT—Burden of Proof.

from the whole of the premises the burden of proof lies on him to show that he had unrestricted authority to eject him on the date of the suit. The mere fact that at some point of time in the past he had such authority is not sufficient to show that he continued to be clothed with that authority at the date of the suit so as to be entitled by himself to require the defendant to clear out of the entire premises notwithstanding the fact that the other co-owner has manifested his intention to the contrary by granting him a fresh lease of the entire properties. (*Kinkhede, A. J. C.*). VITHAL *v.* SADASHEO. **82 I.C. 1041=A.I.R. 1925 Nag. 175.**

———*Plea of tenancy—Failure—Onus on defendant.*

Where in an action for ejectment the defendant pleads tenancy by contract but fails to prove the same, the onus is upon the defendants to show some title which will either extinguish or diminish the extent of the plaintiff's title. If the defendants fail, then the plaintiff is entitled to a decree. (*Mullick and Bucknill, JJ.*). SIR RAMESHWAR SINGH *v.* RIT LAL SINGH. **86 I.C. 771= 3 Pat. L. R. 50=6 P.L.T. 514= A. I. R. 1925 Pat. 739.**

———The plaintiff in a suit for ejectment must make out both that he had title to the land in suit and that he was in possession within twelve years of the date when the suit was instituted and if he fails to prove his possession then notwithstanding his title, it being admitted that the defendant is in possession at the date of the suit, his suit must fail. (*Dawson Miller, C. J. and Mullick, J.*). RAMNATH SARANJI *v.* GOBADHAN PANDEY. **81 I.C. 669=3 Pat. 258=6 P.L.T. 185= A. I. R. 1924 Pat. 629.**

———*Plea of adverse possession—Onus on defendant.*

In an action for ejectment if the defendants plead adverse possession the onus is upon them and they must show what was the date from which such possession began to run. In such a case the plaintiff's suit cannot be dismissed till the precise title acquired by adverse possession has been determined. (*Mullick and Bucknill, JJ.*). SRI RAMESHWAR SINGH *v.* RIT LAL SINGH. **86 I.C. 771= 3 Pat. L.R. 50=6 P.L.T. 514= A. I. R. 1925 Pat. 739.**

———*Plaintiff's failure in prior proceedings.*

Where plaintiff failed in Criminal Procedure Code, S. 145, proceedings to prove possession and also in survey proceedings the *onus* thus lay heavily on the plaintiffs to show that the defendant was not in possession of the properties by virtue of the title he alleged in the previous proceedings. (*Mr. Ameer Ali*). INDRAJIT *v.* AMAR SINGH. **74 I.C. 747=21 A. L.J. 554= 4 P. L.T. 447=1 P.L.R. 345=3 P.L.R.1924= 2 Pat. 676=50 I.A 183=25 Bom. L.R. 1259= 28 C.W.N. 277=33 M.L.T. 233=18 M.L.W. 728= 4 L.R.P.C. 123=5 L.R.P.C. 8=39 C.L.J. 318= A.I.R. 1923 P.C. 128=45 M. L. J. 578.**

———*Suit on title.*

It is for the plaintiff in a suit to establish his title to the land and if he has failed to do so, the failure of defendant to establish his title cannot affect the position. (*Greaves and Panton, JJ.*). M. ABDUL AZIZ *v.* AMIR ALI. **67 I.C. 149= A.I.R. 1923 Cal. 166.**

———In a suit for ejectment it is incumbent upon the plaintiffs not only to prove their title but also that they have been in possession within twelve years of the date of the suit. (*Das and Kulwant Sahay, JJ.*) CHATTRAPAT PRATAB BAHADUR SAHAI *v.* C. G. LEES. **72 I.C. 649=1 P.L.R. 322= 4 P.L.T. 487=A.I.R. 1923 Pat. 558.**

EJECTMENT—Damages and rent.

———A plaintiff can succeed only on the strength of his own title and not on the weakness of a defendant's title. (*Abdul Raoof and Harrison, JJ.*). DURGA DEVI *v.* SHIB DEVI. **4 L. L.J. 173= A.I.R. 1922 Lah. 83.**

———Plaintiffs in a suit for ejectment are under an obligation to establish their title to the relief which they seek in the suit, *i.e.*, they must establish their right that they are entitled to turn the defendants out of the actual possession of the plots in question. (*Wazir Hasan, A.J.C.*). LIAQAT HUSAIN *v.* NAROTAM DAS. **65 I.C. 780= 8 O.L.J. 516=A.I.R. 1921 Oudh 254.**

Per *Full Bench* (*Jwala Prasad, J., dissenting*).—The plaintiff in a suit for ejectment must prove not only his antecedent title but also his possession within 12 years of the suit. In the absence of any credible evidence on either side as to possession the plaintiff must fall and the presumption arising from title cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given, and the plaintiff cannot succeed merely by proving a title and possession at some antecedent period. S. A. 728 of 1917 and 4 P. L. J. 463, *Overruled.* (*Dawson Miller, C.J., Jwala Prasad, Das, Adami and Bucknill, JJ.*). SHIVA PRASAD SINGH *v.* HIRA SINGH. **62 I.C. 1= 2 P.L.T. 487=1921 P.H.C.C. 305=6 P.L.J. 478= A.I.R. 1921 Pat. 237 (F. B.).**

———*Dispossessor's onus.*

Where a person in possession of a property is dispossessed by another the onus is on the latter to show that he had better title than the former. 2 P.L.J. 61, *Ref.* (*Jwala Prasad, A.C.J. and Das, J.*). AWADH BIHARI DIKSHIT *v.* JITU SAHU. **64 I.C. 243 (Pat.).**

—Damages and rent.

———*Decree for mesne profits—Conditions.*

A decree for mesne profits can only be made against the trespasser in a suit for ejectment if ejectment is decreed. If on an appeal against the decree for ejectment that decree is set aside, there cannot possibly be a decree for mesne profits. If, during the pendency of the appeal against the decree for ejectment, a decree for mesne profits has been made, that decree should be considered as a decree dependent upon the original decree for ejectment, and if that decree is set aside the subsequent decree awarding mesne profits on the basis that the plaintiff has obtained a decree for ejectment must fall; and the same should be the result if the two decrees are passed simultaneously. (*B. B. Ghose and Bose, JJ.*). BHOLA NATH MAJUMDAR *v.* NAYEB KHAN. **114 I.C. 154= 48 C.L.J. 387=A.I.R. 1929 Cal. 91.**

———*Alternative plea for use and occupation.*

In a suit for ejectment where plaintiff fails to prove the contract of tenancy, he is not precluded from urging his alternative claim for damages for use and occupation. (*B.B. Ghose and Graham, JJ.*). SAMIULLA *v.* NIL MAMUD. **97 I. C. 564= A. I. R. 1927 Cal. 13.**

———*Building by trespasser—No damages.*

The principle of English Law *quicquid plantatur solo solo cedit* applies to India, but does not apply either to lessees or to trespassers.

Where therefore a trespasser erects a building on another's land without a *bona fide* belief as to the land belonging to him, the trespasser, on being evicted by the owner, cannot receive compensation

EJECTMENT—Damages and rent.

for the building, but is entitled only to remove it: 2 Pat.L.J. 600; 21 All. 496 and 20 Bom. 298, *Foll.* (*Harrison and Dalip Singh, JJ.*). CHANAN DIN *v.* MT. JABAN. **97 I. C. 394= A. I. R. 1926 Lah. 694.**

———*Pending ejectment suit—Right to rent.*

It is established as a general principle that the right to demand the rent which falls due during the pendency of a suit for ejectment is not in suspense during the pendency of the litigation. The cases in 12 M.I.A. 244 (P.C.) and 30 Cal. 1033 (P.C.) are exceptions to the general rule. (*Newbould and Panton, JJ.*). NAGENDRA NATH *v.* SADHU RAM. **48 Cal. 65=25 C.W.N. 954= A. I. R. 1921 Cal. 525.**

———*Distinction.*

Where the defendant has been in possession of a garden in assertion of a hostile title a suit by the alleged owner of the garden for damages for appropriation of fruits cannot be maintained. But the plaintiff, if he is in time, may bring a suit either for recovery of possession or recovery of rent, as the case may be. (*N.R. Chatterjea and Pearson, JJ.*). HARIHAR DAS *v.* KRISHNADHAN GHOSH. **62 I. C. 635 (Cal).**

—Joinder of parties.

———*Co-trespassers.*

Co-trespassers are necessary parties. A decree against defendants in the absence of other necessary defendants illegal. A.I.R. 1928 Cal. 138, *Foll.* (*Mukerji and Mullick, JJ.*). MOKSHUD MONDAL *v.* KHEDU MONDAL. **33 C.W.N. 742= A. I. R. 1929 Cal. 669.**

———*Principle regarding.*

The principles governing the rule of joinder of defendants in an action for ejectment are mainly two: first, if any of the persons in possession is left out, he remains in possession as not being affected by the decree, and the decree as one in ejectment and for possession becomes infructuous because the persons ejected as being bound by the decree can always come in under the person who remains in possession; and second, there is a certain amount of risk involved in not making the persons in actual possession defendants, for, in execution of the decree, persons may happen to be turned out who may then bring actions against the plaintiff for wrongful dispossession, not being bound by the decree. *Deo d. Williamson* v. *Roe*, 10 Moore 493; *Deo d. Lord Darlington* v. *Cock*, (1825) 4 B. and C. 259; *Deo d. Turner* v. *Gee*, (1841) 9 Dowl. 612; *Glen* v. *Herring*, (1905) 1 K. B. 152 and *Minet* v. *Johnson*, (1890) 63 L. T. 507, *Expl.* (*Mukerji and Mitter, JJ.*). ARUNADOYA CHAKRABARTY *v.* MAHAMMAD ALI. **106 I.C. 261= 46 C.L.J. 433= A.I.R. 1928 Cal. 138.**

———*Persons in possession.*

The rule that all persons in actual possession should be joined as parties has been firmly established and the principle that a suit will not be entertained where no effective decree can be passed in it is well recognised. 31 Bom. 250; 62 I. C. 714; A.I.R. 1923 Cal. 289; A. I. R. 1927 Cal. 238 and A. I. R. 1921 Cal. 622, *Rel. on.* (*Mukerji and Mitter, JJ.*). ARUNADOYA CHAKRABARTI *v.* MAHAMMAD ALI. **106 I.C. 261=46 C.L.J. 433= A.I.R. 1928 Cal. 138.**

———*Omission not fatal.*

Mere non-joinder of a party in an ejectment suit is not fatal to the trial of the case. (*Cuming and Chakravarti, JJ.*). BAIKUNTHA NATH *v.* SHAIKH HARI. **92 I.C. 899=A.I.R. 1926 Cal. 592.**

EJECTMENT—Right to eject.

———Person from whom party in actual possession claims to hold is not a necessary party to a suit in ejectment. 21 Bom. 229, *Foll.* (*Das and Adami, JJ.*). BHAGWATI KOER *v.* JAGDOM SAHAY. **62 I.C. 933=2 P.L.T. 471=6 P. L. J. 604= A.I.R. 1921 Pat. 260.**

—Jus tertii.

———*Good plea in defence.*

The defendant is entitled in a suit for ejectment to plead the title of a third party and to show that the plaintiff is not entitled to the interest he claims. (*Greaves and B. B. Ghose, JJ.*). GOUR CHANDRA DAS *v.* SUBASHINI DASI. **90 I. C. 523=42 C.L.J. 200=30 C. W. N. 39= A. I. R. 1926 Cal. 240.**

———*Failure to prove.*

Where the plaintiff in an ejectment suit claims by assignment from a certain person and the defendant pleads that the plaintiff's assignor was not entitled to the property but that a third person was preferentially entitled but the defendant fails to prove his pleading, the plaintiff is entitled to decree. (*Mr. Ameer Ali*). MAHABIR PRASAD *v.* JAMUNA SINGH. **92 I. C. 31= 1925 M.W.N. 738=23 M.L.W. 75= A. I. R. 1925 P. C. 234.**

———*When avails.*

A plea of *jus tertii* is no defence, unless the defendant can show that the act complained of was done by the authority of the owner. The plea of *jus tertii* cannot avail the defendant when the alleged true owner is impleaded as a party and admits the plaintiff's title to it. (*Ramesam, J.*). GANGAYYA *v.* SATYANARAYANA. **91 I. C. 503=22 M. L. W. 120= A. I. R. 1925 Mad. 1021.**

———*Onus on defendant.*

Where a defence of *jus tertii* is set up, it is for the defendants to establish that the persons, in whom they allege the right to the plots to exist, have a title superior to that of the plaintiff. (*Lindsay, J. C. and Wazir Hasan, A.J.C.*). SECY. OF STATE *v.* MD. QASIM. **61 I.C. 871= 24 O.C. 77=8 O.L.J. 160=A.I.R. 1921 Oudh 88.**

—Right to eject.

———*Co-sharer.*

Where a person who is entitled to a lesser share in a land, brings a suit for ejecting a trespasser, he cannot get a decree for possession of the whole of the land, but is entitled to recover possession only to the extent of his share, although he can retain possession of the whole of the joint property as against a trespasser. 12 All. 51 (P. C.), *Dist.* and *Doe Hellyer* v. *King*, 6 Ex. 791, *Foll.* (*Mitter, J.*). NARESHCHANDRA *v.* HAYDER SHEIKH. **115 I.C. 180=49 C.L.J. 83=A.I.R. 1929 Cal. 28.**

———*Different titles.*

Patkar, J.—If a landlord brings a suit for possession on a rent-note and fails to recover possession on the ground that the rent-note is not proved, he is entitled to bring a suit for ejectment on his title as owner and on the allegation of a different legal relation between him and the defendants arising out of holding the lands and paying the rent in respect of them to the plaintiffs. 8 Bom. 174 (F. B.), *Foll.* (*Patkar and Baker, JJ.*). BALRAM GULABCHAND MARVADI *v.* JIGAN JAD PATIL. **114 I. C. 269=30 Bom. L.R. 1583.**

———*One of co-owners.*

One of several co-owners can sue trespasser for ejectment without joining the other co-owners as parties to the action. (*Prideaux, A. J. C.*). ALLI SAHEB *v.* YASIN KHAN. **113 I.C. 886 (Nag.).**

EJECTMENT—Right to eject.

———A Criminal complaint against landlord by tenant does not render him liable to ejectment. (*Gokaran Nath Misra, J.*). MD. AQIL *v.* SHEO BAKSH. **91 I. C. 1055=13 O. L. J. 194= A.I.R. 1926 Oudh 265.**

———*Co-sharer.*

One co-sharer can sue a trespasser in ejectment on behalf of himself and his other co-sharers. (*Dalal, J. C.*). HARI HAR BAKHSH SING *v.* MOHAMMAD USMAN KHAN. **90 I. C. 804= A.I.R. 1926 Oudh 144.**

———*Benamidar.*

Per *Phillips and Venkatasubba Rao, JJ.*—(*In the Order of Reference*). A *benamidar* can bring a suit for ejectment although he is not the real owner. The rule applies whether the transaction is supported by consideration or it is only a transfer by the owner to a *benamidar* which was not really intended to effect a transfer. 46 C. 566 (P.C.), *Foll.* (*Coutts-Trotter, C.J., Ramesam and Wallace, JJ.*). GOVINDA NAIDU *v.* CHENGALROYA MUDALI. **83 I.C. 74=35 M.L.T. 29=1924 M.W.N. 733= 47 Mad. 896=A. I. R. 1925 Mad. 22 = 47 M. L. J. 415 (F.B.).**

———*Alteration of premises.*

Where the original possession was permissive subsequent alterations of the premises cannot give rise to cause of action. 18 A.L.J. 781, *Foll.* (*Piggott, J.*). UDAL *v.* CH. GULAB RAL. **75 I.C. 813= A.I.R. 1924 All. 727.**

———A landlord who has a mere right of reversion expectant on the determination of the tenancy and who has not as against his tenant the right to end the tenancy cannot maintain ejectment against a third person merely because that third person has no title in himself. (*Rankin and M. N. Mukherji, JJ.*). ROMESH CHANDRA *v.* DAIBA CHARAN. **78 I.C. 497=28 C.W.N. 602= 39 C.L.J. 356=A.I.R. 1924 Cal. 900.**

———*Evidence—Ejectment—Quantum of proof—Gora lands.*

The nature and quality of the proof required to satisfy the burden cast upon a plaintiff may vary in different classes of cases. In the case of *gora* lands, that is to say, lands not brought under regular cultivation but which are from time to time, once in four or five years, subject to cultivation of certain classes of crops the evidence, which might be adduced by either party of acts of user is not such as one might expect would be forthcoming in cases of lands under regular cultivation and should not therefore be rejected on that account. (*Dawson-Miller, C.J. and Mullick, J.*). RAMNATH SARANJI *v.* GOBADHAN PANDEY. **81 I.C. 669= 3 Pat. 258=6 P.L.T. 185=A.I.R. 1924 Pat. 629.**

———When common land was partitioned according to *Thullas*, the land in suit was allotted to *Thulla Surta* and the other plot to *Thulla Kanoa*. The plaintiffs were in possession (cultivating) of the latter plot though they were the proprietors of *Thulla Surta*, and the defendants were similarly in possession of the land in suit, for the sake of convenience of enjoyment,

Held, the arrangement was only for mutual convenience and the plaintiffs will not be barred thereby from getting possession of the land in suit from defendants. (*Broadway, J.*). MUGHALA *v.* ABHE RAM. **79 I. C. 494=4 P.W.R. 1923= A.I.R. 1923 Lah. 172.**

———*Lessor can sue trespasser.*

It is not open to a defendant who is sued as trespasser for ejectment by landlord and who does not hold under the tenant, to plead that the tenant has not abandoned the holding. (*Batten, J. C.*). DEBURAM *v.* PRAHLAD PRASAD. **69 I. C. 559= A.I.R. 1923 Nag. 79.**

EJECTMENT—Title and Possession.

———Where a plaintiff had not abandoned the land and had no intention of abandoning the land, he has a right to sue in ejectment, persons who had entered into unlawful possession. (*Lentaigne, J.*). (MAUNG) PEIN *v.* (MAUNG) PO MAUNG. **79 I. C. 817=2 Bur. L.J. 15=A.I.R. 1923 Rang. 138.**

—Title and possession.

———*Tenancy—Title—Relevancy.*

In a suit for ejectment of tenant by a landlord question of title can only be gone into for the purpose of determining the main question in the suit about the relationship between the landlord and the tenant. (*Suhrawardy and Jack, JJ.*). GOVIND KUMAR SEN *v.* MOHINI MOHAN SEN. **33 C.W.N 769=57 Cal. 349=A.I.R. 1930 Cal. 42.**

———*Relative value.*

Possession is *prima facie* proof of title; and it is well established that previous possession is a good foundation for a suit in ejectment, although the plaintiff who instituted the suit may not be able to establish any title in himself, provided that the defendant does not establish a better title to the disputed property: 6 Bom. 215, *Foll.*; 25 Bom. 287; 12 W.R. 164; A.I.R. 1927 Pat. 1, *Ref.*; 20 C.W.N. 773, *Not foll.* (*Das and Ross, JJ.*). RANJIT SINGH *v.* JHORI SINGH. **119 I.C. 906= 8 Pat. 351=11 P.L.T. 34=A.I.R. 1929 Pat. 601.**

———*English law applies to India.*

The principle of the English Law to the effect that possession is a good title against all but the true owner and entitles the possessor to maintain an action for ejectment against any other person than such owner who dispossesses him has been adopted in India. (*Shadi Lal, C.J. and Coldstream, J.*). LABH SINGH *v.* AHMAD SHAH. **97 I.C. 369= A.I.R. 1927 Lah. 11.**

———*Tenancy and adverse possession—Both are open.*

In a suit for possession of land a mere assertion of tenancy does not deprive the tenant from pleading limitation. It is open to the tenant in the first place to plead that the lands were comprised in his tenancy and in the second place to assert that if the tenancy was not established as he had held possession for more than 12 years the right of the plaintiffs to recover possession was extinguished by the law of limitation: 8 C.L.J. 557 and 21 W.R. 70, *Rel. on.* (*Suhrawardy and Duval, JJ.*). CHHAIKUDDIN *v.* RAM NARAYAN. **90 I.C. 617=. A.I.R. 1926 Cal. 364.**

———Although the plaintiff in an ejectment suit has failed to establish a case of letting, he is entitled to a decree on the basis of the title unless defendant can show a better title. 25 All. 498 and 25 All. 256, *Ref.* (*Aston, A.J.C.*). MULIBAI *v.* VASSIBAI. **97 I.C. 248=A.I.R. 1926 Sind 98.**

———A person ousted from possession by another having absolutely no title is entitled to eject the latter however defective the plaintiff's title may be. (*Hallifax, A.J.C.*). MAROTI *v.* SITARAM. **78 I. C. 722=A.I.R. 1925 Nag. 32.**

———Mere peaceful possession without title is sufficient for ejecting trespasser who dispossessed plaintiff. (*Dawson Miller, C.J. and Mullick, J.*). AKAL AHIR *v.* BAIJNATH DAS. **78 I.C. 228= A.I.R. 1924 Pat. 709.**

———*Suit for.*

A plaintiff in a suit for possession against defendant is bound to succeed if he is able to show a better title in himself than the defendants.

EJECTMENT—Miscellaneous.

(*Dawson Miller, C.J. and Mullick, J.*). (SHEIKH) ABDUR RAHMAN *v.* SHEIKH WALI MOHAMAD.
68 I.C. 601=1922 P. H. C.C. 313=2 Pat. 75=4 P. L. T. 267=A.I.R. 1923 Pat. 72.

—Miscellaneous.

———*Suit for possession—Declaration of title unnecessary.*

The institution of a suit for possession is sufficient to show the plaintiff's election to treat the alienation as a nullity and therefore a separate suit is unnecessary and even a separate suit for a declaration is inoperative; this rule applies even if the ejectment is sought in a revenue Court. (34 Cal. 329; 37 All. 254, *Foll.* (*Walsh, A.C.J. and Sulaiman, J.*). MT. RAJROOP KUAR *v.* KANDHYA.
82 I.C. 238=22 A.L.J. 846=47 All. 2=A. I. R. 1924 All. 785.

———*Right to eject.*

The fact that defendants in ejectment suits are entered in the Record-of-Rights as occupancy tenants is not a sufficient reason for solding that the decrees in these suits were without jurisdiction or were wrong in law. (*Ross, J.*). TUFANI LAL *v.* MT. BIBI UMATUL RASOOL. **5 P.L.T. 535=1924 P. H.C.C. 244=A. I. R. 1924 Pat. 765.**

———*Evidence and probabilities.*

It is only in cases where there is no evidence of the plaintiff as to dispossession, or, where the evidence is valueless, that the plaintiff fails to make out his case by merely proving that he had an antecedent title and possession and it must not be considered that, merely because where evidence was given by both sides and the learned Judge who had to determine the case, had a difficulty upon that evidence or even considered that evidence not altogether satisfactory, he was not entitled to give weight to the probabilities of the case or to any presumptions which might properly arise from the fact that the plaintiff had previously been in possession and had title. Merely because the Judge has some difficulty in arriving at a conclusion upon the evidence or that he does not consider the evidence altogether satisfactory, he is thereby not precluded from looking either at the probabilities of the case as disclosed by other parts of the evidence or from the presumption which might arise from the plaintiff's title. (*Dawson Miller, C. J. and Mullick, J.*). TIAN SAHU *v.* MULCHAND SAHU.
67 I.C. 631=2 Pat. 1=3 Pat. L.T. 460=A.I.R. 1922 Pat. 432.

———*Findings.*

In an ejectment suit, the Court must come to a finding as to the nature of tenancy and also whether the tenancy so found has been put an end to, on the date of suit. (*Sadasiva Aiyar and Napier, JJ.*). ITTINAN *v.* GOVINDAN NAMBUDRI. **62 I.C. 390=13 M. L. W. 397.**

EJUSDEM GENERIS.

See INTERPRETATION OF STATUTES.

ELECTION.

See also (1) SUCCESSION ACT, Ss. 167—177.
(2) T. P. ACT, S. 35.
(3) WILL.

—Breach of rules.

———The mere breach of a rule, however, whether mandatory or directory will not invalidate an election unless the result of the election has been materially affected by such breach. (*Wallace, J.*). AHMAD THAMBI *v.* BASAVA.
72 I. C. 902=16 M. L. W. 898=1922 M. W. N. 813=46 Mad. 123=A.I.R. 1923 Mad. 254=44 M.L.J. 69.

ELECTION—Nomination Papers.

—Canvassing.

———*Is not a right.*

A right to canvass for or against a candidate cannot be regarded as a special right of a voter and much less as part of the franchise of a voter. If indeed it be a right, it is a right which a voter enjoys perhaps with thousands of others who are non-voters and it is impossible to recognize or give effect to any such right in law. (*Srinivasa Iyengar, J.*). EKAMBARA NAICKER *v.* COMMR. OF MADRAS CORPORATION. **99 I. C. 18=1926 M.W.N. 842=A. I.R. 1927 Mad. 22.**

—Change of place and time.

———Mere change of place and time of meeting where an election is to take place does not vitiate the election when no voter is misled or prevented in any way from voting. (*Cuming and Chakravarti, JJ.*). DWARKANATH DUTTA *v.* CHANDRA MOHAN ROY. **91 I.C. 642=A.I. R. 1926 Cal. 665.**

—Duty of Polling officer.

———All that the Polling Officer has to see when the voter presents himself to him is whether the name of the voter is on the roll. He need not wait to the end of the day in respect of every vote in order to see if any one else of the same name appears and claims that he is the voter on the Roll. (*Wallace, J.*). MAMUNDI KONAR *v.* SHAMSHUDDIN SAHIB. **90 I.C. 771=22 M. L. W. 507=A.I.R. 1925 Mad. 1207=49 M. L. J. 381.**

—Electoral roll.

———*Old roll continuing till new roll takes effect.*

The effect of S. 51 (4) of the Madras Local Boards Act, 1920, is that an electoral roll once prepared continues in time till a fresh roll comes into effect. Elections held under a six years old roll upheld. (*Ramesam, J.*). VENKATARAMA AYYAR *v.* KUPPUSWAMI AYYANGAR. **1930 M. W. N. 676.**

—Fresh election.

———Where the election to one of the seats in a constituency is set aside, it is desirable that the Court should set aside the election for the whole constituency and order a fresh election. (*Suhrawardy and Costello, JJ.*). RATHIS CHANDRA MUNSHI *v.* AMULYA CHARAN GHATAK. **34 C.W.N. 741.**

—Injunction.

———*When to be granted.*

It is impossible to lay down an exhaustive rule but generally speaking injunctions should be confined to preserving the status *quo ante*, to preventing irremediable damage or loss to the property in the suit, or to averting substantial injury. No such conditions arise where the Court is moved not to re-instate the unseated Councillor, but to unseat the Councillor declared elected in his stead; and thus create a vacancy in the Municipal Council pending a civil litigation in respect of that matter; in such case there is no ground for interference. (*Jackson, J.*). GOPALA KRISHNA KONAR *v.* VILANGA KONAR. **90 I.C. 819=A.I.R. 1926 Mad. 132.**

—Nomination papers.

———*A voter can sign more than one nomination paper in favour of the same candidate.*

In respect of a single vacancy to represent a constituency on a Taluk Board, there were three candidates for election, the plaintiff and defendant 2 being two of them. After defendant 2's nomination paper was filed, three nomination papers proposing the plaintiff were filed. Out of these one was rejected as the proposer had also subscribed as seconder the earlier nomination paper of defendant 2. The second was rejected because the seconder had as proposer subscribed the earlier nomination

ELECTION—Nomination Papers.

paper of defendant 2. The third was also rejected on the ground that the same voter, who had subscribed as proposer plaintiff's second nomination paper had also subscribed as proposer the third nomination paper, the President, being of opinion that the moment the voter subscribed paper No. 2, his right became completely exhausted and he had no further right to sign his name on any subsequent nomination paper. Plaintiff sued for a declaration that he was validly nominated and for an injunction, restraining the President from holding the election.

Held, that where the rules enact that no voter shall be at liberty to nominate more candidates than there are vacancies, what is sought to be prevented is that no voter shall nominate a larger number of candidates than there are vacancies and not that a voter shall be forbidden from subscribing more than one nomination paper in favour of the same candidate. There was but one vacancy and the voter put forward but one candidate. (*Venkatasubba Rao, J.*). THUBATI KOTAYYA *v.* TALUK BOARD, NARASARAOPET. **118 I.C. 289=30 M.L.W. 345= A.I.R. 1929 Mad. 607=57 M.L.J. 40.**

———*Rejection grounds.*

Where the rejection of the nomination papers was on the ground that it did not give the number of the ward for which the candidates decided to stand; and in the other case on the ground that the thumb mark of the seconder of the candidate had not been attested,

Held, the rejection of the nomination papers was not in law justified. (*Schwabe, C.J. and Wallace, J.*). SARVOTHAMA RAO *v.* CHAIRMAN, M.C., SAIDAPET. **73 I.C. 619=47 Mad. 585=17 M.L.W. 431= 32 M.L.T. 178=1923 M.W.N. 266= A.I.R. 1923 Mad. 475=45 M.L.J. 23.**

—Objection petition.

———*Amendment.*

An application for an amendment of the petition filed after the expiry of the days allowed for an objection petition may, in the discretion of the Judge, be allowed. (*Ramesam, J.*). KANDASAMI CHETTIAR *v.* FOULKES. **92 I.C. 100= 24 M.L.W. 213=A. I. R. 1926 Mad. 396.**

—Powers of Court.

———*Limit.*

It is outside the province of an election Court to allow any candidate to examine the voters to show how the voters voted. The Court is only entitled to consider the correct reception and the correct refusal of the vote. (*Devadoss, J.*). VAIDYANATHA *v.* MURUGIAHAN. **115 I.C. 59= 1928 M.W.N. 549=A. I. R. 1928 Mad. 1077.**

———The Court has jurisdiction to enquire into election matters and if necessary declare the election void as the sanctity of a nomination paper which has been accepted by the Chairman can be questioned after the election. (*Odgers, J.*). DORASWAMI NADAR *v.* JOSEPH L. MOTHER. **92 I. C. 119=1926 M.W.N. 572=24 M.L.W. 208= A.I.R. 1926 Mad. 319.**

—Recount.

———*When to be ordered.*

Where a miscount is alleged by the petitioner and his application is supported by a verified petition, and the Court is satisfied that there is a reasonable ground for the petitioner's belief that there has been a miscount, the Court has jurisdiction to grant a recount. *The Stepney Case*, 4 O'M & H. 34 and (1927) M.W.N. 842 (F. B.), *Ref.* (*Curgenven, J.*). M. LAKSHUMANAYYA *v.* S. RAJAM AYYAR. **30 M.L.W. 949=A.I.R. 1930 Mad. 195= 58 M.L.J. 118.**

ELECTION—Second election.

—Returning officer.

———*Decision is a judicial one.*

The function of the Returning Officer in deciding a question as to the eligibility of a candidate for election is in the nature of judicial function and his decision is in the nature of a judicial decision. (*Sanderson, C. J. and Richardson, J.*). MANINDRA CHANDRA NANDI *v.* PROVAS CHANDRA MITTER. **79 I. C. 1042=51 Cal. 279=39 C.L.J. 58= A.I.R. 1924 Cal. 761.**

—Revision—Disposal.

———If a civil revision petition should be admitted in respect of election petitions, care should be taken for disposing of it as early as possible. (*Srinivasa Aiyangar, J.*). CHELLASWAMI KONAR *v.* K. SANGAMA. **103 I.C. 821=A.I.R. 1927 Mad. 935.**

—Right to nominate.

———*Part of franchise.*

The right to nominate a candidate is undoubtedly part of the franchise and a denial of that right does constitute a denial of the franchise. (*Srinivasa Iyengar, J.*). EKAMBARA NAICKER *v.* COMMR. OF MADRAS CORPORATION. **99 I.C. 18= 1926 M.W.N. 842=A.I.R. 1927 Mad. 22.**

—Right to Vote.

———*Deprivation—Right to damages.*

If a man entitled to vote or to be a candidate at an election is wrongfully deprived of that right, an action for damages lies against the person so depriving him. 1 Smith's Leading Cases 295, *Foll.* But if the act by which the right is interfered with is an act done in a judicial capacity, no action lies unless the act is done maliciously which in this context really means dishonestly. (*Schwabe, C. J. and Wallace, J.*). SARVOTHAMA RAO *v.* CHAIRMAN, M. C., SAIDAPET. **73 I.C. 619=47 Mad. 585= 17 M.L.W. 431=32 M.L.T. 178=1923 M.W.N. 266= A.I.R. 1923 Mad. 475=45 M.L.J. 23.**

———*Deprivation of the right to vote—Good ground for damages.*

Where a duly qualified person entitled to be upon the electoral roll or candidates' list of a Municipality or other constituency, is wrongfully omitted therefrom or misdescribed therein, so as to be deprived of his right to vote or so as to have his nomination rejected though the nomination may have been accepted before the actual election, he is entitled to recover damages which may be made punitive where the omission is the result of malicious omission. The liability of the members including the Executive Officer and the Municipal Board itself must be decided according to the ordinary general principle of the law of principal and agent, so that it may be placed upon the right shoulders. (*Walsh and Stuart, JJ.*). MUNICIPAL BOARD, AGRA *v.* ASHARFI LAL. **65 I.C. 984= 44 All. 202=20 A.L.J. 1=A.I.R. 1922 All. 1.**

—Second election.

———Where a candidate, who stands next in rank and who challenges an election, claims the seat and the disqualification under which the successful candidate is ultimately found to labour was not known to all or any of the voters who cast their votes for him, a second election must be ordered and the candidate who stood next in rank cannot be declared elected. *Hobbs* v. *Morey*, (1904) 1 K. B. 74, *Foll.* (*Coutts-Trotter, C. J., Phillips and Kumaraswami Sastri, JJ.*). S. GOPALA AYYANGAR *v.* M. K. MAHOMED IBRAHIM ROWTHER. **90 I. C. 759=1925 M. W. N. 824=48 Mad. 509= 22 M. L. W. 320=1925 M. W. N. 783= A. I. R. 1925 Mad. 1119=49 M. L. J. 606 (F.B.).**

ELECTION—Secrecy of ballot.

—Secrecy of ballot.

———In an election two members by previous arrangement with a candidate used blue pencils to assure him that they had voted for him and election was sought to be cancelled on the ground that the secrecy of the ballot was violated,

Held: that unless it could be proved that the use of blue pencils indicated the persons who used them, the election would not be rendered invalid: 10 C. P. 733; A. I. R. 1925 Mad. 614 and A. I. R. 1924 Mad. 766, *Foll.* (*Pandalai, J.*). RAJABHADUR MUDALIAR *v.* VISWANATHA REDDIAR.

120 I. C. 851=30 M. L. W. 536= A. I. R. 1930 Mad. 97=57 M. L. J. 481.

—Validity of vote.

———A voter who writes the name of the candidate against the space left for the cross-mark commits a breach of the election rules. (*Devadoss, J.*). VENKATARAMIAH *v.* SUBBU REDDI. **90 I. C. 1055= 22 M. L. W. 24=A.I.R. 1925 Mad. 1173.**

———*Rules regarding.*

The name of the candidate for whom the vote was not cast being struck out on the voting papers does not invalidate the vote. The appearance of a tracing of some letters under the cross-mark made on the voting paper against the name of one of the candidates does not invalidate the vote unless the marks are such that the voter may be identified from them. Where the cross-mark is bisected by the line between the names of the candidates no clear intention of the vote having been cast in favour of one candidate or the other can be gathered; and that vote should be excluded from the votes counted. The presence of writing other than the cross-mark would invalidate the vote only if it should be found that the writing is a mark by which the voter may be afterwards identified. [*Woodward* v. *Sarsons*, 10 C. P. 733, *Rel. on.*] It must be either a mark which on the face of it shows or may show the person who has voted or with regard to which there is evidence on the record which shows that the mark was put in there by some prearrangement or conspiracy by reason whereof by looking at the mark one will be in a position to say that it is the vote of such and such a person. In other cases also if the intention that the voter should be identified could be gathered from the mere appearance of the writing the vote will be rejected. (*Srinivasa Ayyangar, J.*). P. C. XAVIER *v.* E. C. JOSEPH. **87 I. C. 216=21 M. L. W. 654= A. I. R. 1925 Mad. 614=48 M. L. J. 268.**

———The rule that when the number of votes recorded exceeds the maximum that can be given at an election must be void, is perfectly sound, especially when there are no rules to meet such a contingency. (*Sanderson, C.J., John Woodroffe and Mukerji, JJ.*). NAGENDRANATH *v.* J. VAS.

60 I.C. 547=32 C.L.J. 124.

———*Fresh evidence inadmissible.*

Where the voting paper is void on the face of it no evidence should be allowed to vary the recorded voting paper. (*Sanderson, C. J., John Woodroffe and Mukerji, JJ.*). NAGENDRANATH *v.* J. VAS.

60 I.C. 547=32 C.L.J. 124.

—Vote.

———*Significance.*

The giving of a vote does not necessarily involve the exercise of judgment at all, it involves merely the expression or intimation of a wish or choice. That wish or choice may indeed be actuated by judgment; but it may also be actuated by mere whim or caprice. The method by which the wish or choice is arrived at is wholly immaterial, so long as the person upon whom the duty of giving the vote is cast expresses or intimates his wish or choice, however arrived at. (*Blackwell, J.*). J. B. PETIT *v.* MUNICIPAL CORPORATION, BOMBAY.

105 I.C. 759=29 Bom L.R. 1430= A.I.R. 1927 Bom. 622.

ELECTIONS OFFENCES AND INQUIRIES ACT (39 of 1920).

—S. 11—Powers of Court.

———*Election set aside—No order as to costs—Court cannot award.*

In an election petition case an application was made before a Small Cause Court to execute the recommendation as to costs awarded by the Commissioners. At the time of the application the Governor had ordered the election to be set aside but had passed no order on the recommendation as to costs, though subsequently costs were ordered.

Held, that the Small Cause Court was bound to confine itself strictly to the order of the Governor as being the only instrument that justified execution being taken out. As the order of the Governor awarding costs did not exist at the time the application was made, the Court had no option but to dismiss the application. (*Das and Doyle, JJ.*). U. MAUNG GYEE *v.* U. BA SIN.

112 I.C. 449=6 Rang. 470= A.I.R 1928 Rang. 245.

ELECTION RULES—R. I.

—Interpretation.

———*Having jurisdiction.*

Certain acts complained of relating to an election, *i.e.*, that votes given for the petitioner at the election were wrongly rejected by the President of Taluk Board as invalid and that the President refused to recount the votes when requested to do so, took place at a place *P*. A petition attacking the validity of the election was presented to the Subordinate Judge at *C*, who had jurisdiction over the place where the candidates were nominated but not over the place where the alleged irregularities happened. According to Rule 1 of the Rules for the Conduct of Inquiries and Decision of Disputes relating to Elections the petition should be presented to the District or Subordinate Judge "having jurisdiction".

Held, that the expression "having jurisdiction" can only mean having jurisdiction over the place of the acts or omissions complained of. (*Reilly, J.*). KUTTY *v.* VYDIARAKATH KUNHALI HAJI.

59 M.L.J. 194.

ELECTRICITY ACT (9 of 1910).

—S. 12—Absence of permission.

———*No interference by High Court.*

A post was erected on the land of a person. Permission from the District Magistrate for erecting it was obtained not before erecting but after institution of suit by the owner of land. Lower Court dismissed the suit.

Held, that High Court would not interfere with the decision. (*Jai Lal, J.*). JIT SINGH *v.* GUJRANWALA ELECTRIC SUPPLY CO., LTD.

114 I. C. 692= =A.I.R. 1929 Lah. 226.

—S. 12—Right to object.

———*Principle.*

The ordinary rule of law is that whoever owns the site is the owner of everything upto the sky and down to the centre of the earth, and such owner can, therefore, object to the laying of electric wire on his land although the line may be laid

ELECTRICITY ACT (1910)—S. 12—Powers of District Magistrate.

more than 30 feet above land. (*Jai Lal, J.*). JIT SINGH *v.* GUJRANWALA ELECTRIC SUPPLY CO., LTD. **114 I.C. 692=A.I.R. 1929 Lah. 226.**

—S. 12—Powers of District Magistrate.

———There is no law authorizing the District Magistrate to grant permission to an electric company to lay electric line over the land of a person. (*Jai Lal, J.*). JIT SINGH *v.* GUJRANWALA ELECTRIC SUPPLY CO., LTD. **114 I.C. 692= A.I.R. 1929 Lah. 226.**

—S. 14—Costs of removal.

———The defendants were a corporation who had obtained a license under the Indian Electricity Act, (Act 9 of 1910) and as licensees under the Act had put up an aerial line, etc., on a certain street within the Municipal District of the Municipality of Karachi, the plaintiffs. The Municipality having arranged with the North Western Railway Co., that the latter should effect an overbridge, the aerial line and poles had to be shifted from their position. The plaintiffs' suit was for declaration that the cost of removal should be borne by defendants.

Held: that S. 14 of the Electricity Act applied and not the Bombay District Municipal Act and that plaintiffs must bear the cost of removal. (*Tyabji, A.J.C.*). MUNICIPALITY OF KARACHI *v.* KARACHI ELECTRIC SUPPLY CORPORATION, LTD. **95 I.C. 226=A.I.R. 1926 Sind 115.**

—S. 22—Failure to supply.

———*Good cause for action.*

There is nothing in the Indian Electricity Act which bars, either expressly or impliedly, a suit for damages against licensee for failure to supply energy on proper requisition. (*Campbell, J.*). MUNICIPAL COMMITTEE, AMRITSAR *v.* SHANKAR DAS. **97 I.C. 537=A.I.R. 1926 Lah. 349.**

—S. 22—Substituted connection.

———*Procedure.*

Before a consumer can be supplied electric power from a new connection in substitution of an old one he must put in a fresh requisition in writing under paras. 4 and 5 of Cl. 6 of the Schedule to the Indian Electricity Act. (*Shah, Ag. C. J. and Fawcett, J.*). BHAGAVANJI SONKLESWAR *v.* AHMEDABAD ELECTRICITY CO., LTD. **85 I.C. 186= 49 Bom. 182= 26 Bom. L. R. 1206= A.I.R. 1925 Bom. 120.**

—S. 37—Removal of seals.

———*What amounts to.*

The evidence for the prosecution showed that when the officials of a licensee company visited the premises of the accused the seals which the company had affixed to the meter placed upon the premises of the accused had been removed,

Held, that the accused must be held responsible for removing these seals and that his conviction under R. 106 read with S. 37 (4) was justified. (*Shadi Lal, C.J.*). MAHOMED SADIQ *v.* DELHI ELECTRIC SUPPLY TRACTION CO. **116 I.C. 889= 30 Cr. L.J. 702=13 A.I. Cr. R. 115= 1929 Cr. C. 601=A.I.R. 1929 Lah. 867.**

—S. 50—'Person aggrieved.'

———A licensee-company is a person aggrieved within the meaning of S. 50. (*Shadi Lal, C. J.*). MUHAMMAD SADIQ *v.* DELHI ELECTRIC SUPPLY & TRACTION CO. **116 I.C. 889=30 Cr. L.J. 702= 13 A.I. Cr. R. 115=1929 Cr. C. 601= A.I.R. 1929 Lah. 867.**

—Sch. Cl. 6, prov. (2)—Discontinuance of supply.

———*Conditions.*

A part of the electric apparatus namely the seals of the out-out were not in good order and condition.

EQUITY—Benefit and repudiation.

As a result of this defect there had been a leakage of energy,

Held, such a state of things must certainly be deemed to be "likely to affect injuriously the use of energy by the licensee or by other persons," and accordingly the electric company were entitled upon discovering this condition of things, to discontinue the electric supply.

Where a main fuse was burnt out, in other words, where the cut-out became defective,

Held, the company was entitled to discontinue the supply of energy to the consumer. (*Scott-Smith and Fforde, JJ.*). KARORI MAL *v.* E. T. LIGHTING CO., LTD. **75 I.C. 456=4 Lah. 182= 6 L.L.J. 86=A.I.R. 1924 Lah. 142.**

EMBEZZLEMENT.

See PENAL CODE, S. 4.

ENCROACHMENT.

See (1) ADVERSE POSSESSION.
(2) ACQUIESCENCE.
(3) LANDLORD AND TENANT.

ENCUMBRANCE.

See (1) BENGAL PATNI REGULATION.
(2) B. T. ACT, S. 159.
(3) MADRAS ESTATES LAND ACT.

———Execution sale, subject to.

See (1) C. P. CODE, O. 21, Rr. 62, 66.
(2) EVIDENCE ACT, S. 115.

ENDORSE.

See NEG. INST. ACT.

ENFRANCHISEMENT.

See GRANT—INAM.

ENGLISH LAW.

See also PRACTICE—PRECEDENTS.

ENGLISH RULES OF CONSTRUCTION.

See DEEDS—CONSTRUCTION.

ENHANCEMENT—Of Rent.

See (1) B. T. ACT, Ss. 50—52.
(2) LANDLORD AND TENANT.
(3) MADRAS ESTATES LAND ACT, S. 26.

———Of Sentence.

See CR. P. CODE, SS. 417, 439.

ENHANCING—Sentence.

See PENAL CODE, S. 75.

ENTICING AWAY MARRIED WOMAN.

See PENAL CODE, Ss. 497—498.

EQUITABLE ASSIGNMENT.

See (1) ASSIGNMENT.
(2) T. P. ACT, Ss. 130—137.

EQUITABLE MORTGAGE.

See TRANSFER OF PROPERTY ACT, S. 59.

EQUITABLE SET-OFF.

See C. P. CODE, O. 8, R. 6.

EQUITY.

—Application of principles.

———A remedy cannot be created in favour of a suitor on the principle of justice, equity and good conscience, when another remedy is already available to him and no case of real hardship is disclosed and when the remedy asked for practically means a declaration that the suitor need not be vigilant but may wait for a period of 12 years, if he chooses to do so, before he avails himself of the remedy. (*Ross and Fazl Ali, JJ.*). BHUVANESHWARI KUER *v.* MANIR KHAN. **111 I.C. 84= 7 Pat. 613=9 P. L. T. 573= A. I. R. 1928 Pat. 641.**

—Benefit and repudiation.

———It is an equitable principle that a man cannot enjoy a substantial benefit under an agreement and then repudiate it. (*Campbell and Zafar Ali, JJ.*). RAMJI DAS *v.* FAZL AZIM. **93 I.C. 959 (Lah.).**

EQUITY—Deliberate wrong.

—Deliberate wrong.

———*Party to—Cannot rely.*

A person who has deliberately brought about a state of affairs, should not be allowed to take exception to that state of affairs and use that changed state for his own advantage.

In the Articles of Association of an Insurance Company, it was provided that the meeting of the policy-holders was to be held in the registered office of the company. The directors of the company refused permission to hold the meeting in company's premises. The meeting was then held at another place,

Held, that the meeting was perfectly regular the change of venue in this case having been caused by the company itself: *New Zealand Shipping Co.* v. *Societe des Ateliers*, (1919) A.C. 1 and *Queshel Forks Gold Mining Co., Ltd.* v. *Ward*, (1920) A.C. 222, *Foll.* (*Beasley, J.*). SUBRAMANIA AIYAR *v.* UNITED INDIA LIFE INS. CO., MADRAS. **114 I.C. 636= A.I.R. 1928 Mad. 1215=55 M.L.J. 385.**

—English law.

———*Applicability.*

The rule of justice, equity and good conscience is in general identical with the rule of English law, but there are exceptions. (*Daniels, J.*). SHEO RATAN *v.* KARAN SINGH. **84 I.C. 269= 22 A.L.J. 788=5 L.R.A. Civ. 571=46 All. 860= A.I.R. 1924 All. 857.**

—Executor and legatee.

———*A* bequeathed certain sum of money by way of a legacy to *M*, who was a minor. *B* was appointed an executor by *A*. Subsequently *B* had also created incomplete gifts in *M's* favour by crediting certain amounts in his accounts in *M's* name. *B* laid out certain sum in buying a house for *M* in which *M* resided till his death. In a suit by heirs of *M* to recover the amount of legacy created in *M's* favour,

Held, that, it should be presumed that *B* paid for the house out of the legacy for which he was liable and not out of inchoate gifts for which he had not yet made himself liable at all. (*Viscount Sumner*). HARIRAM SEROWGEE *v.* MADAN GOPAL BAGLA. **114 I.C. 565=1929 A.L.J. 406=49 C.L.J. 335= 33 C.W.N. 493=31 Bom. L.R. 710= 1929 M.W.N. 422=30 M.L.W. 835= A.I.R. 1929 P.C. 77=57 M.L.J. 581.**

—Hire purchase contract.

———*Primary contract to be carried out.*

In relieving the hirer against forfeiture occasioned by default in the actual payment of instalments as they accrue both under S. 74 and under the general principles of equity the Court has to carry out the primary contract between the parties. Any further contract, express or implied to be binding on the promisor if he breaks the primary contract is secondary or subsidiary, and may be merely intended to secure the fulfilment of the primary contract. The Court may, however, carry out the terms of the secondary contract, if such a contract is just and reasonable but is not bound to: *Kilmer* v. *British Columbia Orchards Lands, Ltd.*, (1913) A.C. 319; *Steedman* v. *Drinkle*, (1916) 1 A.C. 275, *Foll.*; *Cramer* v. *Giles*, (1883) 1 Cab. & El. 151, *Expl.*; *Sterne* v. *Beck*, (1863) 1 De G. & Sm. 595, *Dist.* (*Wadia, J.*). BHIMAJI N. DALAL *v.* BOMBAY TRUST CORPORATION, LTD. **124 I.C. 800= 32 Bom. L.R. 64=A.I.R. 1930 Bom. 306.**

—Liability for loss to others.

———Wherever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it: *Commonwealth Trust Ltd.* v. *Akotey*, (1925) App. Cas. 72, *Foll.*

To permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent with law and with the principles so frequently affirmed: *Lickbarrow* v. *Mason*, (1787) 2 Term. Rep. 63, *Foll.* (*Das and Adami, JJ.*). BAIJANATH PRASAD *v.* FIRM NAND RAM DAS. **95 I.C. 867=1926 P.H.C.C. 183=7 P.L.T. 801= A.I.R. 1926 Pat. 353.**

—Mala fide purchaser.

———There can be no equity in favour of a purchaser in fraud of creditors who acts without *bona fides*. The vendee from the purchaser has no right to be paid what his vendor paid under a speculative and fraudulent purchase. (*Spencer, J.*). KASTURI CHETTY *v.* CHINNASAMI PILLAI. **95 I.C. 262= 1926 M.W.N. 293=23 M.L.W. 760= A.I.R. 1926 Mad. 624.**

—Nullifying of decree.

———Where a person is party to a decree and is bound by its terms he cannot be allowed to act in a manner so as to nullify or evade the terms of that decree. (*Gokaran Natk Misra and Nanavutty, JJ.*). ADITYA PRASAD *v.* JAGDISH PRASAD. **115 I.C. 105=5 O.W.N. 873=4 Luck. 93= A.I.R. 1929 Oudh 26.**

—Power of Court.

———*Cannot act against statute.*

It is not within the function of a Court of equity to contravene a direct provision of a Code in order to attain an equitable result, nor can it excuse a breach of a mandatory rule on the ground that it has resulted in justice. (*Ashworth, J.*). RAMDEO RAM *v.* FRANK COMBES. **117 I.C. 614= A.I.R. 1929 All. 437.**

———In the case of an instalment decree with a default clause the High Court as a Court of equity has wide powers to do what seemed to it just. There is no injustice in putting the decree-holder exactly in the same position as if no default has been committed because the decree-holder has the security of the property for the balance of the decretal amount, and interest was running on that amount. (*Macleod, C. J. and Shah, J.*). NARSINHA GOPAL *v.* BALWANT MADHAV WADGAONKAR. **64 I.C. 570=46 Bom. 463= 23 Bom. L. R. 1238=A.I.R. 1922 Bom. 170.**

—Procedure.

———Rules of procedure are not made for the purpose of hindering, but for the purpose of administering justice. (*Suhrawardy and Duval, JJ.*). CHARU CHANDRA GHOSH *v.* RAI BEHARI LAL. **80 I.C. 931=A.I.R. 1925 Cal. 157.**

—Right to.

———Where the sale was a legal and valid sale the fact that by accident or by act of God the property had since, with the exception of the site, been destroyed by fire, is not a sufficient ground for having recourse to the principles of equity, when there is a definite and specific rule of law applicable. (*Findlay, O. J. C.*). NIZAMUDDIN *v.* JUMMA. **88 I.C. 693=A.I.R. 1926 Nag. 17.**

———*Conditions.*

He who seeks equity must do equity. The plaintiff's conduct in equity must have been perfectly proper. His claim to equitable relief will be

EQUITY—Transference with and without value.

negatived by his fraud or misrepresentation or such other considerations. But merely abating a nuisance of which he complains, without the Court's intervention, is not any impropriety on the plaintiff's part, disqualifying him for equitable relief. (*Mukerji, J.*). BANESWAR BANDOPADHYA *v.* AMULYA CHARAN. **82 I.C. 309= A.I.R. 1925 Cal. 288.**

—Transference with and without value.

———There are no equities in favour of an alienee taking under a voluntary settlement as there are in favour of transferees for valuable consideration. The creation of a trust in favour of deity cannot be treated as one on an equal footing with a transfer for valuable consideration as the securing of merit by dedication of property to the service of God cannot be treated as forming good valuable consideration. (*Kinkhede, A. J. C.*). JANARDHAN KASHINATH KASAR *v.* JANARDHAN VISHWANATH SHASTRI. **101 I.C. 839=A.I.R. 1927 Nag. 214.**

—Wrong-doers.

———*No benefit.*

Graham, J.—Equitable considerations ought not to be invoked on behalf of the party who has put himself in the wrong by wilfully disregarding the law. (*Buckland, J., on difference between Suhrawardy and Graham, JJ.*). SHAM LAL KHETRY *v.* CORPORATION OF CALCUTTA. **1929 Cr. C. 525= 33 C.W.N. 777=A.I.R. 1929 Cal. 781.**

EQUITY OF REDEMPTION.

See T.P. ACT, SS. 60 AND 91.

ESCAPE FROM LAWFUL CUSTODY.

See PENAL CODE, SS. 223—226.

ESCHEAT.

See (1) LANDLORD AND TENANT.
(2) CROWN.

ESTATES PARTITION ACT (V (B.C.) of 1897).

See under BENGAL ESTATES PARTITION ACT.

ESTOPPEL.

See (1) EVIDENCE ACT, SS. 115, 116.
(2) T. P. ACT, SS. 43, 54.
(3) PART-PERFORMANCE.

EUROPEAN BRITISH SUBJECT.

See CR. P. CODE, SS. 528-A TO 528-D, 29-A AND 34-A.

EVICTION.

See EJECTMENT.

EVIDENCE.

See also (1) C. P. CODE, O. 18.
(2) EVIDENCE ACT.

Admissibility.
Appreciation of.
Circumstantial Evidence.
Corroboration.
Credibility.
Criminal Trial.
Documents.
Duty of Court.
Exclusion of.
Expert Evidence.
Hearsay.
Identification.
Onus.
Opinions.
Pedigree.
Personal knowledge.
Presumption.
Receipt.
Recitals.
Relevancy.—*See* EVIDENCE ACT, S. 5.
Sufficiency.
Suspicion.
Trial.

EVIDENCE—Admissibility—Documents.

—Admissibility.

Admission.
Documents.
Form of.
Intention.
Irrelevant facts.
Objection to.
Record.
Statements.
Unstamped instrument.
Miscellaneous.

—Admissibility—Admission.

———Before a previous admission can be used against a party it must be put to him and an opportunity afforded to him to explain if it is capable of explanation. (*Tek Chand and Agha Haidar, JJ.*). GHULAM MURTAZA *v.* NAGINA. **31 Punj. L. R. 243.**

—Admissibility—Documents.

———*Unmarked.*

Where a document has been properly proved and discussed in the trial Court, it is admissible in evidence, though not marked as an exhibit. (*Bhide, J.*). MAHESH DAS *v.* NURA. **111 I.C. 381= A.I.R. 1929 Lah. 82.**

———*No date.*

Where a document bears no date and there is nothing to show how and under what circumstances it was prepared it should not be admitted in evidence. (*Greaves and B. B. Ghose, JJ.*). ADAM SARDAR *v.* BISWESWAR DAS. **92 I. C. 601= A. I. R. 1926 Cal. 684.**

———*No objection.*

That no objection was taken in the trial Court as to admissibility is no ground for allowing a document to be proved if the evidence is not admissible. (*Newbould and Graham, JJ.*). DAMODAR PODDAR *v.* JADUNATH DATT. **91 I.C. 449 (Cal.).**

———Where a document is admitted without objection in the trial Court, it cannot be objected to afterwards. (3 P. L. J. 306; 34 Cal. 1059; 11 Bom. 320 and 31 Cal. 155, *Foll.*). (*Daniels, J.*). BEHARI LAL *v.* AMIN CHAND. **79 I. C. 1029= 5 L.R.A. Civ. 398=A. I. R. 1924 All. 918.**

———*Invoice.*

Where the plaintiff sought to prove by producing the invoices sent to him by the consignors showing that the value of the goods amounted to Rs. 204,

Held, it is *prima facie* evidence of what the plaintiff was charged for the goods and what presumably he would have to pay for them and in the absence of cross-examination it is perfectly admissible evidence and it would not be necessary to call consignors and put them into the box to prove what was the actual value of the goods sent. (*Ryves, J.*). DUKHI RAM *v.* B. N. W. RAILWAY. **73 I.C. 440=4 L.R.A. Civ. 48= A.I.R. 1923 All. 145.**

———*Road-cess return.*

Where the Road Cess Return was signed by the landlords it would be admissible as against them. (*Adami, J.*). SADHU SARAN *v.* AMBIKA LAL. **68 I.C. 676=A.I.R. 1923 Pat. 163.**

———*Fresh evidence—Appeal.*

Plaintiff sued for mortgage-debt relying on certified copies on the ground that the mortgage-deeds were lost. The defendant pleaded that the deeds were included in a compromise decree and torn. The trial Court decided in favour of the defendant. The defendant, on appeal by the plaintiff, produced torn pieces of the bonds in the appellate instead of

EVIDENCE—Admissibility—Documents.

in the trial Court. On the plaintiff taking objection to their admissibility,

Held, fresh evidence should not have been admitted in order to enable the Court to decide the case in favour of the defendants, who claimed the benefit of the alleged compromise. (*Batten, J. C.*). THAKUR BHAIRONSINGH *v.* HINDUSINGH.

67 I.C. 237=A.I.R. 1922 Nag. 119.

———*Not acted upon.*

A document is obviously inadmissible, if it is not given effect to and the object for which it was executed, namely, the proposed compromise in a suit, fell through, as then the document has not the force of a decree. (*Jwala Prasad and Adami, JJ.*). SITARAM TEWARI *v.* GYA PRASAD.

A. I. R. 1923 Pat. 37.

———*Pro-note payable to bearer on demand.*

Pro-note payable to bearer on demand is unenforceable but is admissible in evidence to prove acknowledgment of prior debts. (*Spencer and Devadoss, JJ.*). NATARAJULU NAICKER *v.* SUBRAMANIAN CHETTIAR. **69 I.C. 939=1922 M. W. N. 450=16 M.L.W. 705=45 Mad. 778=A.I.R. 1922 Mad. 181=43 M.L.J. 695.**

———*Two railway companies agreeing to work jointly—Suit against one for compensation for death by employee's negligence—Agreement between the companies—Admissibility of.*

Where two railway companies enter into an agreement for the joint working of a certain line, and one of them is sued for compensation for death caused by the negligence of an employee, the agreement between the companies will be *res inter se alios acta* in so far as it covenants as to liability *inter se* but in so far as it determines the position of the servants who perform their functions on the joint line, it is admissible as the best evidence. (*Lord Dunedin.*) BAIN *v.* CENTRAL VERMONT RAILWAY CO. **A.I.R. 1921 P.C. 221.**

—Admissibility—Form of.

———*Order.*

Where the only order passed on an application asking a document to be admitted in evidence was "file with record",

Held, that it is not proper admission of evidence. (*Greaves and B.B. Ghose, JJ.*). ADAM SARDAR *v.* BISWESWAR DAS. **92 I.C. 601=A.I.R. 1926 Cal. 684.**

—Admissibility—Intention.

———Evidence cannot be admitted about intention of parties when that intention is clearly expressed in deed. (*Cammiade and S. K. Ghose, JJ.*). BIMALA CHARAN *v.* ABDUL RAHMAN. **114 I.C. 81=A.I.R. 1928 Cal. 825.**

—Admissibility—Irrelevant facts.

———*No objection.*

An erroneous omission to object to evidence which would in no case be placed on the record cannot prevent the appellate Court from rejecting it. A case where relevant evidence has been brought on record in a wrong manner can be cured and defect removed if objection is taken at the time when evidence is tendered. But the failure to object to the reception of evidence which is irrelevant cannot make it relevant. (*Shadi Lal, C. J. and Agha Haidar, J.*). LACHHU *v.* MELA RAM. **119 I.C. 734=A.I.R. 1929 Lah. 583.**

———*Trial of other persons for same offence.*

Where accused were being tried for having taken part in a certain dacoity, the fact that certain other persons were previously tried for complicity in that dacoity and acquitted is absolutely irrelevant and immaterial. (*Stuart, C. J. and Raza, J.*). RAM PRASAD *v.* EMPEROR. **106 I.C. 721=2 Luck. 631=1 L.C. 339=8 A.I. Cr. R. 449=A.I.R. 1927 Oudh 369.**

EVIDENCE—Admissibility—Objection to—Appellate Court.

———*Evidence to contradict possible evidence of opponent.*

There is no provision of law which makes evidence, contradicting possible evidence of a possible defence witness, admissible against the accused. (*Suhrawardy and Panton, JJ.*). BHAGIRATHI CHOWDHRY *v.* EMPEROR. **92 I.C. 174=30 C.W.N. 142=27 Cr. L.J. 222=A.I.R. 1926 Cal. 550.**

—Admissibility—Matter found in illegal search.

———If a search warrant is illegal, then what is found as a result of that search can be put in evidence in a criminal case. 35 All. 358, *Rel. on.* (*Marten and Madgavkar, JJ.*). EMPEROR *v.* ABASBHAI. **93 I.C. 967=50 Bom. 344=28 Bom.L.R. 272=27 Cr. L.J. 503=A.I.R. 1926 Bom. 195.**

—Admissibility—Objection to—Appellate Court.

———Where certain documents were received by the trial Court without proof and the objection as to their reception was for the first time raised in appeal, *held*, that the objection could not be entertained. (*Dalip Singh, J.*). GORKHA *v.* KAHNUN. **30 P.L.R. 693.**

———*C. P. Code, O. 26, R. 12 (2).*

When a party does not raise his objections before the Commissioner appointed for partition, and does not object to the Commissioner's report in the lower Court, he is not entitled to come up to the High Court and object to the recommendations made by the Commissioner, although the High Court is not precluded from considering whether the Commissioner acted within his jurisdiction or not. 6 M. H. C. R. 36 and 6 Bom. H. C. R. 149, *Ref.* (*Devadoss and Walsh, JJ.*). KRISHNA REDDIAR *v.* RAMANUJA REDDIAR. **114 I.C. 232=A.I.R. 1929 Mad. 492.**

———*Second appeal.*

It is unfair to allow a party in second appeal for the first time to object to the reception of evidence with the possible necessity of the case being sent back for rehearing. (*Sanderson, C. J., Panton and Graham, JJ.*). BROJENDA KISHORE *v.* MOHIM CHANDRA. **99 I.C. 189=31 C.W.N. 32=A.I.R. 1927 Cal. 1.**

———*Second appeal—Document exhibited mechanically in Trial Court.*

Where a copy of a registered sale-deed was put in by the defendants in the suit, with a list, and it was never afterwards referred to in the Trial Court which exhibited the document mechanically and without any reason and objection was taken to its admissibility in second appeal,

Held, that the appeal should be accepted and in the interests of justice the whole case sent back for re-trial *de novo* under R. 23. (*Addison, J.*). KISHNA *v.* WARYAMAN. **99 I.C. 920=8 L.L.J. 537=A.I.R. 1927 Lah. 45.**

———*No objection in Trial Court.*

Evidence admitted by the Trial Court without any objection at the time when it was offered should not be excluded from consideration by the appellate Court though it may not be legally admissible. 7 M.I.A. 128; 13 M.I.A. 519; 11 B. 320, *Foll.* (*Abdul Raoof and Abdul Qadir, JJ.*). MT. CHANNI BIBI *v.* AHMAD KHAN. **69 I.C. 331=A.I.R. 1924 Lah. 265.**

EVIDENCE — Admissibility — Objection to— Appellate Court.

———*Admission of copy of document.*

A certified copy of a written statement was put in the lower Court in the presence of plaintiff's counsel and without objection by him.

Held, he cannot be permitted in High Court to object that only the original could have been received as proof. (*Martineau and Campbell, JJ.*). DURGA DAL-JAGAN NATH *v.* RAM PARTAB SUKH DAYAL. **79 I.C. 221=A.I.R. 1923 Lah. 138.**

———*No objection in Trial Court.*

Evidence admitted in Trial Court without objection cannot be attacked in appeal. (*Chatterjea and Pearson, JJ.*). RAJESWARI DASI *v.* PULIN BEHARI. **62 I.C. 647=25 C.W.N. 881= A.I.R. 1921 Cal. 71.**

—Admissibility—Objection to—Mode of proof.

———When a fact relevant in itself has been wrongly allowed to be proved in a manner not permitted by law unless the opposite party objects to the evidence at the time when it is offered, he cannot object afterwards. (*Campbell, J.*). JHANDA SINGH *v.* HARNAM SINGH. **94 I.C. 75=27 P.L.R. 260= A.I.R. 1926 Lah. 415.**

———*Appellate Court.*

If no objection be taken in the first Court to the admissibility of evidence on the ground of improper proof, such objection cannot be raised in appeal. 31 Cal. 1059 at p. 1074 (P.C.), *Foll.* (*Baker, J.C.*). R. & K. RY. COMPANY *v.* ZIHURUS SYED ALIVI. **78 I.C. 34=A.I.R. 1924 Nag. 358.**

———*Waiver.*

The question of the mode of proof is a question of procedure and is capable of being waived by a party. Where the question of the admissibility of documents was not raised before the Trial Court, it must be assumed that the party waived his objection to the mode of proof adopted by the opponent. (*Das and Adami. JJ.*). MT. BIBI KANIZ ZAINAB *v.* SYED MOBARAK HOSSAIN. **72 I.C. 748= A.I.R. 1924 Pat. 284.**

—Admissibility—Objection to—Omission to take.

———*Privy Council.*

Where no objection was taken to the admissibility of a document, Privy Council did not think it necessary to consider whether the document was admissible under the Evidence Law of the country. (*Lord Chancellor*). BHAGAT RAM *v.* KHETU RAM. **116 I.C. 394=A.I.R. 1929 P.C. 110.**

———*Hearsay evidence.*

The failure of an advocate to object to the admission of evidence cannot so alter the character of testimony as to convert into corroborative evidence that which the law regards as merely fit for rejection as hearsay. (*Lord Darling*). LIM YAM HONG & CO. *v.* LAM CHOON & CO. **107 I.C. 457= 47 C.L.J. 288=30 Bom. L.R.757 = 29 M.L.W. 520=A.I.R. 1928 P.C. 127= 56 M. L. J. 88.**

———*Effect of.*

Where evidence is admitted in the first Court without any objection being taken to its reception and the evidence is admissible as relevant no party will be allowed to object to the reception of such evidence at any later stage of the litigation. A.I.R. 1925 Cal. 1034 and 19 All. 76 (P.C.), *Foll.* But an omission to take objection to the reception of a document which is irrelevant or inadmissible in evidence in the case does not make it admissible. 19 All. 76 (P.C.), *Foll.* (*Suhrawardy and Mukerji, JJ.*). MANMATHA NATH KAR *v.* PROBODH CHANDRA RATORI. **94 I.C. 279=43 C.L.J. 274.**

EVIDENCE — Admissibility — Objection — When should be taken.

———*Admission by Court—No reasons recorded.*

Where at the time of the admission of the evidence the parties did not take an objection that they had no opportunity to argue on it, the fact that the Judge who admitted the evidence neglected to state his reasons for admitting it, does not render the evidence inadmissible. (*Greaves and Cuming, JJ.*). NABIN CHANDRA *v.* GOUR MOHAN. **90 I.C. 756= A. I. R. 1926 Cal. 369.**

———*Nature of evidence—Mode of proof—Distinction.*

Neither an omission by an advocate to object to the giving of irrelevant and inadmissible evidence, nor the failure of the tribunal to exclude it of its own motion will validate a decree based on material which the Evidence Act declares to be inherently and in substance irrelevant to the issue. But a wholly different question arises where the objection is not as to the nature and quality of the evidence in itself, but merely as to the mode of proof put forward. 43 Mad. 609 (F.B.), *Rel. on.* (*Odgers, J.*). THAMMAYYA *v.* CHINNAYA. **92 I.C. 594= 22 M.L.W. 752=1926 M.W.N. 38= A.I.R. 1926 Mad. 282.**

———*Effect of.*

An erroneous omission to object to evidence which is not admissible under the provisions of the Evidence Act does not make it admissible. (*Mukerjee and Rankin, JJ.*). JAGADISH CHANDRA DE *v.* HARIHAR DE. **78 I.C. 219=40 C.L.J. 39= A.I.R. 1924 Cal. 1042.**

———*Effect of—Duty of Judge.*

The mere omission to object to a document which is not in itself admissible as evidence does not constitute that document evidence so as to be available to either party at the trial. It is clearly the duty of the Judge, apart altogether from any objection by the parties or their pleaders, to exclude irrelevant evidence. (*Dawson Miller, C.J. and Mullick, J.*). MT. SUMITRA KUER *v.* RAM KHAIR CHOWBEY. **1921 P.H.C.C. 17=A.I.R. 1921 Pat. 61.**

—Admissibility—Objection — When should be taken.

———A document can be objected to as irrelevant at any time; a document can be objected to as inadmissible as opposed to irrelevant at the first hearing only. (*Harrison, J.*). GHULAM MUHAMMAD *v.* KALIM ULLAH. **109 I.C. 728=10 L.L.J. 370= A.I.R. 1928 Lah. 428.**

———The proper time for the raising and the determination of all questions as to the admissiblity of documentary evidence is the time when such documents are tendered in evidence. (*Mears, C. J. and Piggott, J.*). MT. MISRI *v.* MT. RAJMATI. **89 I. C. 849=A. I. R. 1926 All. 103.**

———Questions regarding the admissibility of evidence should ordinarily be raised at the time when such evidence is tendered. (*Mears, C.J. and Piggott, J.*). EMPEROR *v.* HAR PRASAD BHARGAVA. **77 I. C. 961=21 A. L. J. 42=45 All. 226= 4 L. R. A. Cr. 19=25 Cr. L. J. 497= A. I.R. 1923 All. 91.**

———*Want of proper proof.*

Where a piece of evidence not proved in the proper manner has been admitted without objection, it is not open to the opposite party to challenge it at a later stage of the litigation. But where evidence has been received without objection in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel, does not apply as none of them is available against

EVIDENCE—Admissibility—Record.

a positive legislative enactment. 8 C. W. N. 101, *Foll.* (*Suhrawardy and Cuming, JJ.*). SHIB CHANDRA SINGHA *v.* GOUR CHANDRA PAUL.
68 I. C. 86=27 C. W. N. 134=35 C. L. J. 473=A.I.R. 1922 Cal. 160.

—Admissibility—Record.

———*Department map—Admission in Appellate Court.*

Where the lower Appellate Court asked the Superintendent of Land Records to send a map from his department in the presence of the parties and subsequently the map was inspected by the Court and admitted in evidence,

Held, that the lower Appellate Court was not wrong in admitting the map in question in evidence and basing its decree thereon. (*Das, J.*). MA SIT *v.* L. A. L. A. ANNAMALAI CHETTIAR.
104 I. C. 671=6 Bur. L. J. 112=A. I. R. 1927 Rang. 330.

———*Case.*

Contents of record in a previous case are not admissible unless admitted or proved. (*Campbell, J.*). MUHAMMAD ZAKRIA *v.* GULAM ALI.
95 I.C. 137.

———*Judicial proceeding.*

Evidence recorded in a previous judicial proceeding between the same parties can be made admissible in a subsequent proceeding by the consent of both parties. 43 Mad. 669, *Foll.* (*Odgers, J.*). VARADARAJULU *v.* VELAYUDA. **90 I.C. 743=22 M.L.W. 230=A.I.R. 1925 Mad. 1160.**

———*Report of sale.*

Where the fact of sale was reported to a Revenue Officer but the sale itself was not registered, the report to the Revenue Officer is admissible as evidence as to what was reported, though the report cannot be, or take the place of a sale-deed. (*Pratt, J.*). MG. SHWE H MON *v.* MG. THA BYON.
72 I.C. 6=11 L.B.R. 462=A.I.R. 1923 Rang. 125.

———*Cr. P. Code, S.* 110—*Proceedings.*

In a trial for an offence under S. 396 of the Penal Code, the result of proceedings taken against the accused under S. 110 of the Cr. P. Code is not admissible. (*Walmsley and Huda, JJ.*). ASIMUDDIN *v.* EMPEROR. **59 I.C. 204=22 Cr.L.J. 60=32 C.L.J. 89.**

—Admissibility—Statements.

———*Usual course of business.*

A statement made in the usual course of business by respectable companies concerned with shipping showing the amount of goods omitted to be delivered to various consignees is admissible in a suit by a consignee against shipowner for damages for short delivery. (*Srinivasa Aiyangar, J.*). PONNUSWAMY CHETTIAR *v.* BRITISH INDIA STEAM NAVIGATION. **108 I.C. 196=1927 M.W.N. 728=27 M.L.W. 439=A.I.R. 1928 Mad. 239=54 M.L.J. 636.**

———*Accused in custody.*

In an excise case statements of the accused taken after the accused were taken to the excise barracks and while they were in custody, were held to be not voluntary statements and hence inadmissible. (*C. C. Ghose and Duval, JJ.*). BATASI MONI DASSI *v.* EMPEROR. **98 I.C. 401=53 Cal. 706=30 C.W.N. 854=27 Cr. L.J. 1329=A.I.R. 1926 Cal. 1163.**

———*Persons not examined.*

Statements made by persons, who have not been examined in Court about the absence of the accused, when search was made for accused, are inadmissible. (*Newbould and B.B. Ghose, JJ.*). KERAMAT MONDAL *v.* EMPEROR. **92 I.C. 439=42 C.L.J. 524=27 Cr. L.J. 263=A.I.R. 1926 Cal. 320.**

EVIDENCE—Admissibility—Miscellaneous.

———*Witness in judgment.*

The statement of a witness abstracted in a judgment can be made use of only in one of two ways either under S. 145 of the Evidence Act to contradict the witness or as an admission under S. 21. It cannot be used in lieu of the original statement itself. (*Beasley, C.J. and Curgenven, J.*). SARADAMBA *v.* PATTABHIRAMAYYA. **1930 M.W.N. 601.**

———*Witness before Coroner.*

At the trial of the accused in the Court of Sessions a statement made by a witness in a proceeding before the Coroner is admissible in evidence. (*Madgavkar, J.*). EMPEROR *v.* RAGHOO GANPAT.
97 I.C. 37=28 Bom.L.R. 775=27 Cr. L.J. 1061=A.I.R. 1926 Bom. 404.

———*Conflicting testimony.*

Statement made by a witness at the trial should be altogether rejected when it is in hopeless conflict with his previous statements. (*Martineau and Zafar Ali, JJ.*). RAM KARAN *v.* EMPEROR.
92 I. C. 577=7 L. L. J. 371=26 P.L.R 659=27 Cr. L.J. 289=A.I.R. 1925 Lah. 483.

———*Consent of parties.*

Statements which are not admissible in evidence cannot be rendered admissible by consent of parties. (*Martineau and Zafar Ali, JJ.*). SUNDAR SINGH *v.* SHAM SINGH. **80 I.C. 235=A.I.R.1923 Lah. 630.**

———*Police file—Thanedar's statement in other case.*

In order to prove an alleged theft of an account book in a Civil Court from the plaintiff's house the police file and a copy of the statement made by the Thanedar in other case are inadmissible. (*Wilberforce, J.*). BARU *v.* SUKHA SINGH. **69 I.C. 1008=4 L.L.J. 418=A.I.R. 1921 Lah. 332.**

———*Extracts of Suit Register.*

Where a judgment or decree in a suit cannot be produced as it had been destroyed, the extract from the suit register is admissible. (*Bhide, J.*). MOHAMED BUDHA *v.* GHULAM QADIR.
112 I.C. 651.

—Admissibility—Unstamped instrument.

———*Determination of—Stamp Act, S.* 2 (11).

The Court, in determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, will look at the document itself as it stands, and not at any collateral circumstances which may be shown in evidence. 16 Cal. 432 and 6 Bom. L. R. 699, *Foll.* (*Macleod, C.J. and Coyajee, J.*). RAMPRASAD SHIVLAL *v.* SHRINIVAS BALMUKUND.
90 I.C. 685=27 Bom. L.R. 1122=A.I.R. 1925 Bom. 527.

———*Cancellation of stamp—Stamp Act, S. 12.*

Where the stamp upon a hundi is cancelled at a later date and not at the time of executing the hundi the cancellation is not valid and the hundi should be treated as unstamped and so inadmissible in evidence. (*Macleod, C. J. and Coyajee, J.*). DAYARAM SURAJMAL *v.* CHANDULAL DAYABHAI.
90 I.C. 689=27 Bom.L.R. 1118=A. I. R. 1925 Bom. 520.

—Admissibility—Miscellaneous.

———*Admissibility and credibility.*

Admissibility is a question of law and credibility of evidence is one of fact. (*Walsh, A.C.J. and Sulaiman, J.*). MEHI LAL *v.* RAMJI DASS.
80 I.C. 939=22 A.L.J. 864=5 L.R.A. Civ. 720=47 All. 13=A.I.R. 1924 All. 792.

EVIDENCE—Appreciation of—Appellate Court.

—Appreciation of—Appellate Court.

———In every case that comes before an appellate Court the lower Court has the advantage of seeing and hearing the witnesses and the appellate Court has not, but it cannot be said that an appellate Court can never hope to make a diagnosis as to the truth of the case as good as that made by the lower Court. No doubt it is an advantage to see and hear the witnesses, but it is an advantage which may be counter-acted and more than counter-acted by the greater experience and knowledge of the appellate Court. (*Pullan, J.*). GURCHARAN *v.* EMPEROR.

103 I.C. 416=1 L.C. 190= 8 A.I. Cr. R. 379= 28 Cr.L.J. 638=A.I.R. 1927 Oudh 611.

—Appreciation of—Deposition.

———*Stray sentences.*

A few (say two) casual and somewhat ambiguous phrases in a deposition cannot destroy the very clear effect of the whole deposition. (*Batten, J.C. and Hallifax, A.J.C.*). MT. KUSHIBAI *v.* MANRAKHAN. **79 I.C. 422=7 N.L.J. 217= A.I.R. 1923 Nag. 265.**

—Appreciation of—Discrepancies.

———*Date.*

Where the discrepancies between witnesses as to dates is not unnatural, it far from being necessarily a badge of fraud, is an indication of *bona fides.* (*Lord Tomlin.*) MUDANNA VIRAYYA *v.* MUDANNA ADENNA. **121 I.C. 205=51 C.L.J. 136= 1930 M.W.N. 60=32 Bom.L.R. 499= 31 M. L. W. 176=A.I.R. 1930 P.C. 18= 58 M.L.J. 245 (P.C.).**

———A slight change in the statement as to date of birth is not necessarily to be discredited. (*Wazir Hasan, J.C. and Kendall, A.J.C.*). BANS BAHADUR SINGH *v.* SAKAL RAJ KUAR. **81 I.C. 484= 11 O.L.J. 297=A.I.R. 1924 Oudh 385.**

—Appreciation of—Findings.

———*Credibility.*

The lower Court is the proper and, in general, the final Judge of the credibility of evdience. (*Curgenven, J.*). M. KANNIAPPAN *v.* KULLAMMAL. **1930 Cr. C. 88=1929 M.W.N. 696= 2 M.Cr.C. 275=A.I.R. 1930 Mad. 194.**

———*Oral evidence.*

The finding of fact of Trial Court on the oral evidence should not be lightly interfered with as that Court is in a much better position to gauge the truth and value of the oral evidence than the appellate Court. (*Sir Lancelot Sanderson.*) R. ARUNACHALA NAYUDU *v.* S. R. BALAKRISHNA & CO. **107 I.C. 349=A.I.R. 1927 P.C. 266.**

———*Appeal Court—Credibility.*

Where the District Court had not examined the witnesses nor had it had an opportunity of observing those witnesses' demeanour, and in fact it was in no better position than the High Court to judge of the reliability of the witnesses' evidence,

Held, that though as a rule very great value would be attached by the High Court to the finding of the District Court on facts, yet, in this case, its finding could be upset. (*Duckworth and Godfrey, JJ.*). MA E KHIN *v.* MAUNG SEIN. **88 I.C. 167= 2 Rang. 495=A.I.R. 1925 Rang. 71.**

—Appreciation of—Injury.

———*External marks.*

The absence of any external mark of injury is not necessarily destructive of the case that the injury was caused by a brick. It is possible that a blow in the abdomen is less likely to leave a mark than one on a less elastic and resilient part of the anatomy. (*Mullick and Kulwant Sahay, JJ.*). RAMJIT AHIR *v.* EMPEROR. **74 I.C. 705=2 Pat. 309= 1 Pat. L.R. Cr. 236=24 Cr. L.J. 801= A. I. R. 1923 Pat. 413.**

EVIDENCE—Appreciation of—Presumption.

—Appreciation of—Maxim.

———Per *Hallifax, A. J. C.*—The maxim *falsus in uno falsus in omnibus* is entirely false. (*Hallifax, Prideaux and Kotval, A. J. Cs.*). SAKKU *v.* EMPEROR. **65 I. C. 561=23 Cr. L. J. 129= A.I.R. 1922 Nag. 146.**

—Appreciation of—Memory.

———*Imagination or fact.*

"Men without deliberately intending to falsify facts are extremely prone to believe what they wish, to confound what they believe with what they heard and to ascribe to memory what is merely the result of imagination." (*Daniels and Lyle, A.J.Cs.*). MT. ANJUMAN-UN-NISA *v.* SHAIK ASHIG ALI. **66 I.C. 222=8 O.L.J. 439= A.I.R. 1922 Oudh 178.**

—Appreciation of—Oral evidence.

———*Absence of documentary evidence.*

Where the oral evidence produced is itself convincing the absence of documentary evidence in support of it should not be made much of. 3 Lah. 48 (P. C.), *Rel. on.* (*Abdul Raoof and Abdul Qadir, JJ.*). MT. CHANNI BIBI *v.* AHMAD KHAN. **69 I.C. 331=A.I.R. 1924 Lah. 265.**

———Alibi *in criminal case.*

Where witnesses for the accused deposed that they met the accused Ghulam Ali and Fazal Illahi at Sangla about 10 A.M. on the 12th of July and this oral evidence was unsupported by any documentary evidence and the witnesses were not persons who would remember the date precisely,

Held, such evidence as that is easily obtainable in this country. (*Le Rossignol and Zafar Ali, JJ.*). JALAL *v.* KING-EMPEROR. **81 I.C. 347= 25 Cr.L.J. 811=A. I. R. 1923 Lah. 232.**

—Appreciation of—Partition papers.

———*Value on questions of existence of tenancy.*

Partition papers are not of real assistance in the absence of detailed information as to the history of the document mentioned, when it was prepared, by whom, in whose presence, and for what purpose.

The question whether a document is admissible in evidence as a public document is fundamentally distinct from the question whether its contents are binding upon tenants without proof of notice on them or of their consent. Weight will obviously have to be attached to the statutory provisions for the partition of estates in operation at that time; and how far the proceedings did in fact conform to these rules is plainly a relevant matter. (*Mookerjee and Chotzner, JJ.*). TARA KUMAR GHOSE *v.* KUMAR ARUNCHANDRA SINGH. **74 I.C. 383= 36 C.L.J. 389=A.I.R. 1923 Cal. 261.**

—Appreciation of—Presumption.

———*Non-production of accounts.*

Where certain documents produced after the defendant's examination showed that the defendant's story on an important point was false and notwithstanding the fact that opportunity was given to recall him and explain, if possible the contradiction, he was not recalled and where accounts in his possession, though summoned, were not produced,

Held, that the proper presumption from these circumstances was that the defendant's case is untrue. (*Lord Phillimore.*) VENKANNA *v.* AGASTHIAH. **32 M.L.T. 86=27 C. W.N. 725= A.I.R. 1923 P.C. 31.**

EVIDENCE—Appreciation of—Presumption.

———*Possession following title.*

Where there is strong evidence of possession on the part of the respondents, opposed by evidence apparently strong also on the part of the appellants in estimating the weight due to the evidence on both sides, the presumption may well be regarded that possession went with the title. (*Mookerjee and Chotzner, JJ.*). PROMODE KUMAR ROY *v.* MADAN MOHAN SAHA PRAMANIK. **70 I.C. 555= 27 C.W.N. 305=36 C.L.J. 396= A.I.R. 1923 Cal. 228.**

—Appreciation of—Privy Council.

———Where the trial Court, who had seen the witnesses, disbelieved the evidence of the preparation and execution of the will, the Privy Council refused to dissent from him in his estimate of the evidence of the witnesses on those points. (*Sir Binod Mitter.*) VELLASWAMY SERVAI *v.* L. SIVARAMAN SERVAI. **121 I.C. 230= 51 C.L.J. 150=34 C.W.N. 206=31 M.L.W. 185= 1930 M.W.N. 394=32 Bom. L.R. 511= 57 I.A. 96=8 Rang. 179=A.I.R. 1930 P.C. 24= 58 M.L.J. 114 (P.C.).**

—Appreciation of—Probabilities.

———*Based on certain fact not leading to one conclusion—Judge can draw legitimate inferences from facts proved—When particular inference cannot be reasonably drawn from facts partly relying on it for discharging onus of proof fails—Evidence—Burden of proof.*

Where the Court has to depend upon probabilities based on certain facts which do not lead to one conclusion, the Judge is entitled to draw inferences from the facts proved before him, but the inferences must be such as could be legitimately drawn from the facts. If the facts are such that no reasonable man could draw a particular inference is such as to be equally consistent with non-liability and with liability, then the party who relies on the inference to discharge the onus of proof of establishing liability fails. *Smith, Ltd.* v. *G. W. Railway Co.*, (1921) 2 K. B. 237, *Foll.* (*Suhrawardy and Patterson, JJ.*). BENGAL-NAGPUR RAILWAY COMPANY *v.* MOOLJI SICKA & CO. **52 C.L.J. 235.**

—Appreciation of—Proof.

———*Positive and negative.*

An affirmative proposition is not established by showing that the witnesses who depose to a contradictory negative proposition are not roliable. Of course, if there is a conflict of evidence on a point, it would be perfectly legitimate to take into consideration the circumstantial evidence with a view to show that evidence of the first class of witnesses was true and that of the second false. (*Lord Atkinson.*) SARATKUMARI *v.* AMULYADHAN. **71 I.C. 632=17 M.L.W. 481=27 C.W.N. 629= 25 Bom. L.R. 548=37 Cal. L.J. 501= 1923 M.W.N. 392=32 M.L.T. 137= A.I.R. 1923 P.C. 13 (P.C.).**

———*Use of King Edward Stamp in* 1915.

The mere fact that the promissory note is stamped with a King Edward stamp does not prove that the note was executed in 1911 and not in 1915, in the absence of any evidence that there were no King Edward stamps in existence in 1915. (*Moti Sagar, J.*). MT. CHANDO *v.* SIRI RAM. **80 I.C. 177=A.I.R. 1923 Lah. 607.**

—Appreciation of—Relevant evidence.

———*Cumulative effect.*

The proper and satisfactory way of appreciating evidence is to consider, not whether each piece of evidence proves the case by itself, but to consider the cumulative effect of all the relevant items of evidence adduced in the case. **31 All. 412** (P.C.), *Foll.* (*Ananthakrishna Ayyar, J.*). VENKATARAMAYYA *v.* VENKATAPPAYYA. **122 I.C. 653= 1929 M.W.N. 664=A.I.R. 1930 Mad. 337.**

—Appreciation of—Reliability.

———*Signature in different places.*

The fact that in one place of an account book the signature of a party may be forged cannot preclude the Court from holding that his signature in another place is genuine. (*Odgers, J.*). RAMASWAMI *v.* RAJU. **96 I.C. 1051=1926 M.W.N. 635= A.I.R. 1926 Mad. 963=51 M.L.J. 167.**

———*Vernacular record.*

Generally in cases where evidence is given by a witness in his own language, the vernacular record is always treated as more reliable and entitled to greater weight, though this maxim could not always be safely applied in cases where a Magistrate who is taking down the evidence simultaneously in English understands the language as well as his reader. (*Abdul Qadir, J.*). SADHU SINGH *v.* KING-EMPEROR. **73 I.C. 513=24 Cr.L.J. 625= A.I.R. 1923 Lah. 167.**

———*Confession—Delay.*

When the story of confession was not told by the witness until after a fortnight of the occurrence, the evidence is unreliable. (*Coutts and Adami, JJ.*). NIRU BHAGAT *v.* EMPEROR. **71 I.C. 219= 1 Pat. 630=4 P.L.T. 76=24 Cr.L.J. 91= A.I.R. 1924 Pat. 582.**

—Appreciation of—Trial Court's opinion.

———The Court of appeal ought to give sufficient weight to the opinion of the trial Judge on the demeanour, intelligence, position and character of the witnesses who were brought before him before reviewing the findings of the trial Judge, who, upon such matters, is in a position to form a much better judgment than could be formed by Judges who had not had the advantage of seeing the witnesses. A.I.R. 1923 P.C. 62, *Rel. on.* (*Raymond and Madgavkar, A.J.Cs.*). RATANSING GULABSING *v.* NANIK RAM CHATOMAL. **20 S.L.R. 220= A.I.R. 1927 Sind 219.**

—Appreciation of—Will.

———*Circumstantial evidence.*

Where if *B* had been adopted there was no necessity to have a will in his favour and it seemed that the husband of testatrix in his desire to retain the property of his deceased wife in his hands had been resorting to various devices and the idea of getting a will from his wife shortly before her death was one of those devices.

Held, that neither the will nor the adoption was held to be proved. (*Broadway and D. Abdul Qadir, JJ.*). HAR BHAGWAN *v.* HUKAM SINGH. **68 I.C. 769=4 Lah. L.J. 245=3 Lah. 242= A.I.R. 1922 Lah. 243.**

—Appreciation of—Witnesses.

———*Cross-examination—Demeanour.*

Unless the evidence given by witnesses is shaken in cross-examination or their demeanour is such as to lead one to the inevitable conclusion that they have perjured themselves, no Court is entitled to discard evidence on the ground that the witnesses are tenants of a party to the suit. (*Wort, J.*). BEAS SINGH *v.* KHEDU MIAN. **123 I.C. 637= A.I.R. 1930 Pat. 58.**

———*Partisans.*

Where the witnesses are partisans there is always a tendency to strain a point in favour of a friend. It is doubtful if such can conceive that he was thereby doing something improper. The attitude of mind is often a self-deception produced

EVIDENCE—Appreciation of—Witnesses.

sub-consciously by an outside cause. In these circumstances best method to arrive at a correct conclusion is to look at inherent probabilities of the case. (*Stuart, C. J. and Raza, J.*). NISAR ALI KHAN *v.* MUHAMMAD ALI KHAN. **119 I.C. 337= 6 O.W.N. 549=A.I.R. 1929 Oudh 494.**

———*Contradictory evidence—Credibility—Finding of trial Court.*

It is doubtless true that on appeal the whole case, including the facts, are within the jurisdiction of the appeal Court. But, genearally speaking it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses, and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses.

When the appellate Court finds witnesses for plaintiff deposing to facts absolutely contrary to the facts to which the witnesses for defendant depose; when witnesses on one side are *prima facie* as deserving of credit as the witnesses on the other side; when the witnesses on neither side have been shaken in cross-examination and when trial Court has applied its mind intelligently as to the witnesses whom it should believe and the witnesses whom it should not believe, the finding of the trial Court as to the credibility of the witnesses should be accepted. A. I. R. 1915 P. C. 1, *Foll.* (*Stuart, C. J. and Raza, J.*). RAJ BOCHAN SINGH *v.* SRI THAKORJI MAHARAJ. **4 O.W.N. 1179= A.I.R. 1927 Oudh 618.**

———*Interested.*

Where the brother of the witness in question brought a complaint for causing hurt against the first cousin of the accused a year before,

Held, that this was not a sufficient reason for disbelieving the evidence of the witness. (*Scott-Smith and Martineau, JJ.*). DILIP SINGH *v.* EMPEROR. **86 I.C. 341=7 L.L.J. 44=26 Cr.L.J. 757= A.I.R. 1925 Lah. 318.**

———*Medical opinion—Eye-witness—Value of.*

Where there is the testimony of a considerable body of trustworthy witnesses of good position and undoubted respectability who were able to observe facts and draw inferences therefrom, who acted not in secrecy but with the utmost publicity in the midst of a large assembly and who had no intelligible motive to engage in a conspiracy for setting up a false testamentary instrument, the opinion of a medical man as to what should have been the probable state of the testator should not outweigh and prevail over the testimony of such eye-witnesses. (*Mookerjee and Chotzner, JJ.*). SARADINDU NATH RAI CHAUDURI *v.* SUDHIR CHANDRA DAS. **69 I.C. 48=50 Cal. 100=35 C.L.J. 569= A.I.R. 1923 Cal. 116.**

———*Debtor to party.*

To say that, because one in the ordinary course of one's business, owes money to a certain person, one should not be believed when speaking in favour of that person, is too absurd. (*Maung Kin, J.*). MAUNG PO GYON *v.* MAUNG SO. **70 I.C. 902= 1 Bur. L.J. 213=A.I.R. 1923 Rang. 30.**

———*Suggestion of doubt—Poor witness—Credibility.*

In order to discredit a witness it is not enough to suggest doubts about his veracity. If the means of contradiction are available to the party who challenges his truthfulness these should be produced before the Court. It cannot be affirmed as a general rule that a person is not trustworthy because he is not wealthy. (*Mookerjee and Buckland,*

EVIDENCE—Circumstantial evidence.

JJ.). PRASANNAMOYI DEBI *v.* BAIKUNTHA NATH CHATTORAJ. **66 I.C. 782=49 Cal. 132= 34 C.L.J. 384=25 C.W.N. 779= A.I.R. 1922 Cal. 260.**

———*Appreciation of—Miscellaneous.*

———Per *Hallifax, A.J.C.*—There is no distinction between what a prudent man would believe out of Court and what a Judge may believe. (*Hallifax, Prideaux and Kotval, A.J. Cs.*). SAPKU *v.* EMPEROR. **65 I.C. 561=23 Cr. L.J. 129= A.I.R. 1922 Nag. 146.**

—Circumstantial evidence.

———*Partisan—Direct evidence.*

Where there is very strong feeling between the parties and direct evidence on both sides is of a partisan character, it is safe to decide the case upon the circumstances and probabilities. (*Lindsay and Banerji, JJ.*). SIBT AHMAD *v.* AMINA KHATOON. **113 I.C. 434=26 A.L.J. 705= 50 All. 733=A.I.R. 1929 All. 18.**

———*When conclusive.*

Per *Mukerji, J.*—Circumstantial evidence should not merely point to the inference that is to be drawn, but that the evidence must be of such a nature that it can possibly lead to no other inference. (*Rankin, C.J. and Mukerji, J.*). KAMAL KUMAR *v.* NANDULAL DUBAY. **116 I.C. 378= 33 C.W.N.211=56 Cal. 738= A.I.R. 1929 Cal. 37.**

———The ordinary rule in a case of circumstantial evidence is that, in order to justify a conviction, it should be incompatible with any reasonable hypothesis than that of the accused's guilt. (*Fawcett and Mirza, JJ.*). EMPEROR *v.* ISMAIL KHADIRSAB. **108 I.C. 501=52 Bom. 385= 30 Bom. L.R. 330=10 A.I.Cr.R. 118= 29 Cr. L.J. 403=A.I.R. 1928 Bom. 130.**

———*When conclusive—Incompatibility with innocence.*

In order to infer guilt from the circumstantial evidence it must be shown that the inculpatory facts are incompatible, with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. (*Tek Chand, J.*). PRITCHARD *v.* EMPEROR. **112 I.C. 850=30 Cr. L.J. 18=11 A.I. Cr. R. 405= A. I. R. 1928 Lah. 382.**

———*When sufficient for conviction.*

Circumstantial evidence to convict a person requires a high degree of probability, that is sufficiently high that a prudent man, considering all the facts and realizing that the life or liberty of the accused person depends upon the decision, feels justified in holding that the accused committed the crime. 32 P.R. 1916 Cr., *Foll.* (*Addison and Coldstream, JJ.*). DINA *v.* EMPEROR. **109 I.C. 912=29 Cr. L.J. 640=10 A.I. Cr. R. 350.**

———*Exhaustiveness—Probability.*

Though circumstantial evidence must be exhaustive, that does not mean that every incident short of the actual commission of the offence must be proved by positive evidence but that what is required is so high a degree of probability that a prudent man would feel justified in holding that the accused committed the crime. 32 P. R. 1916 Cr., *Appl.* (*Campbell and Addison, JJ.*). BUTA SINGH *v.* EMPEROR. **97 I.C. 752=7 Lah. 396= 27 Cr. L.J. 1168=27 P.L.R. 447= A.I.R. 1926 Lah. 582.**

———The minutes of a meeting are *prima facie* evidence of what happened at the meeting. (*Shah*)

EVIDENCE—Circumstantial evidence.

Ag. C.J. and Fawcett, J.). PARSHURAM DATTARAM *v.* TATA INDUSTRIAL BANK, LTD.
90 I.C. 580=26 Bom. L.R. 987=A.I.R. 1925 Bom. 49.

———*Redness of eyes—Bhang smoker.*

The redness in the eyes of a person may be due to several causes and in the absence of evidence it cannot be held that the person merely on that account is an habitual smoker of bhang. (*Gokaran Nath, A.J.C.*). BAHADUR DUBE *v.* KING-EMPEROR.
89 I.C. 145=12 O.L.J. 388=26 Cr. L.J. 1281=A.I.R. 1925 Oudh 480.

———*Oral evidence—Equal value.*

Where the question involved is whether the guardian was guilty of gross negligence in the conduct of the case,

Held, that circumstantial evidence is as good as any other kind of evidence in such matters and perhaps better evidence than oral evidence. (*Krishnan and Venkatasubba Rao, JJ.*). VEERAPPAN *v.* MENNAPPAN. **70 I.C. 335= 31 M.L.T. 449=A.I.R. 1923 Mad. 245.**

———*When conclusive.*

If an accused person is to be convicted on circumstantial evidence the circumstances must be such as to exclude all reasonable probability of his innocence. (*Scott-Smith and Abdul Raoof, JJ.*). MD. YAR *v.* EMPEROR. **81 I.C. 555=4 Lah. L.J. 235=25 Cr. L.J. 939=A.I.R. 1922 Lah. 263.**

———The fundamental rule by which circumstantial evidence is estimated is that in order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis other than that of his guilt. It is safer to follow the rule that "the fouler the crime the clearer and the plainer the proof ought to be." (*Jwala Prasad and Sultan Ahmed, JJ.*). RAGHUNANDAN KOERI *v.* EMPEROR. **59 I.C. 858=22 Cr.L.J. 154=1 Pat. L.T. 684.**

—Corroboration.

———*Contemporaneous documentary evidence—Oral evidence.*

Where there is a difficult investigation of a fact, the history relating to which is somewhat obscure, contemporaneous documentary evidence, if it is trustworthy, should be preferred to any amount of oral evidence, which does not always create the same amount of confidence. (*Banerji and King, JJ.*). DEBI DAYAL *v.* AMBIKA PRASAD.
119 I.C. 99=A.I.R. 1929 All. 545.

———*Statement of witness.*

It is impossible to treat statements by a witness as corroborating his own evidence, these being merely parts of that very evidence itself. (*Lord Darling.*) LIM YAM HONG & CO. *v.* LAN CHOON & CO. **107 I.C. 457=47 C.L.J. 288=30 Bom. L.R. 757=29 M.L.W. 520=A.I.R. 1928 P.C. 127=56 M.L.J. 88 (P.C.)**

———*Partisan—Oral evidence—Documentary evidence.*

Where there are two factions, each trying to support its own candidate, *i.e.*, either one party or the other the oral evidence given on either side should not be believed and acted upon except where it is borne out and corroborated by the documentary evidence. (*Waller and Madhavan Nair, JJ.*). LAKSHMINARAYAN *v.* K. PUNNAYYA.
103 I.C. 134=A.I.R. 1927 Mad. 820.

EVIDENCE—Credibility.

———*Marriage settlement—Oral evidence—Written evidence.*

It would be unwise of a Judge to act in a disputed Indian case upon oral evidence that there had been an ante-nuptial agreement which would in effect be a marriage settlement unless there was contemporaneous written evidence to corroborate the oral evidence. (*Sir John Edge.*) LAKSHMIAH *v.* KOTHANDARAMA. **88 I.C. 327=27 Bom.L.R. 1076=29 C.W.N. 1013=1925 M.W.N. 717=48 Mad. 605=3 Pat.L.R. 290=23 M.L.W. 138=23 A.L.J. 662=52 I.A. 286=42 C.L.J. 8=A.I.R. 1925 P.C. 181=49 M.L.J. 109 (P. C.).**

———*Police surveillance—Statement under.*

No reliance should ordinarily be placed on the uncorroborated testimony of a criminal who has undergone a sentence of imprisonment and is under police surveillance especially when he is produced by Police under whose supervision he is. (*Shadi Lal, C.J. and Jafar Ali, J.*). NAWAB *v.* THE CROWN. **89 I.C. 311=7 L.L.J. 219=26 P.L.R. 518=26 Cr.L.J. 1335=A.I.R. 1925 Lah. 397.**

—Credibility.

———*Oral evidence—Documentary evidence.*

The trial Judge did not deal with the genuineness of the entries in the books of Pandas upon any reasoned footing. He had no evidence before him directly bearing upon the topic of genuineness, except such as may have been afforded by the comparison of certain signatures. He pronounced the entries forgeries because they were inconsistent with the evidence of one *B*, whom he believed in all. For the same reason he declared that one other document was a forgery, although apparently he had not before him the original or any satisfactory evidence of the circumstances in which it was alleged to have been made. The High Court, however, approached the matter from a different angle. The Judges thought it proper to make a critical examination of the actual books and of the evidence, if any, supporting or impeaching the genuineness of the entries, and after the most rigid scrutiny of these books, came to the conclusion that the entries were undoubtedly genuine. They also weighed the oral evidence directed to the rest of the case, and having seen *M*, the principal witness, rejected the evidence. Upon these findings the ultimate conclusion at which the High Court arrived was inevitable. (*Lord Tomlin.*) MALAYAM SINGH *v.* SHIVRAJ SINGH. **118 I. C. 13=1929 A. L. J. 856=30 M. L. W. 744=A. I. R. 1929 P. C. 217=57 M. L. J. 572 (P. C.).**

———*Finding as to—Legal evidence.*

It is open to the Court to find that the evidence of a person is not worthy of credit; but it cannot arrive at a finding in absence of legal evidence. (*Bennet and Iqbal Ahmad, JJ.*). SHUJAUDDIN KHAN *v.* MEHDI RAZA. **118 I. C. 230=A.I.R. 1929 All. 873.**

———*Competency to decide—Privy Council.*

On a pure question of credibility of witnesses, the Privy Council have no better competence to determine where the truth lay than the lower Appellate Court has. (*Viscount Sumner.*) RAM GOPAL *v.* DHANJI JADHAVJI BHATIA.
111 I.C. 480=55 Cal. 1048=55 I.A. 299=48 C.L.J. 567=1928 M.W.N. 924=24 N.L.R. 154=30 Bom. L.R. 1389=32 C.W.N. 1117=28 M.L.W. 55=11 N.L.J. 229=A.I.R. 1928 P.C. 200=55 M.L.J. 248 (P. C.).

EVIDENCE—Credibility.

———*Trial Judge's opinion.*

At all times considerable weight should be attached to the opinion of the Judge who heard the witnesses as to their relative credibility. When the record does not show that the witnesses on either side have been materially discredited or greatly shaken in cross-examination, it is the duty of the Judge to decide which side is telling the truth. When the Judge has tried the case with marked care and intelligence, his opinion as to credibility of the witnesses should ordinarily be accepted. (*Stuart, C. J. and Gokaran Nath Misra, J.*). MUKTA PRASAD *v.* EMPEROR. **94 I.C. 193= 27 Cr. L.J. 577=13 O.L.J. 69.**

———*Changing sides.*

A witness who has changed sides and has made statements in favour of both the prosecution and the accused is an unreliable witness and neither of his statements can be believed. (*Wazir Hasan, A.J.C.*). SARJU SINGH *v.* EMPEROR.

88 I.C. 852=26 Cr. L. J. 1236= A.I.R. 1925 Oudh 726.

———*Denomination.*

Credibility of witnesses or jurors must not be judged from their denomination. 11 C.W.N. 1085, *Foll.* (*Mookerjee and Chatterjee, JJ.*). MAMFRU CHOWDHURY *v.* EMPEROR.

81 I.C. 264=51 Cal. 418=38 C.L.J. 397= 25 Cr. L.J. 776=A.I.R. 1924 Cal. 323.

———*Impracticability.*

Where a witness states that he could see and did see, in apparently very short time, that a certain quantity of land had not been cleared, the statement can be disbelieved as being improbable only if cross-examination is directed to the impracticability of forming a judgment by mere inspection even with the aid of glasses, as to the proportion cleared. (*Viscount Haldane*). NABA KUMAR DAS *v.* RUDRA NARAYAN. **77 I.C. 141= 1923 M.W.N. 622=28 C.W.N. 589=33 M.L.T. 309= 5 L.R. P.C. 25=A.I.R. 1923 P.C. 95= 45 M.L.J. 438.**

———*Delay in disclosure.*

Where a witness keeps quiet for many days after the occurrence and comes forward after the police had made a discovery he is not reliable. (*Shadi Lal, C. J. and Zafar Ali, J.*). RULLIA RAM *v.* THE CROWN. **84 I.C. 321=5 L.L.J. 325= 26 Cr.L.J. 257=A.I.R. 1923 Lah. 438.**

———*Discredited testimony on material facts.*

In dealing with the evidence of witnesses who have been discredited on important and material facts as not speaking the truth it will be well to remember that their evidence on other points must be received with considerable caution. Witnesses who are proved to be not speaking the truth on some important points ought not to be trusted implicitly. 27 C. 637 at p. 646 (P. C.), *referred to.* (*Kumaraswami Sastry and Reilly, JJ.*). RAHIMATULLA SAHIB *v.* KAMARAJA PANDIYA. **1930 M.W.N. 417.**

———*Demeanour—Trial Judge's opinion—Proved facts—Appellate Court's opinion.*

When the question is whether a witness is speaking the truth or not, light is thrown upon it by the demeanour of that witness in the box by the manner in which he answers question, and by how he seems to be affected by the questions that are put to him, and so on. No doubt there the trial Judge has an advantage which cannot possibly be shared by any appellate Court. But when the views upon credibility are founded upon argumentative inferences from facts which are not disputed, then the Court of Appeal is really in just as good a situation as the Judge of first instance. (*Lord Dunedin*). PALCHUR SANKARAREDDI *v.* PALCHUR MAHALAKSHMAMA. **70 I.C. 949= 27 C.W.N. 414=17 M.L.W. 1=31 M.L.T. 307= A.I.R. 1922 P.C. 315.**

EVIDENCE—Criminal Trial.

———*Person acquitted in prior case.*

In estimating the value of the evidence given by a witness, the elementary principle must not be overlooked that where there has been an acquittal, the acquittal is conclusive and it would be a very dangerous principle to adopt to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates. (*Mookerjee and Buckland, JJ.*). SAROJINI DASSI *v.* HARI DAS GHOSE. **66 I.C. 774=49 Cal. 235= 34 C.L.J. 373=26 C.W.N. 113= A.I.R. 1922 Cal. 12.**

—Criminal Trial.

———*Examination of witnesses—Obligation of prosecution—Right of cross-examination by defence.*

The prosecution is under no obligation to examine witnesses who it has reason to believe will not speak the truth. It is usual in such circumstances for the prosecution to tender such witnesses for cross-examination. The defence, however, is certainly entitled to claim that privilege but having omitted to do so they cannot be permitted to make capital of the fact that these witnesses were not cross-examined. 8 Cal. 121, *held too widely stated.* (*Graham and Lort Williams, JJ.*). NAYAN MANDAL *v.* EMPEROR. **34 C.W.N. 170= 1930 Cr. C. 134=A.I.R. 1930 Cal. 134.**

———*Retraction.*

In a case of murder, the evidences of witnesses who have resiled from their previous statements should not be relied upon. (*Devadoss and Wallace, JJ.*). AYYAMPERUMAL PILLAI *v.* EMPEROR. **91 I.C. 50=27 Cr.L.J. 18=1925 M.W.N. 319= 22 M.L.W. 405=A.I.R. 1925 Mad. 879.**

———*Immaterial discrepancies in.*

Where the reason for the acquittal of the accused by the learned Sessions Judge was certain inconsistencies and improbabilities in the evidence of the prosecution story and the difficulty of finding any explanation justifying the rejection of the *alibi.*

It was *held*, that if the prosecution is to be rejected in substance there must be some other explanation of the facts that actually occurred. Failing any such explanation it is not permissible to reject the prosecution evidence owing to immaterial discrepancies or improbabilities. (*Lyle and Ashworth, A. J. Cs.*). EMPEROR *v.* NAROTAM. **74 I.C. 434= 10 O.L.J. 68=24 Cr. L. J. 770= A. I. R. 1923 Oudh 217.**

———*Partial credibility.*

Evidence of a witness, if held to be unreliable in respect of one accused cannot be held to be reliable in respect to other accused. (*Shadi Lal, C. J. and Le Rossignol, J.*). KHERI *v.* THE CROWN. **99 I. C. 857=3 L.L.J. 147=28 Cr. L. J. 185.**

———*Nature of offence—Quantum of evidence.*

The fouler the crime, the clearer and plainer the proof ought to be, though it cannot be laid down as a proposition of law that the quantum or value of evidence must be proportionate to the enormity of the crime or the consequences which may follow from convictions. (*Jwala Prasad and Sultan Ahmad, JJ.*). RAGHUNANDAN KOERI *v.* EMPEROR **59 I.C. 858=22 Cr. L. J. 154=1 P. L. T. 684.**

EVIDENCE—Documents.

—Documents.

———*Account books.*

The noting of the items in the account book kept regularly by munim in whose presence the money was not paid is no evidence. (*Martineau, J.*). FIRM GOKAL MAL. *v.* FIRM NATH MAL.
75 I.C. 812=A.I.R. 1923 Lah. 431.

———*Two conveyances—Same parties—Falsity of one—Truth of other.*

Where two instruments of conveyance between the same parties are very intimately connected with each other, and from the evidence of the parties one of them is found to be false and fraudulent, the evidence of the parties with regard to the other should be approached with great suspicion and subjected to strictest scrutiny. The mere fact that the one was false and fraudulent transaction does not by itself prove that the other deed was also false and fraudulent, but it does throw upon the party a heavy burden to prove that the same was a *bona fide* document and not executed with a view to defeat or delay any claims of the creditor on the executant of the deed. (*Sir Binode Mitter.*) MOHAMMAD ALI MOHAMMAD KHAN *v.* MT. BISMILLAH BEGAM. **A.I.R. 1930 P.C. 255.**

Documents—Award.

———Where exclusive title is set up on the strength of an award, the award must be produced. (*Raza, J.*). NAROTTAN DAS *v.* MAHOMMAD RAZA.
96 I. C. 14=A. I. R. 1926 Oudh 522.

—Documents—Decree.

———Where there was a decree in favour of a cosharer, against Government followed by a partition in accordance with the decree between that cosharer, plaintiff and Government,

Held, the decree being followed by partition is elevant and is an important piece of evidence in a suit by the plaintiff against the Government in rerspect of portion of the property covered by the previous suit. (*Lord Phillimore*). NARESH NARAYAN *v.* SECY. OF STATE. **77 I.C. 1048=32 M.L.T. 162=1923 M.W.N. 511=50 Cal. 446=50 I. A. 121=28 C.W.N. 453=4 L.R.P.C. 50=A.I.R. 1923 P.C. 1=45 M.L.J. 444.**

—Documents—Horoscopes.

———Horoscope is not in itself a probative document. The importance of the custody of the documents related to their genuineness and not to relevancy. (*Dalal and Simpson, A. J. Cs.*). AMBIKA PRASAD *v.* LAL BAHADUR. **83 I.C. 840=11 O.L.J. 164=A.I.R. 1924 Oudh 353.**

—Document—Judgment.

—*Proof of litigation.*

The fact that a judgment is admitted in evidence in order to prove that there was litigation which terminated in a certain way, does not make all the recitals in that judgment part of the evidence in the subsequent action. 20 C.W.N. 643; 23 C.L.J. 583; (1915) and 42 M. L.J. 324 (F.B.) (1922), *Foll.* (*Mookerjee and Rankin, JJ.*). ABDUL LATIF KAZI *v.* ABDUL HUR KAZI. **81 I.C. 667=28 C. W. N. 62=A.I.R. 1924 Cal. 523.**

———*Proof of Custom.*

Where a question of custom is under consideration, a succession of judgments relating thereto is valuable evidence from which the Court can come to a conclusion. (*Ashworth, J .C. and Simpson, A.J.C.*). THAKUR RUDRAPROTAP NARAYAN SING *v.* THAKUR NIRMAN PRASAD SING. **74 I.C. 225=9 O.L.J. 552=A.I.R. 1923 Oudh 61.**

EVIDENCE—Document—Relevancy of.

—Documents—Maps.

———*Entries.*

The entries in *Thakbast* map and *Khasra* made by an Amin before and for the preparation of survey have no evidentiary value. (*Mr. Ameer Ali*). JAGDEO NARAIN SINGH *v.* BALDEO SINGH. **71 I.C. 984=1923 M.W.N. 361=27 C.W.N. 925=3 P.L.T. 605=49 I.A. 393=36 C.L.J. 499=32 M.L.T. 1=2 Pat. 38=A.I.R. 1922 P.C. 272=45 M.L.J. 460.**

—Documents—Probative value.

———The decision of a question of fact must depend on evidence. That evidence may be, and naturally is, documentary, but the documents admitted in evidence upon that question are really historical materials and although they have to be construed, and if possible understood, they are not to be treated as involving issues of law merely because they have to be construed. It is not as though they were being construed as instruments of title, or were contracts or statutes, or otherwise the direct foundation of rights. (*Lord Sumner*). MID. ZAMINDARI CO. *v.* UMA CHARAN. **74 I.C. 482=40 C.L.J. 16=29 C.W.N. 131=21 A.L.J. 723=25 Bom. L.R. 1287=4 L.R.P.C. 184=33 M.L.T. 291=1923 M.W.N. 832=4 P.L.T. 627=A.I.R. 1923 P.C. 187=45 M.L.J. 663.**

—Documents—Proof of.

———*Production by accused.*

A document produced by the accused in support of his own defence need not be formally proved by prosecution as against the party producing it. (*Kinkhede, A. J. C.*). MOHAMAD IBRAHIM *v.* EMPEROR. **112 I. C. 902=30 Cr. L.J. 38=11 A.I.Cr.R. 526=A.I.R. 1929 Nag. 43.**

———*Presence of opposite-party—Production and exhibition.*

Formal proof should be presumed to have been waived where a document is produced in the presence of the opposite party and marked as an exhibit. (*Curgenven, J.*). ZAMINDAR OF BODOKIMIDY *v.* BUDANKAYALA BHIMAYYA. **98 I.C. 800=24 M.L.W. 677=A.I.R. 1927 Mad. 76.**

———*Mode—Objection.*

Any objection as to the method of proving a particular document must be taken when it is tendered for admission. (*Mukerji, J.*). ABDUL SAMAD *v.* GUNENDRA KRISHNA ROY. **82 I.C. 974=A.I.R. 1925 Cal. 452.**

———*Waiver.*

The question of relevancy of a document is a question of law and can be raised at any stage but the question of proof is a question of procedure and can be waived by the parties. (*Das and Bucknill, JJ.*). KUMAR KALIKANAND SINGH *v.* SHIVA NANDAN PRASAD SINGH. **63 I.C. 625=3 Pat. L.T. 149=A.I.R. 1922 Pat. 122.**

—Documents—Record.

———*Hakikat Chauhaddi Bundi papers.*

Hakikat Chauhaddi Bundi papers are boundary papers prepared by the owners of the estates and submitted to Government. 26 C.L.J. 500 (P.C.), *Foll.* (*Mookerjee and Buckland, JJ.*). SECY. OF STATE *v.* WAZER ALI. **65 I.C. 866=34 C.L.J. 141=A.I.R. 1921 Cal. 687.**

—Document—Relevancy of.

———*Consideration by appellate—Court. Civil P.C., O. 44 R. 24.*

The first appellate Court which is a Court of fact as well as of law can consider the question of the relevancy of a document which is only a piece of evidence, though this question was not raised in

EVIDENCE—Documents—Relevancy of.

the Trial Court. (*Mallik, J.*). KANTESWAR SARKAR v. INDRAMANI DASHYA. **109 I.C. 25= A.I.R. 1928 Cal. 512.**

———*Against non-party.*

Documents prepared by a surveyor under the authority of the Collector who was then the agent of the Court of Wards in the course of a survey under the Court of Wards Act for the purpose of the Court of Wards are of little or no probative value in a case of a person who was in no way concerned in the proceedings before the surveyor. (*Devadoss, J.*). ARJUNA *v.* DAYANIDHI. **98 I.C. 301. A.I.R. 1927 Mad. 60=51 M.L.J. 637.**

———*Private document—Government records.*

A mere document between private parties cannot possibly be proof of the correctness of any description of the land contained therein, in the face of entries in Government records. (*Wallace, J.*). RAMASWAMI THEVAN *v.* ALAGU PILLAI. **79 I. C. 881=A. I. R. 1925 Mad. 143.**

—Documents—Reports.

———*Commissioner.*

A Commissioner's report is evidence in the case, but Courts should take care to see that the report is filed as an exhibit. (*Devadoss, J.*). ARJUNA MAHAPATRO *v.* DAYANIDHI BOINPALI. **98 I. C. 301=A. I. R. 1927 Mad. 60= 51 M. L. J. 637.**

———*Commissioner.*

Ordinarily in a boundary dispute the Commissioner's report is of great importance but where the finding of the Commissioner are inconclusive his report is not of much help to the Court. (*Chatterjea and Panton, JJ.*). ABDUL HAMID *v.* BROJENDRA KUMAR. **90 I. C. 643= A. I. R. 1926 Cal. 290.**

———*Inam statement—Inam register.*

An Inam statement is only a statement made by a party at the Inam inquiry and is merely an assertion of his alleged title before a tribunal which has to decide it. The Inam register embodies the result of the finding of the Inam Commissioner, based partly on statements put in by the parties and partly on other evidence and should be looked to see what the facts were. 'Maseethu' is a Telugu form of the Hindustani word "Musjid" which means a Mosque and a 'Panjab' is not called "Maseethu" in Telugu.

The word Devadayam implies a public endowment. 24 Mad. 243, *Foll.* (*Phillips and Venkatasubba Rao, JJ.*). P. PACHA SAHEB *v.* MOHAMMAD RAHIMUDDIN SAHEB. **77 I. C. 777= 19 M. L. W. 174=1924 M. W. N. 217= 34 M. L. T. 347=A. I. R. 1924 Mad. 431= 46 M. L. J. 243.**

—Duty of Court.

———*Allegation against deceased person.*

Where an allegation is made against a deceased person to the detriment of his estate, Courts of law should scrutinize it carefully before accepting it as correct. (*Mirza, J.*). KRISHNA BAI *v.* VARJIWANDAS JAGJIWANDAS. **32 Bom. L.R. 201= A.I.R. 1930 Bom. 236.**

———*Written statement manifestly not true.*

A written statement which is manifestly not true cannot be used as substantive evidence of the truth of what is stated in it. To do so is contrary to technical rules of evidence. (*Courtney-Terrell, C.J. and James, J.*). GOBIND GORHI *v.* BALDEO RAM. **A.I.R. 1930 Pat. 293.**

———*Doubt.*

It is a principle of law that if it is doubtful whether evidence is admissible or inadmissible

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then the benefit must be given in favour of the evidence. (*Dalip Singh, J.*). MOHANLAL *v.* MT. TULSAN. **109 I.C. 774=A.I.R. 1928 Lah. 824.**

———*Loss of document—Absence of plea—Relevant evidence.*

A document which was relied on was mentioned in the plaint. The document was lost and the fact that it was lost was mentioned in an oral pleading made while evidence was being given and leave was asked to prove it by secondary evidence. This was refused on the ground that no plea of loss of document was raised in the earliest stage. The document was found subsequently and was tendered in the lower Appellate Court, and that Court was of opinion that the refusal to admit secondary evidence was correct because no plea about the loss of the original document was made and he refused to accept the document itself for the same reason,

Held, it is the duty of a Court to get hold of all the relevant evidence there may be and to examine it, giving of course due weight to any circumstances attending its production that might render it less or more credible, and giving the other party a fair opportunity of meeting it, and no Court has the right to reject evidence tendered at any stage of the trial before its close unless it is irrelevant. (*Hallifax, A.J.C.*). KAMOD SINGH *v.* KHEM KARAN. **103 I.C. 186=10 N.L.J. 129=A.I.R. 1927 Nag. 269.**

———*Relevant evidence.*

It is the duty of the Court to welcome any evidence that may be offered and indeed to search for it, and it is wrong to exclude any evidence that is relevant. If it is tendered late, such suspicion or disbelief of it as may be due to that fact will attach to it automatically, and if the other party has had no opportunity, because of the lateness of production of rebutting evidence he might have had, the disbelief is greatly increased. (*Hallifax, A.J.C.*). KESHEO RAO *v.* MAROTIRAO. **92 I.C. 102= 8 N.L.J. 227=A.I.R. 1926 Nag. 139.**

———*Admissibility—Summary decision—Doubtful cases—Procedure.*

Matters tendered in evidence by the prosecution affecting case, must be dealt with summarily and instantly by the Judge at the trial when they are tendered. Judges in a Court of appeal, are apt sometimes to attach weight to the opinion of the assessors, and although their opinion does not have any legal effect, the Judge ought to guard very carefully against allowing a discussion in Court, of the reading of a document in Court, in the presence of the assessors injurious to the accused, when it is by law inadmissible. The benefit of a reasonable doubt ought to be given from the Bench, even to the admission of evidence particularly documentary evidence, during the trial, and when the Judge is unable to make up his mind about admissibility, the proper course for him is, either to direct the prosecution to keep back the documets until he has an opportunity of looking into the law, or to reject them altogether. No Judge in a doubtful case of admissibility ought to allow the evidence first to be given, and then in his judgment give a decision about their admissibility. Doubtful or inadmissible documents ought not to be admitted in criminal trials. (*Walsh and Sulaiman, JJ.*). LAICAM SINGH *v.* EMPEROR. **86 I.C. 817=26 Cr. L.J. 881=6 L.R.A. Cr. 73= A.I.R. 1925 All. 405.**

———*Guilt or innocence—Decision on—Not soundness of plea.*

Even the entire omission of an available true and complete defence and the substitution for it of

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unsustainable falsehoods are so closely in accordance with the common, indeed almost universal course of human conduct that it cannot be inferred from such a defence that the guilt of the accused is likely. It is the duty of a Magistrate to find out whether an accused person is guilty or innocent, not merely to decide whether the pleas he chooses to put forward are sound or not. (*Hallifax, A.J.C.*). DOMAR SINGH *v.* EMPEROR. **66 I.C. 1001= 23 Cr. L.J. 345=A.I.R. 1922 Nag. 87.**

———*Production of books—Enforcement of order.*

All account books must be produced by the party who has possession of or control over them. If a party disobeys the order made in this behalf, the Court has ample power to enforce its order. (*Mookerjee and Walmsley, JJ.*). HARAMOHAN PODDAR *v.* SUDARSON PODDAR. **66 I.C. 811= 25 C.W.N. 847=A.I.R. 1921 Cal. 538.**

———*Materials placed by consent—Decision on—Practice.*

It is open to parties to agree as to materials to be placed before the Judge for his decision and if the Judge acts on such agreement, he does not thereby delegate his functions as a Judge. So if the parties consent, the Judge can act on the evidence taken by a Commissioner unauthorisedly. (*Richardson and Shamsul Huda, JJ.*). SHAMBHU NATH KHETTRI *v.* SATISH CHANDRA MITRA. **66 I.C. 49= 25 C.W.N. 369=A.I.R. 1921 Cal. 363.**

—Exclusion of.

———*Production at late stage.*

Where an application made for admitting, at an abnormally late stage, evidence which could have been equally well produced at the proper time is vexatious and made with the object of delaying disposal of the suit, such evidence should be excluded: 20 Cal. 740, *Dist.* (*Findlay, J.C. and Prideaux, A.J.C.*). CHOTESHA *v.* MT. MAKTUM BI. **109 I.C. 195=A.I.R. 1928 Nag. 223.**

———*Caste people—Voluntary evidence.*

Defence evidence should not be rejected on the ground that the witnesses were the caste-fellows of the accused or that they had come forward at the trial voluntarily without being summoned. 43 All. 186; A.I.R. 1923 All. 35 and 22 O.C. 375, *Rel. on.* (*Gokaran Nath, A.J.C.*). KEWAL KISHORE *v.* KING EMPEROR. **89 I. C. 147=12 O.L.J. 413= 26 Cr.L.J. 1283=29 O.C. 44= A.I.R. 1925 Oudh 473.**

———*Brahmins accused.*

Where the only ground which the lower Court gave for disbelieving witnesses was that accused were *Brahmins*, that the deceased was a woman and that the witnesses did not consider the death of a mere woman of any importance compared with the lives of *Brahmins* who were accused of her murder,

It was, *held*, the mere facts that the accused are *Brahmins* is not a sufficient reason for rejecting the evidence of witnesses who are *prima facie* reliable. (*Scott-Smith and Moti Sagar, JJ.*). SHEO RAM *v.* THE CROWN. **75 I.C. 733=6 L.L.J. 486= 25 Cr. L.J. 45=A.I.R. 1923 Lah. 436.**

———*Technical grounds.*

The exclusion of evidence of relevant facts on merely technical grounds is always to be deprecated. No legal fiction of presumption can lead to a just decision so surely as an ascertained truth. (*Batten, J. C. and Hallifax, A. J. C.*). BHURI BHAI *v.* ISHAK HUSEN. **69 I.C.619=A.I.R. 1923 Nag. 83.**

—Expert Evidence.

———*When admissible.*

The reports of the experts are not legal evidence unless they appear in Court as witnesses and

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are examined by both parties in respect of their opinion. (*Tek Chand, J.*). WADHAWA *v.* JAI KISHAN DAS. **106 I.C. 493=29 P.L.R. 125= A.I.R. 1928 Lah. 427.**

———*Dispute as to age—Limitation—Medical evidence.*

Medical evidence in cases of age of a party to a suit which falls to be decided for purposes of limitation cannot throw much light because from its very nature it is based on conjectures only and it cannot possibly be looked upon for the purposes of determining with precision the exact age of a particular person. In cases when limitation is pleaded in defence, a difference of even a single day settles the fate of the case one way or the other, and no doctor, however conscientious and competent he may be, can give the precise age of a person so as to enable the Court to determine the exact date of that person's birth. (*Tek Chand and Agha Haidar, JJ.*). ZONDA *v.* MT. ROSHNAI. **113 I.C. 53= 10 L.L.J. 183=A.I.R. 1928 Lah. 250.**

———*Statement in different trial—Admissibility of.*

The prosecution is not entitled to put in evidence statements made by a medical expert in some other trial in the absence of the accused. He ought to be examined orally like any other witness before the Magistrate and in the presence of the accused. Such statements if placed on record must be ignored. (*Fforde, J.*). SARDARA *v.* EMPEROR. **94 I.C. 139=26 Punj. L.R. 80= 27 Cr. L.J. 571.**

———*Consent to intercourse.*

The mere presence of semen on the loin cloth of the woman is not sufficient to prove that she was a consenting party, especially in the absence of any spermatozo in the vagina. (*Shadi Lal, C. J. and Lumsden, J.*). GHULAM HUSSAIN *v.* EMPEROR. **6 L.L.J. 474=A.I.R. 1925 Lah. 94.**

———*Dispute as to age.*

Conclusive evidence of age is very rarely obtainable in India. (*Dalal and Simpson, A. J. Cs.*). AMBIKA PRASAD *v.* LAL BAHADUR. **83 I.C. 840= 11 O. L. J. 164=A.I.R. 1924 Oudh 353.**

—Hearsay.

—Where evidence to support immigration of a Hindu family from one province into another is of witnesses who have heard about it from deceased members of the family, it is inadmissible. Cls. (5) and (6) of S. 32, Evidence Act do not apply to it. (*Jackson and Mohiuddin, A. J. Cs.*). RAMCHANDRA *v.* RAMABAI. **123 I.C. 907= A.I.R. 1930 Nag. 267.**

———*Basis of action.*

Under the Evidence Act hearsay evidence is inadmissible to prove a fact which is deposed to on hearsay, but does not necessarily preclude evidence as to a statement having been made upon which certain action was taken or certain results followed. (*Phillips and Madhavan Nair, JJ.*). VENKATARAMANUJACHARYULU *v.* APPALACHARYULU. **97 I.C. 785=24 M.L.W. 227= A.I.R. 1926 Mad. 1003.**

—Identification.

———*Identification proceedings.*

There is no section of the Evidence Act, which makes the identification proceedings evidence at all. (*Banerji, J.*). BINDESHRI *v.* EMPEROR. **98 I. C. 478=7 L.R. A. Cr. 170=27 Cr.L.J. 1358= A.I.R. 1927 All. 163.**

———*Indian women.*

Indian women can identify their own articles of jewellery even if they are of a common pattern,

EVIDENCE—Identification.

(*Scott-Smith and Eforde, JJ.*). ACHPAL *v.* EMPEROR. **89 I.C. 449=26 Cr.L.J. 1361=A. I. R. 1926 Lah. 132.**

———*When unreliable.*

An identification made of a man, who is said to have been wearing a beard at the time of offence and whose beard is concealed or absent at the time of identification, is by no means convincing, and when it stands alone, must be regarded as an unstable piece of evidence. (*Walsh and Sulaiman, JJ.*). LAIGAM SINGH *v.* EMPEROR. **86 I.C. 817=26 Cr. L.J. 881=6 L.R. A. Cr. 73=A. I. R. 1925 All. 405.**

———*Outsiders with accused—Legality of Procedure.*

Where owing to the scarcity of other under-trial prisoners in jail outsiders were brought in and placed in the line with the accused.

It was *held*, that the procedure was no doubt unusual, but in the peculiar circumstances of the case it was justified. (*Daniels and Neave, JJ.*). ABDUL WAHAB *v.* EMPEROR. **95 I.C. 756=47 All. 39=27 Cr. L.J. 836=5 L.R. A. Cr. 193=A. I. R. 1925 All. 223.**

———*After long time—Value of.*

Evidence of identification of persons previously unknown after a number of months that certain persons took part in an attack is unreliable, unless there was a regular identification parade in which the witnesses picked out those persons from among others, especially where it is not stated that such persons bear any distinguishing marks by which they can be recognised. (*Martineau, J.*). MAKHAN SINGH *v.* THE CROWN. **85 I.C. 61=6 L.L.J. 320=26 Cr.L.J. 445=A. I. R. 1924 Lah. 722.**

———*After questions put by Court—Value of.*

Where it appeared that it was only in answer to questions put by the Court that witness deposed to his being able to identify accused.

It was *held*, the danger of accepting such a testimony is apparent, since witness had ample opportunity to see the accused during the committal proceedings. (*Broadway, J.*). REHMAN *v.* THE CROWN. **83 I. C. 499=26 Cr. L.J. 19=5 L.L.J. 477=A.I.R. 1923 Lah. 662.**

———*Circumstantial evidence.*

Accused robbed three passengers in the female compartment causing them injuries one of whom received a grievous hurt, and then jumped out of the train, and was found lying by the railside as he broke his leg while jumping, having in possession some of the ornaments robbed while more valuable things were taken away by his companion,

Held, the guilt of the accused is perfectly made out. The offence was committed in the morning and the offenders were in the compartment for some time taking off ornaments from the person of the victims and causing them injuries, and there is nothing unlikely in their having been able to identify him. (*Abdul Qadir, J.*). SARIDAGAR *v.* KING EMPEROR. **A.I.R. 1923 Lah. 169.**

—Onus.

———*Admissibility.*

It is for the person tendering documentary evidence to show that it is admissible. (*Carr, J.*). ANWAR ALI *v.* TAFOZAL AHMED. **84 I. C. 487=3 Bur. L.J. 194=2 Rang. 391=A.I.R. 1925 Rang. 84.**

———*Admission of debt—Plea of limitation.*

Where a defendant admits a debt but pleads that it is barred, he has to prove his plea. Where, however, there is no such admission, the plaintiff has to prove everything required to entitle him to a decree. (*Curgenven, J.*). SUBBARAYUDU *v.* VENGAMA NAIDU. **128 I.C. 197.**

EVIDENCE—Pedigree.

———*Wrongly laid—When immaterial.*

When evidence has been led on both sides and a finding has been arrived at on a review of the entire evidence, it is immaterial that the *onus* of proof has been wrongly laid on a party. (*Mears, C.J. and Piggott, J.*). IQBAL HAIDER KHAN *v.* MT. WASI FATIMA. **74 I.C. 1004=45 All. 53=A.I.R. 1923 All. 358.**

———*Forgery.*

Where a certain document filed by one party is alleged to be a forgery, the Court is not bound to enquire into the details but the party alleging that it is a forgery must *prima facie* make out a case of forgery before asking the Court to reject the document as a forgery. (*Coutts and Das, JJ.*). LACHMI NARAIN AGARWALA *v.* MUKHRAM MARWARI. **72 I.C. 971=24 Cr. L.J. 507=A. I. R. 1923 Pat. 31.**

—Opinions.

———*Admissibility of.*

Only what the witness actually saw and heard as to what a mob was doing and saying is admissible to prove the nature of the assembly; his opinion and impressions that the assembly appeared to be unlawful are not admissible. (*Jwala Prasad, J.*). JOGI RANT *v.* EMPEROR. **105 I.C. 234=28 Cr.L.J. 906=9 P.L.T. 260=A.I.R. 1928 Pat. 98.**

———*Eye-witnesses—Conflict.*

Where the opinion of the doctor who visited the patient on one day was that she would not be capable of a particular action the next day after his visit.

It was *held*, the opinion must be hypothetical and cannot be implicitly relied upon or at any rate it must be put into the scale against the evidence of those who actually deposed that the particular act had been done by the patient. (*Macleod, C. J. and Shah, J.*). SHIDDUBAI RUDRAGAUDA DESAI *v.* NILAPPAGAUDA BHARMAGAUDA. **83 I.C. 616=26 Bom. L.R. 622=A.I.R. 1924 Bom. 457.**

—Pedigree.

———*Unknown common ancestor—Relationship.*

There can be no legal proposition that because the name of the common ancestor is not known, the relationship cannot be held to be proved. 6 Cal. 626, *Expl.* (*Kumaraswami Sastri and Ramesam, JJ.*). JAGANNATHAM *v.* VENKATA SUBBA RAO. **104 I.C. 468=50 Mad. 877=26 M.L.W. 115=A.I.R. 1927 Mad. 844=53 M.L.J. 864.**

———*Common ancestor—Settlement record.*

A certain common ancestor of the parties in the pedigree table recorded at the time of settlement indicates that the land in dispute was occupied by him. This is a piece of evidence to be taken into consideration along with other evidence in determining the issue, but it cannot be alone conclusive proof that the property has descended from that common ancestor. (*Shadi Lal, C.J. and Coldstream, JJ.*). SANDHI *v.* MT. DANI. **96 I.C. 349.**

———*Earlier and later—Conflict.*

Out of the two conflicting pedigrees, the one though brought to light later in point of time, but which was supported by verbal evidence and accepted by competent authorities was accepted in preference to that which was originally produced many years ago and contained the statement that it was all the pedigree that was then known made by the person who was the person most likely to have knowledge. (*Lord Buckmaster*). DODDAWA *v.* BENNEPAGOWDA. **86 I. C. 326=A. I. R. 1925 P.C. 199.**

EVIDENCE—Pedigree.

——*Production—Admission of relationship—Evidence Act, Ss.* 17 and 21.

From the mere fact that a pedigree is filed by a person, it cannot be assumed that he admitted all the relationship stated in it to be correct. (*Lyle, A.J.C.*) BHIMA SINGH *v.* MT. SUNDAR. **69 I. C. 421= 9 O. L. J. 186=26 O. C. 109= A. I. R. 1922 Oudh 218.**

—Personal knowledge.

——*Parties to mutation proceedings.*

It is impossible to fasten the knowledge of mutation proceedings upon persons other than the parties in absence of evidence to show that they had such knowledge (*Wazir Hasan, Ag. C.J., and Pullan, J.*). MT. GUJRATI KUNWAR *v.* BHAGWATIDIN SINGH. **118 I. C. 808=A.I.R. 1930 Oudh 17.**

——*Local inspection—When reliable.*

Where a plaintiff's evidence is not convincing but the defendant has produced practically no evidence, the Court can rely on the local inspection made by itself to determine whether the plaintiff's story is correct. (*Lindsay and Kanhaiya Lal, JJ.*). GHASI RAM *v.* BHOLA NATH. **79 I.C. 314=21 A.L.J. 886=5 L.R.A. (Civ.) 1= 46 All. 115=A.I.R. 1924 All. 153.**

——*Dispute as to age—Statement of person concerned.*

A man cannot give direct evidence of his own age, but his statements on the subject are not therefore to be dismissed as of no value. (*Kanhaiya Lal, J.C. and Daniels, A.J.C.*). KANDHAI LAL *v.* MAHOMED ALAM. **63 I.C. 525= 8 O.L.J. 324=A.I.R. 1921 Oudh 160.**

——*Tendering evidence—Duty of party.*

It is the bounden duty of a party personally knowing the facts and circumstances to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstance which will go to discredit the truth of his case. (*Shingue, J.*). MARTAND *v.* RADHABAI. **32 Bom. L.R. 924.**

—Presumption.

——*Possession—Record-of-rights.*

The presumption of correctness, which attaches to the finally published Record-of- Rights, relates only to possession at the time when the record is prepared: and, even if such presumption can be made in a criminal trial, it is clear that where there has been an interval of 10 or 12 years between the preparation of the record and the occurrence of an offence in respect of dispute arising over possession of land, any presumption arising from the record is obviously of the weakest possible description. Indeed the probative value is practically nil since all sorts of changes may obviously take place in the course of 10 or 12 years. (*Graham and Lort-Williams, JJ.*). NAYAN MANDAL *v.* EMPEROR. **34 C.W.N. 170=1930 Cr. C. 134= A.I.R. 1930 Cal. 134.**

——*Demeanour—Finding of trial Court.*

Trial Court not mentioning that reliance was placed on demeanour of witnesses—Reliance should be presumed.

Even though the trial Court does not mention that reliance was placed on demeanour of witnesses, it must be presumed. (*Lord Carson*). NETHELANDSCHE HANDEL *v.* R. M. P. CHETTIAR FIRM. **118 I.C. 257=7 Rang. 498=30 M.L.W. 569= A. I. R. 1929 P.C. 202.**

——*Non-production of document.*

Non-production of important documents raises adverse presumption against party not producing

EVIDENCE—Recitals..

the documents. (*Phillips and Srinivasa Ayyangar, JJ.*). NATESA PILLAI *v.* MEENAKSHISUNDARA MUDALIAR. **109 I.C. 96.**

——*Stolen property.*

The fact that a person is found in possession of stolen property shortly after the theft raises the presumption that he took part in the theft. (*Adami and Scroope, JJ.*). KHATIR JAMA KHAN *v.* EMPEROR. **123 I.C. 393=31 Cr. L.J. 492.**

——*Summon to witness—Failure to examine.*

Where both parties did summon the two attesting witnesses, and as the plaintiff gave them up the defendants did the same, the inference that if they had been examined they would have deposed against the plaintiff, cannot be drawn. (*Hallifax and Kotval, A.J.Cs.*). NILKANTHA RAO *v.* GUNABAI. **96 I.C. 401=A.I.R. 1926 Nag. 482.**

——*Credibility of witness—Relation to party.*

The mere fact that a witness is related to a party is not a true criterion for holding that he has given untrue or perjured evidence. (*Duckworth, J.*). KO MAUNG *v.* MAUNG BA HTWE. **98 I.C. 166= 5 Bur. L.J. 116=A.I.R. 1926 Rang. 204.**

——*Age of witness.*

The statements of ages of witnesses at the head of depositions do not furnish evidence on the subject. 26 All. 108 (P.C.), *Foll.* (*Mukerjee and Suhrawardy, JJ.*). LAKSHAN CHANDRA MANDAL *v.* TAKIM DHALI. **80 I.C. 357=39 C.L.J. 90= 28 C. W. N. 1033=A.I.R. 1924 Cal. 558.**

—Receipt.

——*Value of—Deed.*

The written acknowledgment of receipt is undoubtedly evidence of the fact that the money has been received, but it is not conclusive. (*Dawson-Miller, C.J. and Mullick, J.*). SAIYID ALI IMAM *v.* EMPEROR. **85 I.C. 164=4 Pat. 210= 6 P.L.T. 47=3 Pat. L. R. Cr. 85=1924 P.H.C.C. 349= A.I.R. 1925 Pat. 281.**

—Recitals.

——*Value of.*

Recitals in a deed are evidence. 44 C. 186 (P. C.), *Rel. on.* (*Stuart, J.*). SITA RAM *v.* REWA RAM. **71 I.C 390=A.I.R. 1923 All. 366.**

——*Living person—Admissibility.*

Where a document containing recitals by a person who is alive is admitted in evidence as evidence of a transaction, the recitals in the document do not become part of the evidence unless the person making the assertions is brought before the Court. (*Mukerjee and Chotzner, JJ.*). NIHAR BEWA *v.* KADAR BAKAS MOHAMMED. **68 I. C. 282=A.I.R. 1923 Cal. 290.**

——*Judgment.*

The substance of the pleadings narrated in the judgment furnishes evidence of the allegations made by the parties on that occasion. (*Mookerjee and Cuming, JJ.*). KAILASH CHANDRA NAG *v.* BEJOY CHANDRA NAG. **72 I.C. 680= 36 C.L.J. 434=A.I.R. 1923 Cal. 18.**

——*Third parties—Value against.*

Recitals in deeds are only evidence against the parties to the deed and persons claiming through or under them. (*Martineau, J.*). DHARAM SINGH *v.* KIRPAL SINGH. **69 I. C. 409=A.I.R. 1923 Lah. 31.**

——*Deeds of third parties—Admissibility—Evidence Act, Ss.* 11, 13 and 32 (2).

Recitals of boundaries of lands in documents between third parties are not admissible in evidence under S. 11 or S. 13 but are admissible under S. 32 (2) of the Evidence Act. (*Prideaux, A.J.C.*). TRIMBAKH *v.* GANESH. **68 I. C. 314= A. I. R. 1923 Nag. 22.**

EVIDENCE—Recitals.

———*Debts—Necessity—Proof of.*

Mere recitals in bonds are not presumptive proof of the necessity for the debts borrowed thereunder. (*Jwala Prasad and Adami, JJ.*). SHEIK KAROO *v.* RAMESHWAR SAO. **62 I. C. 905=3 P.L.T. 43= 6 P.L.J. 451= A.I.R. 1923 Pat. 143.**

———*Boundaries—Third parties' documents.*

Recitals of boundaries of other lands in documents between third parties, are not admissible in evidence. (*Chatterji and Suhrawardy, JJ.*). S. K. ACHARJI CHOUDHURY *v.* UMED ALI HAWALDAR. **63 I. C. 954=25 C. W. N. 1022= 35 C.L.J. 19=A.I.R. 1922 Cal.251.**

———*Invalid compromise—Admissions—Value of.*

Where the compromise is not binding on the parties any recital in it is not of much value as evidence. Parties are often willing to make admissions for the purpose of effecting a compromise, to which it would be unfair to hold them, if the compromise falls through. (*Daniels and Lyle, A.J.Cs.*). KUAR NAGESHAR SAHAI *v.* SHIAM BAHADUR. **9 O.L.J. 262=A.I.R. 1922 Oudh 231.**

———*'Mother'—Value of.*

Mother is a term used out of respect and affection among Indians and the mere use of this word in a deed does not denote the actual relation of mother and child between the parties when the whole tenor of the document is against such a conclusion. (*Daniels, J. C. and Dalal, A. J. C.*). MUMTAZ-UN-NISA. *v.* WAZIR ALI. **65 I. C. 308= 8 O. L. J. 569=A.I.R. 1921 Oudh 242.**

—Sufficiency.

———*Occupation of land—Taking water—If proof of right.*

The evidence that a person has the occupation of lands and that he has been taking water to irrigate his lands through a channel from a tank is good evidence that he has some right to do so. This is not one of those things that can be concealed. The fact of enjoyment of such a right is some evidence of the right itself. (*Rankin, C. J.*). ISMAIL BISWAS *v.* EMPEROR. **A. I. R. 1930 Cal. 289.**

———Plaintiff who had a certificate entitling him to collect the debts due to the estate of the deceased aunt claimed from the defendant (another nephew of the aunt) a sum of rupees 10,000, which the defendant deposited under a deposit note with the National Bank of India at Mandalay. The issue in effect was whether the money which the defendant deposited in the Bank was his own money or his aunt's. The plaintiff said and he gave explicit evidence to the effect that, on the instructions of his aunt, shortly before she died he took out the money in his hands which belonged to her, Rs. 10,000, and handed to the defendant, and that is the money which had been deposited in the bank and has not been repaid. The defendant said that he had considerable funds of his own and that Rs. 10,000 was his, which he deposited in the bank of his own account. Evidence produced by both the parties was open to criticism. The trial Judge, who gave careful attention to the evidence, found in favour of the plaintiff's story. The High Court did not believe the story of either side but reversed the decree of the trial Court,

Held, that the trial Judge accepted plaintiff's story, and once plaintiff's story was accepted defendant's evidence was not sufficient answer to plaintiff's case and the original judgment of the trial Court should not be disturbed. (*Viscount Sumner*). SHWE MYO *v.* PO WA. **123 I.C. 174= A. I. R. 1929 P.C. 295.**

EVIDENCE—Suspicion.

———*Admission by vendor—No evidence by vendee—Proof of sale.*

A sued *B* and *C* for possession of land on the ground that the land was sold to him by *B*, but *C* was resisting possession. *B* admitted sale of land to *A* in his written statement and *C* denied *A*'s title and joined issue on the point. No evidence was led by *A* to prove the sale,

Held, that *B*'s admission was not sufficient proof of the sale and *A* must fail. (*Jai Lal, J.*). SAIDU *v.* MEHR DAD. **101 I. C. 589= A. I. R. 1927 Lah. 356.**

———*Omission to examine—When material.*

Where *A* was a tenant of a house, and *B*, a guest in his house complained to Magistrate of nuisance and *A* was not examined as a witness,

Held, that omission to examine *A* as witness was not material. (*Shah, Ag. C. J. and Crump, J.*). BOMBAY MUNICIPALITY *v.* L. R. MALLANDAINE. **84 I.C. 854=48 Bom. 241= 25 Bom. L.R. 1321=26 Cr. L. J. 374= A.I.R. 1924 Bom. 241.**

———*Revenue records—Proof of mortgage—Evidence Act, S. 35.*

Where in a suit for redemption of a usufructuary mortgage, the mortgagee was found to be in possession for a period over 20 years and the only reliable evidence as to the existence of the mortgage was the extracts from supplementary revenue record register No. 1 and register No. 5,

Held: that in the absence of other reliable evidence supplementary survey records are insufficient to prove mortgage. 2 U. B. R. (1907-1909) Evidence 19, *Foll.* (*May Oung and Duckworth, JJ.*). KO PO MAUNG *v.* MA KEIN GALE. **77 I.C. 380= 1 Rang. 562=A.I.R. 1924 Rang. 135.**

———*Proof of fraud.*

Where a case of fraud is attempted to be made out and the evidence adduced in the case is equally consistent with the allegations of the plaintiff as with the denial of the defendants a case of fraud is not established. (*Das and Bucknill, JJ.*). DAMODAR PRASAD *v.* RAM SARUP KUMAR. **71 I.C. 843=4 Pat. L.T. 102= 1923 P.H.C.C. 137=1 P.L.R. 252= A.I.R. 1923 Pat. 327.**

———*Alteration of trial Court's conclusion—Cogent grounds.*

Cogent grounds would be needed to alter the conclusion drawn by the trial Court from the oral evidence, in spite of the fact that the witness spoke Greek and that it seemed doubtful whether the interpreter thoroughly understood Greek while the Court did not at any rate profess to understand that language. (*Lord Sumner*). SOCRATES ATYCHIDES *v.* SECRETARY OF STATE. **70 I.C. 156=84 I.C. 737= 32 M.L.T. 81= 27 C.W.N. 557=18 M.L.W. 664= 1923 M.W.N. 846=46 Bom. 857= 25 Bom. L.R. 116=A. I. R. 1922 P.C. 371.**

———*Evidence of possession—Proof of lease.*

Where the question is whether certain tenancies are fictitious or real, the crucial test is whether the alleged lessees are in possession. (*Mookerjee and Panton, JJ.*). SARAT CHANDRA *v.* BIBHABATI DEBI. **66 I. C. 433=34 C.L.J. 302= A. I. R. 1921 Cal. 584.**

—Suspicion.

———*Delay in registration.*

Delay in registering a deed is not a sufficient reason for doubting the genuineness of the deed. (*Ross and Wort, JJ.*). MADAN CHOUDHURI *v.* KAMALDHARI THAKUR. **A.I.R. 1930 Pat. 121.**

EVIDENCE—Suspicion.

———*Marksman—Difference in marks.*

It cannot be said that because an illiterate woman put a particular kind of mark in a certain document the mark put by her in another document 23 years afterwards, which differs slightly from the mark in the previous instrument could not be genuine. (*Kumaraswami Sastri, J.*). GANSHAMDOSS NARAYANDOSS *v.* SARASWATHI BAI. **87 I.C. 621=21 M.L.W. 415=1925 M.W.N. 285=A.I.R. 1925 Mad. 861.**

———*Allegation of—Suppression of document by opponent.*

A claim to recover an agreement which is not produced and is alleged to have been fraudulently detained by an opponent is always one which should be regarded with extreme suspicion and closely examined in every aspect before it is accepted. (*Lentaigne, J.*). MAUNG AUNG GYAW *v.* MUTHIYA. **89 I.C. 361=3 Rang. 177=A.I.R. 1925 Rang. 308.**

———*Positive testimony.*

Positive testimony should not be rejected on mere suspicion. (*Mookerjee and Buckland, JJ.*). BEPIN KRISHNA RAY *v.* JOGESHWAR RAY. **66 I.C. 345=34 Cr.L.J. 256=26 C.W.N. 36=A.I.R. 1921 Cal. 730.**

—Trial.

———*Defence not directed to contradict plaintiff's story—Cross-examination of defence—If necessary.*

Where in a suit by vendors for damages for breach of contract of sale, the plaintiffs' evidence of the purchasers' grounds for requesting delay is corroborated in more than one particular and the writer when called by the purchaser is not asked a single question to contradict the story given by the vendor, it is not correct to say that the vendor ought to have raised the question of the grounds in cross-examination of the witness. Contradiction, if any could be made, ought to have been given by the witness in examination-in-chief. (*Lord Atkin*). BHAI PANNA SINGH *v.* BHI ARJUN SINGH. **117 I.C. 485=1929 A.L.J. 791=31 Bom. L.R. 909=33 C. W. N. 949= 6 O. W. N. 617=1929 M.W.N. 558=30 M.L.W. 281=51 C.L.J. 105=A.I.R. 1929 P.C. 179=57 M.L.J. 323.**

———*Disbelief of defence.*

Disbelief of a defence does not naturally involve proof of a claim. (*Dalal, J.*). DALLO *v.* JAGAN LAL. **110 I.C. 818=A.I.R. 1928 All. 688.**

———*Charge of fraud—Cross-examination of person charged.*

A person who is charged with fraud should, when he is examined in Court, be cross-examined in regard to it and his explanation taken into consideration. (*Fawcett and Madgavkar, JJ.*). D. DHARMAPPA *v.* P. VENKAPPA. **91 I.C. 426=27 Bom.L.R. 1318=A. I. R. 1926 Bom. 33.**

———*Attestor—Scribe.*

It cannot be said as a matter of law that a scribe cannot be an attesting witness. It is a question of fact which must be determined by a Court of fact. (*Suhrawardy and Duval, JJ.*). ACHOLA SUNDARI *v.* DOMAN SUNDARI. **90 I.C. 774=A. I. R. 1926 Cal. 150.**

———*Evidence for one accused—Treatment as evidence against the other—Evidence of co-accused.*

The evidence of a defence witness produced by one accused cannot be treated as prosecution evidence against the other. A. I. R. 1925 All. 769, *Foll.* (*Harrison, J.*). SAMMAN *v.* EMPEROR. **96 I. C. 989=27 Cr. L. J. 1037=A.I.R. 1926 Lah. 627.**

EVIDENCE—Value of.

———*Possession—History of title.*

When evidence of possession is scrutinised, the history of title cannot well be ignored. (*Mookerjee and Chotzner, JJ.*). JOBEDA KHATUN *v.* TULSI CHARAN DAS. **77 I. C. 564=36 C. L. J. 472=A. I. R. 1923 Cal. 82.**

———*No opportunity to cross-examine.*

Acting on evidence without giving opportunity to cross-examination is illegal. (*Jwala Prasad and Coutts, JJ.*). MOTI SINGH *v.* DHANUKDHARI SINGH. **73 I. C. 339=24 Cr. L. J. 595=A. I. R. 1923 Pat. 53.**

———*Mode of evidence—Agreement of parties.*

Though the recitals in a judgment cannot be relied upon for the purpose of proving the contents of a document, yet parties, if so minded may ordinarily agree that evidence shall be taken in a particular way. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent, cannot be used. Evidence not taken before the Judge actually deciding the case has been made admissible in India by Statute. 43 Mad. 609; 38 Mad. 160; 30 Bom. 109, *Foll.* (*Spencer and Devadass, JJ.*). GOPU NATARAJA CHETTY *v.* RAJAMMAL. **69 I. C. 15=16 M. L. W. 122=1922 M. W. N. 464=31 M. L. T. 125=A. I. R. 1922 Mad. 394=43 M. L. J. 448.**

—Value of.

———*Rennell's Survey Map.*

Though Rennell's Survey Map made in 1764 before the Permanent Settlement is valuable evidence on the topography, the absence of a certain rivulet in it is not conclusive of its non-existence. (*Suhrawardy and Costello, JJ.*). BENODE LAL CHAKRAVARTY *v.* SECRETARY OF STATE. **34 C. W. N. 1113.**

———*Thak statements.*

Thak statements have evidentiary value and are admissible in evidence unless they deal with matter altogether outside the scope of the survey: 49 I.A. 399, *Expl.* (*Sir John Wallis*). KRISHNA PROMADA DASI *v.* DHIRENDRA NATH GHOSH. **113 I.C. 465=56 Cal. 813=56 I.A. 74=33 C.W.N. 289=49 C.L.J. 112=A. I. R. 1929 P. C. 50.**

———*Summary proceedings—Question of custom.*

Where the proceedings of a case are necessarily summary as in objection proceedings much reliance cannot be placed upon the decision of the case as an evidence of any custom. (*Jai Lal, J.*). KISHEN SINGH *v.* FAQIR. **112 I.C. 447=A.I.R. 1928 Lah. 966.**

———*Positive and negative evidence.*

It is more important to look to the positive evidence than to the negative. (*Wazir Hasan and Pullan, JJ.*). KHALIL AHMAD KHAN *v.* MD. MUSTOFA KHAN. **112 I.C. 68=5 O.W.N. 275=A.I.R. 1928 Oudh 269.**

———*Conflicting evidence—Duty of Court.*

There is no bettter criterion for the truth, no safer rule for investigating cases of conflicting evidence where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute and to examine which of the two cases best accords with those facts according to the ordinary course of human affairs and the usual habits of life: 5 W. R. P. C. 26, *Appl.* (*Rupchand Bilaram and Lobo, A.J.Cs.*). MT. HAKIMA *v.* JIANDI. **103 I.C. 870= A.I.R. 1927 Sind 209.**

EVIDENCE—Value of.

———*Cumulative effect.*

Though each of the facts inconclusive, their cumulative value may establish the guilt and exclude other possibilities. (*Harrison and Dalip Singh, JJ.*). ABDULLAH *v.* EMPEROR.
95 I.C. 311=27 Cr.L.J. 775.

———*Public document—Discovered not public.*

If a document is once admitted in evidence on the understanding that it is a public document, it loses all evidential value when it is discovered that it is not a public document. (*Zafar Ali, J.*). THAKORSINGH *v.* GHANYA SINGH. **94 I. C. 125= 27 P.L.R. 198=A.I.R. 1926 Lah. 452.**

———*Evidence unreliable in part.*

The ordinary legal and reasonable presumptions of facts must not be lost sight of in the trial of Indian cases however untrustworthy much of the evidence submitted to the Courts may commonly be. (14 M.I.A. 346, *Foll.*). And therefore evidence should not be rejected wholesale simply because some of it is unreliable if the story told by the witnesses is in the main true. (*Kinkhede, A.J.C.*). YESHAWANT *v.* DAULAT. **89 I.C. 663= A.I.R. 1926 Nag. 129.**

———*Printed leases—Expressions in.*

Much reliance cannot be placed upon the words and expressions used in leases executed on printed forms where they are used indiscriminately. (*Mukerji, J.*). MUHAMMAD SULAIMAN *v.* UMA CHARAN SIL. **79 I.C. 648=A.I.R. 1925 Cal. 181.**

———*Retracted statement.*

Evidence of a witness who retracted his statement in the cross-examination cannot be relied upon for convicting an accused person unless there are very strong reasons to suppose that the second statement in the cross-examination is absolutely false. (*Abdul Raoof, J.*). SHAH ALINE *v.* CROWN. **84 I.C. 1052=6 L.L.J. 280= 26 Cr.L.J. 412=A.I.R. 1925 Lah. 44.**

———*Anonymous letter.*

An anonymous letter is no evidence of its contents. (*Devadoss and Wallace, JJ.*). AYYAMPERUMAL PILLAI *v.* EMPEROR. **91 I.C. 50= 27 Cr.L.J. 18=1925 M. W. N. 319= 22 M. L. W. 405=A. I. R. 1925 Mad. 879.**

———*Evidence—No cross-examination.*

In the absence of cross-examination evidence is of little value, 17 C.W.N. 230, *Foll.* (*Wazir Hasan, A.J.C.*). SARJU SINGH *v.* EMPEROR. **88 I.C. 852= 26 Cr. L.J. 1236=A.I.R. 1925 Oudh 726.**

———*Evidence disbelieved in essentials.*

Where the prosecution cannot be believed in its essential details, conviction cannot be based upon a part of the story of the prosecution. Where the greater portion of the prosecution evidence is disbelieved, a Court cannot reconstruct a story and convict the accused on the story wholly inconsistent with that told by witnesses. (*Foster, J.*). JOHARMAL MARWARI *v.* KING-EMPEROR. **81 I.C. 212=5 P.L.T. 635=25 Cr. L.J. 724= A.I.R. 1924 Pat. 813.**

EVIDENCE—Value of.

———*Evidence as to social position and custom—Suit for agreed dower.*

In a suit for dower on the basis of an agreement fixing the amount of the dower, evidence regarding social position of the parties and customary dower is not material except as affording some test of the credibility of the witnesses of the party alleging the agreement. In the case of an agreement entered into 37 years back, the oral evidence of the agreement must be clear and convincing in order to establish a claim against the estate of the man who is said to have been a party to it. (*Lord Salvesen.*) MT. HAFIZAN *v.* MT. SUBA BIBI. **76 I.C. 948= 37 C.L.J. 461=27 C. W.N. 864=18 M.L. W. 670= 4 L.R.P.C. 95=A.I.R. 1923 P.C. 29= 44 M.L.J. 714 (P.C.).**

———*Bearing of* onus.

The weight to be attached to the evidence of a party is not governed by any such external consideration as that of the burden of proof but depends entirely on the intrinsic evidence. (*Kotval, A.J.C.*). GOWARDHAN DAS *v.* R. S. HARLAL RAMSUKH. **69 I.C. 541=A.I.R. 1923 Nag. 62.**

———*Secondary and inferior evidence.*

It is quite unsafe to accept the evidence more or less secondary in its character and certainly of inferior quality to the evidence which would have been produced but has been withheld. Where therefore most of the facts deposed to by the witness of one party are matters of which the opposite party would have in the natural course of circumstances of any particular case, direct knowledge, it is an act of impertinence on the part of the latter party to ask the Court to disbelieve the evidence led by the former party, when he himself is not prepared to take the responsibility of an oath and give to the Court his own version of the facts. (*Dalal and Wazir Hasan, A. J. Cs.*). MT. CHAURAS KUAR *v.* MT. ABHAIRAJ KUAR. **65 I.C. 380= 8 O. L. J. 681=A.I.R. 1922 Oudh 59.**

———*Probability against positive evidence.*

The Court may allow its decision to be affected by considerations of probabilities, even though there may be positive testimony to the contrary effect. (*Mookerjee and Fletcher, JJ.*). SURENDRA KRISHNA *v.* RANEE DASSEE. **59 I. C. 814= 33 C.L.J. 34=A.I.R. 1921 Cal. 677.**

———*Delayed information.*

When a witness admits that he disclosed his knowledge of a crime to the police at a very late date and gives no explanation of this delay, his evidence is of no value. (*Shadi Lal, C. J. and Le Rossignol, J.*). KHERI *v.* THE CROWN. **99 I. C. 857=3 L. L.J. 147=28 Cr. L. J. 185.**

THE INDIAN EVIDENCE ACT

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EVIDENCE ACT (I OF 1872).

—Presumption about death.

———*Religious endowment — Property vested in mahant—Alienation by mahant—Suit by successor against alienee—Limitation.*

Where the property is vested in the juridical person, and the Mahant is only the representative and manager of the idol, the act of alienation is a direct challenge upon the title of the idol, and the idol or the manager of the idol on behalf of the idol must bring the suit within 12 years from the date of the alienation. But where the title is in the Mahant or the Shebait the act of alienation is not a challenge upon the title of the idol, though the property may be endowed property in the sense that its income has to be appropriated to the purposes of the endowment; and there is no adverse possession so long as the person making the alienation is alive and the possession of the defendant becomes adverse to the plaintiffs only when a new title has come into existence capable of maintaining the suit and which has not approved of or acquiesced in the alienation. Where there can be no doubt whatever that though the property is endowed property in the sense that its income has to be appropriated to the purposes of the endowment, still the title is in the successive Mahants, time is to run from the date of the death of alienor who alienated the properties in dispute. If the alienor has not been heard of for 7 years by those who would naturally have heard of him, if he had been alive, it can be presumed that he is dead. The suits are not barred as the time begins to run from the date of the presumption. *Damodar Das* v. *Lakhan Das*,

EVIDENCE ACT (1872)—Scope.

37 Cal. 885, *Ref.*; *Vidya Varuthi* v. *Balusami*, 44 Mad. 831, *Foll. (Das and Bucknill, JJ.).* MAHANTH RAMRUPGIR *v.* LAL CHAND MARWARI.
67 I. C. 401=3 Pat. L.T. 352=1 Pat. 475=A. I. R. 1922 Pat. 243.

—Scope.

———The intention of the Legislature in using the words "in civil proceedings" in S. 196 (7) was to make the statement admissible against the person examined unconditionally so far as civil proceedings are concerned and in criminal proceedings subject to the provisions of S. 132, Evidence Act. S. 196, Companies Act was not intended in any way to override the provisions of the Indian Evidence Act. (*Jai Lal, J.*). RAMCHAND GURWALA *v.* KING-EMPEROR. **98 I.C. 599=27 Cr. L.J. 1383=A.I.R. 1926 Lah. 385.**

———*Applicability of Cr. P. Code.*

The Evidence Act is a separate statute dealing with an important branch of law, and its provisions are independent of the rules of procedure contained in the Criminal Procedure Code and must have full scope unless it is clearly proved that they have been repealed or altered by another statute. (*Shadi Lal, C.J. and Addison, J.*). RANNUN *v.* KING-EMPEROR. **94 I.C. 901=7 Lah. 84=27 Cr. L.J. 709=27 P.L.R. 583=A. I. R. 1926 Lah. 88.**

———*Applicability of Oaths Act.*

The provisions of the Oaths Act are not intended to be utilized in such a manner as would abrogate the provisions of the Evidence Act. (*Kinkhede, A.J.C.*). SK. JAMU *v.* MAHOMED IBRAHIM. **90 I.C. 378=A.I.R. 1926 Nag. 194.**

EVIDENCE ACT (1872), S. 1—Ceylon ordinance.

—S. 1—Ceylon ordinance.

———The Evidence Ordinance of Ceylon is merely the application to Ceylon of the Indian Evidence Act, S. 1. (*Lord Darling.*) DR. VRASAPILLAI GABRIEL *v.* A. S. ELIATAMBY. **52 I.A. 372= A.I.R. 1925 P.C. 229.**

—S. 3—"Evidence."

———*Meaning of*

Per *Macnair, A. J. C.*—The word "evidence" in the Act signifies only the instruments by means of which relevant facts are brought before the Court, *viz.*, witnesses and documents, and by means of which the Court is convinced of these facts. (*Findlay, J. C., Macnair and Subhedar, A. J. Cs.*). GOBARYA *v.* EMPEROR.

A.I.R. 1930 Nag. 242 (F.B.).

———"*Matters before it*"—*Meaning of.*

Every Court is bound to base its decision not merely on "evidence" but on "matters before it." The expression "matters before it" in S. 3 of the Evidence Act includes matters which do not fall within the definition of "evidence" as given in that section. Therefore in determining what is evidence other than "evidence" in the phraseology of the Act, the definition of "evidence" must be read with that of "proved" given in the said section. (*Kinkhede, A.J.C.*). BHAIRONPRASAD *v.* MAHANT LAXMI NARAYANDAS.

79 I.C. 609=A.I.R. 1924 Nag. 385.

—S. 3—"Proved."

———*Degree of proof.*

Where a reversioner is suing persons who are merely trespassers no strong proof is required of the death of a nearer reversioner. A prudent man might within the meaning of the definition of "proved" in S. 3, Evidence Act, consider the death of the nearer reversioner sufficiently probable on very little evidence. (*Ashworth, J.*). BADAL *v.* SARASWATI. **103 I.C. 329=A.I.R. 1927 All. 687.**

———*Meaning of.*

When, after considering all the matters before it, if a Court believes a certain thing exists it cannot say that the thing is not proved. (*Hallifax and Kotval, A.J. Cs.*). MANGAL GAUDA *v.* EMPEROR. **81 I.C. 901=25 Cr. L.J. 1077=A.I.R. 1925 Nag. 37.**

———"*Not proved*", "*disproved*" *and* "*reasonable doubt*"—*Meaning of.*

The word "proved" means that it is so probable that a fact is established that a person should as a reasonable man act upon it. The law does not require that facts should be proved with anything like mathematical certainty. The word "disproved" is merely the converse of the previous proposition. The expression "not to be proved" indicates a state of mind between the two states of mind, when it is not possible to say precisely how the matter stands. "Reasonable doubt" is the doubt which reasonable men may reasonably entertain and not the doubt of a weak or vacillating mind. (*Crump, J.*). EMPEROR *v.* SHAFI AHMAD.

31 Bom. L.R. 515.

—S. 4—Presumption—Possession.

Per *Dawson Miller, C. J.*—Possession, however, is not necessarily the same thing as user and if the land is of such a nature as to render it unfit for actual enjoyment in the usual modes it may properly be presumed that the previous possession of the plaintiff continued until the contrary is proved. This presumption is a presumption of fact. It is by no means conclusive and whether it should be applied or not must depend upon the facts of each particular case. 9 Cal. 744 (F. B.), *Rel. on.*

EVIDENCE ACT (1872), S. 5—Depositions.

Per *Mullick, J.*—In every case the Court may draw a presumption as to possession from title. It is a presumption of fact which the Evidence Act expressly warrants by S. 114. Section 4 of that Act enacts that the Court may regard the fact as proved unless and until it is disproved or may call for proof of it. The discretion of the Court is to be exercised with due regard to the nature of the land and the evidence in the case. 1 P. L. J. 146, *Expl.* (*Dawson-Miller, C. J. and Mullick, J.*). INDER LALL *v.* RAM SURAT KUER. **2 P. L. T. 55= 1921 P. H. C. C. 118=A.I.R. 1921 Pat. 158.**

—S. 4—Presumption—Powers of Court.

———*Public purposes—Declaration in acquisition.*

The fact that the declaration may be conclusive as to the land being needed for a public purpose does not in any way debar the Court from enquiring into the validity of the steps which led up to that declaration. (*Greaves, J.*). MANICK CHAND MAHATA *v.* THE CORPORATION OF CALCUTTA AND THE CALCUTTA IMPROVEMENT TRUST.

48 Cal. 916=A. I. R. 1921 Cal. 159.

—S. 4—"Shall presume."—Meaning of.

———*Agra Tenancy Act* (1901), *S.* 201 (3).

The words "shall presume" in the section mean there is irrebuttable and conclusive presumption even if the parties are members of a joint Hindu family. 33 All. 799 (F. B.), *Foll.* (*Sulaiman and Banerji, JJ.*). GIRDHARI LAL *v.* GOVIND RAI.

103 I.C. 346=25 A. L. J. 706= 8 L. R. A. Rev. 168=A. I. R. 1927 All. 810.

—S. 5—Conduct of a party.

———In a suit against the son of a lambardar for profits, the evidence brought to prove that there was difficulty in the collection of the rent and to prove that on the death of the lambardar no one could be induced to take his place is relevant and admissible. (*Ashworth, J.*). BHAGWATI SARAN *v.* DEO SARAN SINGH. **9 L.R.A. Rev. 23=107 I.C. 702= A.I.R. 1928 All. 166.**

—S. 5—Depositions.

———*Cr. P. Code, S.* 360—*Non-compliance with S.* 360 *does not make record entirely inadmissible in evidence—Evidence Act, Ss.* 5 *and* 80—*Evidence Act, S.* 91.

The provisions of S. 360 are mandatory. But non-compliance does not legally result in the total inadmissibility of the record of evidence and in the absence of any definite provision of law entailing inadmissibility, each case of non-compliance must be considered by the Court on its own merits and the document which purports to be the record can be admitted, but without the presumption laid down in S. 80 of the Evidence Act, and, therefore, open to question by the defence and appraisal by the Court.

The law itself does not expressly lay down that the least failure to comply with the provisions of Section 360 renders the whole document inadmissible. Where therefore there has been an attempt by the presiding officer to comply with its provisions and to secure the accuracy of the record of evidence the provisions of S. 80 do not lead to complete exclusion of the document, and the Court is bound to admit under S. 5 but it is open to each side to adduce evidence as to its faithfulness or otherwise and as to the degree of presumption under S. 80 and the weight to be attached to it. 46 Cal. 895, *Foll.* (*Madgavkar, A.J.C.*). PITOOMAL *v.* EMPEROR. **86 I.C. 33=16 S.L.R. 255= 26 Cr. L.J. 657=A.I.R. 1921 Sind 151.**

EVIDENCE ACT (1872), S. 5—Irrelevant evidence.

—S. 5—Irrelevant evidence.

———*Omission to object—Duty of Court.*

The mere omission to object to a document which is not in itself admissible as evidence does not constitute that document evidence so as to be available to either party at the trial. It is clearly the duty of the Judge, apart altogether from any objection by the parties or their pleaders, to exclude irrelevant evidence. (*Dawson-Miller, C. J. and Mullick, J.*). SUMITRA KUER *v.* RAM KHAIR CHOWBEY. **1921 P. H. C. C. 17= A. I. R. 1921 Pat. 61.**

—S. 5—Objection to—When should be taken.

———A document can be objected to as irrelevant at any time. A document can be objected to as inadmissible as opposed to irrelevant at the first hearing only. (*Harrison, J.*). GHULAM MAHAMMAD *v.* KALIM ULLAH. **109 I.C. 728= 10 L.L.J. 370=A.I.R. 1928 Lah. 428.**

—S. 5—Relevant evidence—Murder trial.

———In the trial for the murder of a particular person the case against the accused under trial, should be determined on evidence which is relevant and admissible under the Act and on the strength of evidence which the Court may consider necessary to record and appreciate with reference to two entirely diff erent murders committed by the accused. (*Shah and Crump, JJ.*). GANGARAM *v.* IMPERATOR. **62 I.C. 545=22 Bom. L.R. 1274= 22 Cr. L.J. 529.**

—S. 5—Third party's documents.

———The recitals of boundaries of other lands in documents between third parties are not admissible in evidence either with regard to a question of boundaries or as to the nature of the land. A. I. R. 1924 Cal. 1067, *Foll.* (*Newbould and Gra-ham, JJ.*). DIMODAR PODDAR *v.* JADUNATH DATT. **91 I. C. 449 (Cal.).**

———Documents relating to land on the boundaries of the land in suit are not admissible for the purpose of showing possession of the disputed land. (*Newbould and Graham, JJ.*). ABDUL KARIM *v.* CHHALE AHMED. **91 I.C. 688= A.I.R. 1926 Cal. 479.**

—S. 6, Ill. (a)—Absence at occurrence.

———Evidence of a witness who was not present at the occurrence but only deposed to circumstances after the occurrence is not admissible to prove facts relating to the occurrence. (*Abdul Raoof and Addison, JJ.*). PAKHAR SINGH *v.* EMPEROR. **91 I.C. 812=7 L.L.J. 436=26 P.L.R. 674= 27 C.L.J. 140=A.I.R. 1925 Lah. 578.**

—S. 6—False complaint.

———Where the offence under trial is filing a false complaint, what happened at the subsequent Police Investigation of the complaint forms no part of the *res gestae*. (*Wallace and Madhavan Nair, JJ.*). VENKATASUBBIAH *v.* EMPEROR. **85 I. C. 209=26 Cr. L.J. 721=48 Mad. 640= 21 M.L.W. 190=1925 M.W.N. 68= A. I. R. 1925 Mad. 579=48 M.L.J. 195.**

—S. 6—Hearsay evidence.

———*Basis of action—Relevancy.*

Under the Evidence Act hearsay evidence is inadmissible to prove a fact which is deposed to on hearsay, but does not necessarily preclude evidence as to a statement having been made upon which certain action was taken or certain results followed. (*Phillips and Madhavan Nair, JJ.*). VENKATARAMANUJACHARYULU *v.* APPALACHARYULU. **97 I.C. 785=24 M.L.W. 227= A. I. R. 1926 Mad. 1003.**

EVIDENCE ACT (1872), S. 7—Absence of entry—Relevancy.

—S. 6—Irrelevant evidence.

———*Applicability.*

A certain witness stated that he had seen three women, who were sleeping in the same bari as the complainant and his wife that night, searching something at dusk,

Held, that as the alleged search that evening was not part of the same transaction as the abduction at night, S. 6 could not make it admissible and as the women were neither parties to the case nor agents to any party, S. 8 was inapplicable, S. 9 was also inapplicable. (*Newbould and B. B. Ghose, JJ.*). FAZARUDDIN *v.* EMPEROR. **90 I.C. 433=42 C.L.J. 111=26 Cr. L.J. 1553= A. I. R. 1926 Cal. 105.**

—S. 6—What is Res gestae.

———Where the woman raped made a statement to her relative shortly after and committed suicide about three days after the occurrence.

Held, that the statement was not admissible under S. 6. (*Wallace and Jackson, JJ.*) KAPPINAIAH *v.* EMPEROR. **(1930) M.W.N. 702.**

———*After occurrence.*

What a witness tells at the time of the occurrence in respect of the occurrence itself is *res gestae* under S. 6. But a statement with regard to an event which took place a year ago would not be part of *res gestae*. (*Cuming and Mukerji, JJ.*). KHIJIRUDDIN *v.* EMPEROR. **92 I. C. 442= 53 Cal. 372=42 C.L.J. 504=27 Cr. L. J. 266= A. I. R. 1926 Cal. 139.**

———Whenever recollection comes in, whenever there is opportunity for reflection and explanations, then statements cease to be part of the *res gestae*. (*Martineau, J.*). RAMAN *v.* EMPEROR. **4 L. L. J. 491=A. I. R. 1921 Lah. 258.**

—S. 6—Statements after transaction.

———Where the statement of the girl to her mother does not form part of the transaction, *viz.*, the raping of the girl, or occur during it, but is made after the transaction is over, when the perpetrator had gone away and the girl came away from the scene of occurrence to her mother's house, the statement is not relevant under S. 6. (*Cuming and Lort-Williams, JJ.*). SREEHARI SWARNAKAR *v.* EMPEROR. **50 C. L. J. 524=1930 Cr. C. 132= A. I. R. 1930 Cal. 132.**

———In absence of definite and reliable evidence that the outrage upon a girl in an offence under S. 376, I.P.C. and her statement of the occurrence to her father constitute together *res gestae* much value cannot be attached to the statement even if it is held to be admissible. (*Agha Haidar, J.*). GHULAM HUSSAIN *v.* EMPEROR. **A.I.R. 1930 Lah. 337.**

—S. 6—Statements of members—Unlawful assembly.

———Evidence of statements, made by members of an assembly the promoters of which were charged with offences under S. 325 read with S. 149, I. P. C., of their determination to force their way through the police forms evidence of a part of the *res gestae* and is admissible to indicate that the promoters' intention to ignore the police orders had been communicated to sections of the crowd. (*Rutledge and Maung Gyi, JJ.*). MAUNG TOK *v.* EMPEROR. **90 I. C. 918=3 Rang. 352=26 Cr. L. J. 1622= A. I. R. 1925 Rang. 354.**

—S. 7—Absence of entry—Relevancy.

———The absence of an entry in an account book is a relevant fact, under either S. 7 or S. 8 or S. 11 of

EVIDENCE ACT (1872), S. 8 — Conduct and character.

the Evidence Act. 10 Cal. 1024, *Diss.* 4 C.W.N. 207, *Foll.* (*Hallifax, A.J.C.*). KASAM *v.* FIRM OF HAJI JAMAL. **76 I.C. 327=A.I.R. 1924 Nag. 22.**

—S. 8—Conduct and character.

———*Criminal tendency—Acts which formed basis of prior charge—Relevancy.*

It is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue. *Makin* v. *Attorney-General for New South Wales*, (1894) A. C. 57, *Foll.*

Evidence of defalcations both prior or subsequent whether such defalcations formed the basis of another charge on which the accused may have been acquitted or not are admissible in evidence to prove guilty intent as also to anticipate the defence of the non-existence of such intent. (*Kincaid, J.C. and Rupchand Bilaram, A.J.C.*). EMPEROR *v.* STEWART. **97 I.C. 1041= 21 S.L.R. 55=27 Cr.L.J. 1217= A.I.R. 1927 Sind 28.**

—S. 8—Corroboration of Evidence.

———Section 8 does not render a statement by a woman raped admissible in evidence when there is nothing to corroborate or confirm the same. (*Wallace and Jackson, JJ.*). KAPPINAIAH *v.* EMPEROR. **(1930) M.W.N. 702.**

—S. 8—Hearsay evidence.

———*Relevancy.*

The answers given by the child in reply to mother's queries could not be admitted in evidence by letting in the mother's statement and that to hold otherwise would be admitting hearsay evidence. (*Shadi Lal, C.J. and Agha Haidar, J.*). EMPEROR *v.* SOOPI. **120 I.C. 539= 1930 Cr. C. 100=31 Cr. L.J. 141=31 P.L.R. 391= A.I.R. 1930 Lah. 84.**

—S. 8—Motive.

———*Value of.*

Motive for a crime, while it is always a satisfactory circumstance of corroboration when there is convincing evidence to prove the guilt of an accused person, can never supply the want of reliable evidence, direct or circumstantial, of the commission of the crime with which he is charged. (*Shadi Lal, C. J. and Addison, J.*). RONNUN *v.* KING-EMPEROR. **94 I. C. 901= 7 Lah. 84=27 Cr. L. J. 709=27 P. L. R. 583= A. I. R. 1926 Lah. 88.**

———*What is.*

In a trial for the murder of a particular person, the prosecution should not show, that on two previous occasions the accused under trial had committed murders but had falsely charged and got convicted some others as murderers. The fact that the previous murders have been committed by the accused does not constitute a motive or preparation under S. 8.

Per *Crump, J.*—A motive is that which moves a man to do a particular act. Whether the belief which produces the state of mind is true or false, the motive remains the same and the truth or falsity, of the belief is not really in question. (*Shah and Crump, JJ.*). GANGARAM *v.* EMPEROR. **62 I.C. 545=22 Cr. L. J. 529=22 Bom. L.R. 1274.**

EVIDENCE ACT (1872), S. 8—Subsequent conduct.

—S. 8—Previous conduct.

———*Principal and agent.*

It is a matter of common knowledge that brokers sometimes for the purposes of gain do resort to the nefarious system of entering into a transaction unauthorisedly in the expectation of its subsequent ratification, but it is a far cry that because an agent had been shown to be guilty of shady practice once his evidence as to the circumstances under which the contract in suit was entered into should be entirely discarded. (*Raymond, A.J.C.*). TYEBALLY ABDUL HUSSAIN *v.* MESSRS. JAMES FINLAY. **80 I.C. 969=17 S.L.R. 15= A.I.R. 1924 Sind 105.**

—S. 8—Statement after transaction.

———*Rape.*

Where the statement of the girl to her mother does not form part of the transaction, *viz.*, the raping of the girl, or occur during it, but is made after this transaction is over, when the perpetrator had gone away and the girl came away from the scene of occurrence to her mother's house, the statement is not relevant under S. 6. (*Cuming and Lort-Williams, JJ.*). SREEHARI SWARNAKAR *v.* EMPRROR. **50 C.L.J. 524=1930 Cr.C. 132= A.I.R. 1930 Cal. 132.**

———*Robbery and assault.*

A statement made by the deceased immediately after the robbery regarding the robbery and also regarding the assault committed in the course of the robbery, is admissible showing conduct, though the person who made it cannot be called to depose to it on oath. (*Mullick, Ag.C.J. and Wort, J.*). LALJI DUSADH *v.* EMPEROR. **106 I. C. 698= 6 Pat. 747=9 A.I.Cr.R. 379=29 Cr. L. J. 106= A.I.R. 1928 Pat. 162.**

—S. 8—Statements before Magistrate.

———*Confession proceedings.*

Where an accused person was sent up before a Magistrate under S. 164, Criminal P. C., to have his confession, recorded and he gave the police to understand that he would make a confession, but, instead of making a confession he made a statement, though he was told that it was open to him to say that he would make no statement,

Held, that the statement was admissible as evidence of conduct. (*Mullick, Ag.C.J. and Wort, J.*). LALJI DUSADH *v.* EMPEROR. **106 I.C. 698= 6 Pat. 747=9 A.I.Cr.R. 376=29 Cr.L.J. 106= A. I. R.1928 Pat. 162.**

—S. 8—Statement in answer.

———*Admissibility as complaint.*

The mere fact that the statement is made in answer to a question is not of itself sufficient to make it inadmissible as a complaint. If the question merely anticipates a statement which the complainant is about to make it is not rendered inadmissible by the fact that the questioner happens to speak first. (*Martineau, J.*). RAMAN *v.* EMPEROR. **4 L.L.J. 491=A.I.R. 1921 Lah. 258.**

—S. 8—Subsequent conduct.

———*Value of.*

Different persons are differently constituted and that some accused even though innocent deliberately abscond rather than face the ordeal of a criminal trial and that some other innocent accused do equally foolish things such as make a false admission of guilt or pay off the amount

EVIDENCE ACT (1872), S. 8—Subsequent conduct.

said to have been stolen or embezzled in the vain hope that they may escape a criminal prosecution or get off with a light punishment. Such subsequent conduct cannot dispense with the positive proof of the guilt of the accused, the burden of which lies upon the prosecution. When once the Crown has established the guilt of the accused by the evidence of prosecution witnesses then such subsequent conduct may be utilized as furnishing further proof of the correctness of the conclusion as to the guilt of the accused drawn from the evidence of the prosecution witnesses; by itself, however, it can furnish no legitimate proof of the guilt of the accused. (*Nanavutty, J.*). CHANDRIKA PRASAD *v.* EMPEROR. **7 O.W.N. 564= A.I.R. 1930 Oudh 324.**

———*Approver.*

The mere fact of an accused person having taken the Magistrate to a particular spot and pointed out the several places, where the various incidents narrated by the approver took place, is not admissible as evidence of conduct nor is it of any value in determining his guilt. (*Tek Chand, J.*). BAGEL SINGH *v.* EMPEROR. **121 I. C. 497= 1929 Cr. C. 426=31 Cr. L. J. 269= A.I.R. 1929 Lah. 794.**

———*Construction of deed.*

Per *Mukerji, J.*—Where the meaning of the document regarding certain transactions is not clear, the conduct of the parties is admissible in evidence to show in what light they themselves regarded the transactions. A.I.R 1924 P.C. 88; P. C. A. No. 15 of 1923 and A. I. R. 1926 P. C. 41, *Foll.*

Per *Ashworth, J.*—Subsequent conduct is only admissible for the purpose of construing a deed when it is impossible to arrive at a clear finding as to the meaning of the deed from its own terms and from surrounding circumstances. (*Mukerji and Ashworth, JJ.*). BADRI SINGH *v.* SADAPHAL SINGH. **111 I. . 701=25 A. L. J. 849= A. I. R. 1928 All. 34.**

———*Raped girl.*

If the raped girl went to her relatives straight after the occurrence and complained on her own initiative about her rape, her conduct would have a direct bearing upon and connection with the occurrence, but if she only answered questions put to her, her statement would be mere hearsay. (*Foster, J.*). EMPEROR *v.* PHAGUNIA BHUIAN. **89 I.C. 1043=26 Cr.L.J. 1475= A. I. R. 1926 Pat. 58.**

———*Murder case.*

The fact that the accused pointed out the place, where the weapon was found as being the place at which it was concealed, and the fact that shortly after the crime he was in a very agitated state and made a statement which led to his being asked to show the spot where the weapon used in the commission of the murder was concealed are evidence of conduct under S. 8 of the Evidence Act, which render highly probable, the oral evidence in the case and indicate that the accused was the murderer. (*Spencer, O.C.J. and Reilly, J.*). SEMALAI GOUNDAN, *In re.* **86 I.C. 664=26 Cr.L.J. 840= 21 M. L. W. 199=A.I.R. 1925 Mad. 574.**

———*Rape case.*

Where a tender girl was alleged to have been raped, a statement made by her stating that she was raped, and uttered immediately after the rape, crying and weeping, is admissible as explaining her act of crying, under S. 8 and by way of corroboration under S. 157. (*Kinkhede, A.J.C.*). SOOSALAL BANIA *v.* EMPEROR. **82 I.C. 142= 25 Cr.L.J. 1214=A.I.R. 1925 Nag. 74.**

EVIDENCE ACT (1872), S. 9—Identification.

—S. 9—Absconding of accused.

———If after the commission of a crime a person whose name is mentioned as a participator in the crime absconds, his conduct implies that he is concerned in the crime. Anything therefore which tends to explain his conduct and furnishes motive other than a guilty conscience is relevant under S. 9. (*Shah and Crump, JJ.*). GANGARAM *v.* EMPEROR. **62 I.C. 545=22 Cr.L.J. 529=22 Bom. L.R. 1274.**

—S. 9—Conspiracy.

———*Evidence of previous association—Several persons charged of conspiracy—Evidence to show previous association for criminal purposes with approver is admissible to corroborate approver under S. 9 and (or) S. 11 as regards his statement regarding conspiracy.*

Where several persons are charged with committing or conspiring to commit a particular dacoity and evidence is tendered to show that prior to the dacoity the accused were closely and intimately associating with the approver and the object of the association was commission of theft and other discreditable acts,

Held, that as far as the evidence of close association with the approver is concerned corroborating the approver's statement that a conspiracy existed, it is admissible under S. 9 and (or) S. 11 of the Act. (*K. Kemp, J.*). EMPEROR *v.* WAHIDUDDIN HAMIDUDDIN (NO. 1). **32 Bom. L.R. 324= A.I.R. 1930 Bom. 157.**

———*Conduct of alleged conspirator.*

Where a person is alleged to be also one of the conspirators but who has not expressly been implicated in the case as a conspirator with the accused, his conduct is evidence only under S. 9 and not under S. 10. (*Fawcett and Madgavkar, JJ.*). EMPEROR *v.* ABDUL. **91 I.C. 690=49 Bom. 878= 27 Bom. L.R. 1373=27 Cr.L.J. 114= A.I.R. 1926 Bom. 71.**

—S. 9—Copy of document.

———*Admissibility of.*

Where the prosecution, when trying a person for sedition, brought a copy of a letter written by him and found in his possession which was alleged to have been sent by him along with the objected writing and it was contended on behalf of the accused that it is necessary for the prosecution to prove that such a letter was sent before this document can be admitted,

Held, that (1) the copy of the letter was relevant to show the accused's intention and could be admitted as evidence; and (2) it is not necessary for the prosecution to prove that such a letter was sent before the copy could be admitted as evidence. (*Fawcett, J.*). EMPEROR *v.* PHILLIP SPRATT (NO. 2). **180 I.C. 32=30 Bom. L.R. 314= 29 Cr.L.J. 322=A.I.R. 1928 Bom. 77.**

—S. 9—Identification.

———*Out of Court—Value of.*

The evidence that a person has identified another person as having taken part in a particular offence either in jail identification proceedings or elsewhere is admissible though the value of such evidence is weakened perceptibly as a general rule by failure to identify subsequently in Court. A.I.R. 1927 Oudh 369, *Foll.*; A.I.R. 1921 All. 215 and A.I.R. 1927 All. 163, *Ref.* (*Stuart, C.J.*). PARBHU *v.* EMPEROR. **104 I.C. 626=4 O.W.N. 803= 28 Cr.L.J. 850=A.I.R. 1927 Oudh 598.**

EVIDENCE ACT (1872), S. 9—Identification.

———*Independent evidence.*

In order to rely on the evidence of persons who identified the accused in jail but failed to do so in Court, the fact of the jail identification must be stated in the witness's evidence. An identification in jail is in essence a statement by the witness, "I saw this man who is now before me taking part in the offence". That statement can be used to corroborate his evidence given in Court. If the witness says in his evidence: "A number of persons were shown to me at the jail and from among them I pointed out those persons whom I had seen taking part in the offence", it is permissible under S. 9 to call independent evidence, such as that of the Magistrate who conducted the identification, to prove the identity of the persons whom the witness picked out at the jail, even though the witness himself may not correctly remember who they were. (*Daniels, J.C.*). CHUTKAN *v.* EMPEROR.

90 I.C. 444=26 O.C. 258=26 Cr.L.J. 1564=A.I.R. 1926 Oudh 36.

———*Magistrate's evidence—Corroborative value.*

For a Magistrate or other officer to come into Court and depose that a particular witness in his presence identified one of the accused as having taken part in the dacoity is nothing more than hearsay evidence but the Magistrate's evidence will be strictly relevant under the provisions of the Evidence Act to corroborate the evidence of a witness saying that he identified certain persons at the jail and that the persons whom he there identified were persons whom he had seen taking part in the dacoity. 19 A. L. J. 947, *Ref.* (*Daniels and Neave, JJ.*). ABDUL WAHAB *v.* EMPEROR.

95 I. C. 756=47 All. 39=27 Cr. L. J. 836=5 L. R. A. Cr. 193=A.I.R. 1925 All. 223.

—S. 9—Scope.

———Ss. 9 and 11 read along with S. 21 of the Evidence Act amply justify a Court in admitting into evidence all previous statements made by the accused which have a bearing on the question of his guilt and whether the previous statement is made to a police officer or to an officer or to a third party is immaterial if the statement is relevant to the fact in issue. These sections are not controlled by the Cr. P. Code. (*Mullick and Thornhill, JJ.*). MADAN GURU *v.* EMPEROR.

73 I. C. 963=24 Cr. L. J. 723=4 Pat. L. T. 381.

—S. 10—Confession by approver.

———Admission of an approver that he accepted a sum after the dacoity is not a circumstance incriminating him that he committed the dacoity. (*Newbould and B. B. Ghose, JJ.*). IBRAHIM, *In re.*

88 I.C. 458=42 C. L. J. 496=26 Cr. L. J. 1146=A.I.R. 1926 Cal. 374.

—S. 10—Confession of co-accused.

———A confession of a co-accused implicating himself and others is admissible in evidence against all the accused under S. 10. It can also be taken into consideration against them under the provisions of S. 30. (*Stuart, C. J. and Raza, JJ.*). RAM PRASAD *v.* EMPEROR.

106 I. C. 721=2 Luck. 631=1 L. C. 339=8 A. I. Cr. R. 449=A. I. R. 1927 Oudh 369.

—S. 10—Connection with acts.

———Connexion has to be established with the conspiracy and not with the separate acts of different conspirators which are the overt acts of the different individuals in proof of the conspiracy. (*Dalal, J. C.*). BISHAMBHAR NATH TANDON *v.* EMPEROR.

90 I.C. 706=26 Cr. L. J. 1602=2 O. W. N. 760= A. I. R. 1926 Oudh 161.

EVIDENCE ACT (1872), S. 10—Scope and effect.

—S. 10—Object and applicability.

———*Cipher Code—Inference.*

The object of S. 10 is merely to ensure that one person shall not be made responsible for the acts or deeds of another until some bond in the nature of agency has been established between them and the acts, words, or writing of another which it is proposed to attribute vicariously to the person charged must be in furtherance of the common design and after such design was entertained.

In a trial of several accused for sedition an exercise book containing a Cipher Code was put in evidence,

Held, that the Cipher Code book was not to be treated as 'the act, word or deed of a particular individual, but the fact that it existed the fact that it set forth the names and addresses of a substantial number of persons charged the fact that it was in a peculiar form such as is not likely to be found in any Code intended to be used for lawful purposes, and many internal indications such as grouping of the names and the use of words and names having a revolutionary significance all gave rise to a probability, amounting almost to certainty that the persons named in the Code were associated for some unlawful purposes whose interests demanded that it should be kept secret and in absence of evidence that the persons named in it were associated for some legitimate purposes to be kept secret for some legitimate reason, the Cipher Code was in itself a good ground for supposing that the persons named had conspired to commit an offence and any other acts or writings of individual conspirators in furtherance of the common design became admissible under S. 10. (*Courtney-Terrell, C.J., Kulwant Sahay and Macpherson, JJ.*). INDRA CHANDRA *v.* EMPEROR.

116 I.C. 756=30 Cr. L.J. 646=11 P.L.T. 45=13 A.I. Cr. R. 80=A.I.R. 1929 Pat. 145 (F.B).

—S. 10—Previous conduct.

———*Offence under S. 222, Penal Code.*

The accused who was a warder in the jail was being tried under S. 222, Penal Code in respect of intentionally aiding the prisoners under sentence of death in attempting to escape from confinement in jail. He procured saw blades and loosened the rivets of the grates. Previously he was seen by some witness warders conversing and carrying on negotiations with certain fellow-caste-men of the convicts. A constable who was called in as witness and had exhorted the convicts while under trial, deposed that after the death sentence was pronounced and the convicts were brought out one of the convicts called out to his fellowman and told him to give the accused Rs. 100. The request was repeated twice,

Held, that the evidence of the constable was admissible under the circumstances under S. 10. (*Hilton, J.*). MAULA BAKHSH *v.* EMPEROR.

119 I.C. 762=30 Cr.L.J. 1103=1929 Cr. C. 190=A. I. R. 1929 Lah. 631.

—S. 10—Scope.

———Section 10 renders admissible in cases of conspiracy much evidence which is not otherwise ordinarily admissible under the Indian law. The provisions of the section are wider than those of English law. (*Stuart, C.J. and Raza, J.*). RAM PRASAD *v.* EMPEROR.

106 I.C. 721=2 Luck. 631=1 L.C. 339=8 A.I. Cr. R. 449=A.I.R. 1927 Oudh 369.

—S. 10—Scope and effect.

———*Existence of conspiracy and joining therein—Proof of, necessary.*

EVIDENCE ACT (1872), S. 10—Scope and effect.

Section 10 of the Evidence Act means this : if two persons conspire together to commit an offence, each is regarded as being the agent of another and just as the principal is liable for the acts of the agent, so each conspirator is liable for what is done by his fellow conspirator in furtherance of the common intention which they had both entertained. First, you must find, that there was a conspiracy and, secondly, that the person to whom the doctrine is to apply should have joined the conspiracy before they can be made liable for anything said or done by others. (*Crump, J.*). EMPEROR *v.* SHAFI AHMAD. **31 Bom. L.R. 515.**

—S. 10—Statements in furtherance.

———*Conspiracy case.*

If *prima facie* evidence of the existence of a conspiracy is given and accepted the evidence of statements made by any one of the conspirators in furtherance of the common object is admissible against all. (*Coutts-Trotter, C.J.*). LILARAM GANGANMULL, *In re.* **81 I.C. 817=20 M.L.W. 202=25 Cr.L.J. 1041=A.I.R. 1924 Mad. 805.**

—S. 11—Admissibility.

———*Principles—Evidence of previous acts.*

The admissibility of a particular evidence under S. 11 in each case must depend on how near is the connexion of the facts sought to be proved with facts in issue to what degree do they render facts in issue, probable or improbable, when taken with other facts in the case and to what extend would the admission of the evidence be inconsistent with principles enunciated elsewhere in the Act.

Where *A* was charged with entering into a conspiracy to bring false evidence against *B* and *C* and all the previous acts of which evidence was to be given were acts in which he acted against *B* or *C*, or both,

Held, that such evidence was admissible under S. 11 but not under Ss. 10 and 15; *Reg.* v. *Planningan and Higgin*, 15 Cox. C. C. 403 and other cases *Ref.* (*Mya Bu and Brown, JJ.*). HTIN GYAW *v.* EMPEROR. **109 I.C. 491=6 Rang. 6=29 Cr. L.J. 555=10 A.I. Cr. R. 249=A.I.R. 1928 Rang. 118.**

———*Question as to dedication to religious endowment—Circumstances under which gift of one item was made—Same throwing light on question of dedication.*

Where the suit related to rights to properties belonging to a math and the question as to dedication was put in issue and the gift of certain item of property belonging to the institution was sought to be relied on as throwing light on the general question, *held*, that it was admissible under S. 11 (2) of the Evidence Act. (*Mears, C.J. and Dalal, J.*). BHAGWAT PRASAD *v.* BINDESHWARI DAS. **1930 A.L.J. 964.**

—S. 11—Deed between strangers.

———A document between strangers to the suit, in which mention is made of one of the parties to the suit or their predecessors-in-interest as holding the land as belonging to the executants of the document is not admissible in evidence. A.I.R. 1927 Lah. 448, *Foll.* (*Bhide, J.*). ABDUL GHANI *v.* FAKIR MAHOMED. **111 I.C. 361=A.I.R. 1929 Lah. 78.**

———A document between strangers to the suit in which mention is made of one of the parties to the suit or their predecessors as holding the land lying on the boundaries of the lands belonging to the executants of the document is not admissible in evidence. 46 I.C. 119, *Not foll.*; A.I.R. 1925 Cal. 1034 and 224 P. L. R. 1913, *Foll.* (*Shadi Lal, C. J. and Zafar Ali, J.*). LAJPAT RAI *v.* FAIZ AHMAD. **103 I. C. 889=8 Lah. 651=29 P.L.R. 74=A.I.R. 1927 Lah. 448.**

EVIDENCE ACT (1872), S. 11—Dispute about land.

———A document between strangers to the suit in which mention is made of one of the parties or their predecessors as holding the land lying on the boundaries of the lands belonging to the executants of the document is not admissible in evidence. (*Suhrawardy and Cuming, JJ.*). CHOONI LAL KHEMANI *v.* NILMADHAB BARIK. **86 I.C. 734=41 C.L.J. 374=A.I.R. 1925 Cal. 1034.**

———A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence as against the parties who make it. But it is no more evidence as against third persons than any other statement would be. (*Greaves and Chakravarti, JJ.*). PRAMATHA NATH CHOUDHURI *v.* KRISHNA CHANDRA BHATTACHARJEE. **84 I. C. 420=28 C.W.N. 1092=A.I.R. 1924 Cal. 1067.**

———*Recitals in—When admissible.*

Recitals in the boundaries of other lands in documents between the third parties, are not admissible in evidence under S. 11 or S. 13. But they might be admissible under Cl. (3) of S. 32 when they are the statements made by persons of the character described in the opening sentence of that section; that is to say, persons who are dead or who cannot be found or for other reasons therein stated cannot be examined as witnesses. (*Newbould, J.*). ABDUL RAHIM KAZI *v.* JONABALI SIKDAR. **68 I.C. 329=A. I. R. 1923 Cal. 299.**

———Recitals of boundaries of lands in documents between third parties are not admissible in evidence under S. 11 or S. 13 but are admissible under S. 32 (2) of the Evidence Act. (*Prideaux, A. J. C.*). TRIMBAK *v.* GANESH. **68 I. C. 314=A.I.R. 1923 Nag. 22.**

—S. 11—Dispute about land.

———*Recitals in certificate or proclamation of sale.*

Recitals in a sale certificate or a sale proclamation are not admissible under Ss. 11, 13 and 32, Cl. 3. A. I. R. 1927 Cal. 230; A. I. R. 1924 Cal. 1067, *Foll.*; 22 W. R. 239 and 23 Bom. 63, *Dist.* (*Cuming and Mukherji, JJ.*). AMBIKA CHARAN *v.* KUMUD MOHUN. **110 I.C. 521=A.I.R. 1928 Cal. 893.**

———*Documents with recitals of boundaries—When admissible.*

Recitals in documents regarding boundaries executed by third parties in favour of the plaintiffs are not admissible in evidence if the executant is not dead and does not come to corroborate them : A.I.R. 1927 Lah. 448, *Foll.*; A.I.R. 1927 Cal. 230; A.I.R. 1916 P.C. 5, *Dist.* (*Harrison, J.*). GHULAM MUHAMMAD *v.* KALIM ULLAH. **109 I.C. 728=10 L.L.J. 370=A.I.R. 1928 Lah. 428.**

———Where the executants of documents containing recitals of boundaries of land in dispute are alive and do not give their evidence, such documents are not admissible either under S. 11 or S. 13. (*B. B. Ghose and Panton, JJ.*). KETABUDDIN *v.* NOFAR CHANDRA. **99 I. C. 907=44 C.L.J. 582=A.I.R. 1927 Cal. 230.**

———*Batwara papers—Entries in.*

The presumption which arises as to the correctness of an entry in the record-of-rights under S. 103-B of the Bengal Tenancy Act would not attach to an entry in the batwara papers, prepared by the Collector under the Bengal Estates Partition Act 5 of 1897. Where certain lands are entered in

EVIDENCE ACT (1872), S. 11—Dispute about land.

those papers as *chowkidari chakran* lands, so far as a stranger is concerned, the only way in which those papers can be treated as evidence would be under S. 11 of the Evidence Act on the ground that in the partition proceedings the lands were claimed as *chowkidari chakran* lands. The entries in those papers could not be in any way binding upon a stranger to those proceedings. 13 C.W.N. 93, *Dist.* (*Chakravarti, J.*). RAHIMUDDIN SARKAR *v.* UMESH CHANDRA. **87 I. C. 694= A. I. R. 1926 Cal. 115.**

———*Description in lease—Value of.*

The right to possession by lessee of a plot of land was in controversy. The right was denied on the ground that the alleged lessor was not entitled to the plot. A pattah executed by the lessor in respect of another plot of land, a year previous to the granting of the lease in question, contained a description of the boundary of the land demised by that pattah. This description clearly evidenced his title to the other plot which formed the subject of the lease in question,

Held, that the lessor's statement in the pattah previously granted could not be said to be a "fact" within the meaning of S. 11 and that that section could not be invoked for admitting the statement. (*Suhrawardy and Cuming, JJ.*). RADHA KRISHNA MARWARI *v.* SARBESWAR NAG. **86 I.C. 674= 29 C.W.N. 469= A.I.R. 1925 Cal. 684.**

———*Document evidencing construction—Value of.*

Old documents mentioning persons who built certain very old houses may be admitted in evidence under S. 11, Cl. 2 and S. 13, Cl. (b) where direct evidence about the construction may not be easily available. (*Kanhaiya Lal, J.*). RAGHUNATH *v.* BINDESHWARI NANDAN. **82 I. C. 582= 5 L.R.A. Civ. 231= A.I.R. 1924 All. 526.**

———*Writs of attachment—Non-mention of tenancy ———Effect of.*

Where writs of attachment issued in 1792 and 1797 must have been prepared when the Collector took possession of the zemindari upon default in payment of revenue by the proprietor and the documents might be relevant in connection with the history of the estate and might be used to show that the proprietor defaulted and the Collector went into possession, but there was nothing to indicate that the duty was cast upon the Collector to prepare a complete record of all the tenures then in existence,

Held, that in view of the scope of the two attachment writs no inference favourable to the landlord can be drawn therefrom, and they cannot be treated as relevant under S. 11. (*Mookerjee and Chotzner, JJ.*). TARA KUMAR GHOSE *v.* KUMAR ARUNCHANDRA SINGH. **74 I.C. 383=36 C.L.J. 389= A.I.R. 1923 Cal. 261.**

—S. 11—Former judgment.

———*Case under S. 153-A, I. P. C.—Procedure.*

During the prosecution of an author of a book under S. 153-A, I.P.C. the book was proscribed by an order of Government under the Criminal P. C., (amended 1926) S. 99-A on the ground that the book contained matter the publication of which is punishable under S. 153-A, I. P. C. The author applied under S. 99-B and his application was dismissed by a bench of the High Court. Thereupon the trial Magistrate without recording any defence evidence or allowing further cross-examination of prosecution witnesses convicted the accused,

Held, that the conviction was legal and the judgment of the Bench of the High Court was admissible under Ss. 11 and 13, Evidence Act. (*Dalal, J.*). KALI CHARAN SHARMA *v.* EMPEROR. **104 I.C. 225=8 A.I. Cr. R. 204= 8 L. R. A. Cr. 124=25 A.L.J. 846= 28 Cr. L.J. 785= A.I.R. 1927 All. 654.**

EVIDENCE ACT (1872), S. 11—Legitimacy of children.

———*Admissibility—Case under S. 401, I. P. C.*

When offence charged against an accused is that of belonging to a gang of thieves, a former judgment more than 25 years old and convicting him of dacoity is admissible in evidence, though the former judgment is useful only for the purpose of proving that the accused is a person of criminal tendencies to commit theft who may be a member of the alleged gang. The judgment by no means goes to show that he had any habit of committing theft in the period under consideration. 14 Bom. L.R. 373 and 38 Cal. 408, *Foll.* (*Marten and Fawcett, JJ.*). MOTIRAM HARI *v.* EMPEROR. **89 I.C. 527= 26 Bom.L.R. 1223=26 Cr. L.J. 1391= A.I.R. 1925 Bom. 195.**

—S. 11—Hindu Muslim riot.

———*Previous attempt to convert—Admissibility of.*

When the charges against the accused are of dacoity and rioting, evidence that on the day after the occurence, the accused who was a Mussalman wanted another, a Hindu, to embrace Islam and threatened to beat him if he did not, is wholly irrelevant to either of the charges and should not be admitted notwithstanding that the riots in which accused was involved were due to Hindu-Muslim dissensions. (*Newbould and Mukherjee, JJ.*). DARGAHI *v.* EMPEROR. **88 I.C. 733= 52 Cal. 499=26 Cr. L. J. 1213= A.I.R. 1925 Cal. 831.**

—S. 11—Law on migration.

———*Proof of adoption.*

Where the question is whether a migrating family has adopted the law of the new place, the fact that in the allied or connected families, the new law has very widely been adopted and the rites and ceremonies of the new place have been generally recognised, renders it probable within the meaning of S. 11 that the family in question has adopted the new law.

Where the fact in issue is whether the migrating family has adopted the law of the new place a previous judgment, in which the ancestors of the family in question were on one side, is relevant. The observance of rites and ceremonies at marriages, deaths and births are also relevant. (*Mookerjee and Cuming, JJ.*). SARADA PARSANNA ROY *v.* UMA KANTA. **77 I.C. 450=37 C. L. J. 233= 50 Cal. 370= A.I.R. 1923 Cal. 485.**

—S. 11—Legitimacy of children.

———*Previous case—Absence of cross-examination on illegitimacy—Admissibility.*

Where the question is whether a particular person is the illegitimate son of a certain man and a certain woman, the fact on a previous occasion, when giving evidence on behalf of the woman the man was asked questions in cross-examination in order to show his partiality to her, including the question whether she had been his wife before another man took her in marriage, but that no question was asked him as to her bearing him illegitimate children, is admissible in evidence under S. 11 (2) as it makes highly improbable the allegation that the illegitimacy was well-known. (*Daniels, J.C. and Dalal, A.J.C.*). MUMTAZ-UNNISSA *v.* WAZIR ALI. **65 I.C. 308=8 O.L.J. 569= A.I.R. 1921 Oudh 242.**

EVIDENCE ACT (1872), S. 11—No entry in accounts.

—S. 11—No entry in accounts.

———The absence of an entry in an account book is a relevant fact, under either S. 7 or S. 8 or S. 11 of the Evidence Act. 10 Cal. 1024, *Diss.*; 4 C.W.N. 207, *Foll.* (*Hallifax, A.J.C.*). KASAM *v.* FIRM OF HAJI JAMAL. **76 I.C. 327=A.I.R. 1924 Nag. 22.**

———*Admissibility.*

Evidence that there is no entry in the account books, though not admissible under S. 34 may be admissible under Ss. 9 and 11.

The fact of absence of entry is relevant; its effect is to be determined in the light of the general evidence in the case. (*Mookerjee and Chotzner, JJ.*). TARA KUMAR GHOSE *v.* KUMAR ARUNCHANDRA SINGH. **74 I.C. 383=36 C.L.J. 389. A.I.R. 1923 Cal. 261.**

—S. 11—Partnership.

———*Proof of agency.*

Where a plaintiff sues a firm on foot of a transaction made by one member of the firm, it is for the plaintiff to show that either by the course of dealings between him and the defendants or by some overt acts of the defendant firm, that member was acting as their authorized agent in those transactions in such a manner as to bind the firm. (*Fforde and Agha Haidar, JJ.*). FIRM GHAZI RAM RAMPAT *v.* SHIMBU DAYAL. **109 I. C. 327= 9 L. L. J. 518=29 P. L, R. 276= A. I. R. 1928 Lah. 105.**

—S. 11—Religion.

———*Admission in will—Value of.*

Where the religion of a deceased person is a fact in issue, any solemn declaration made by him as to his religion is relevant and if such a declaration is made in a formal document for example in his will, it is relevant as an admission under the provisions of S. 11 (2), 14 and 21 (2) and is entitled to very great weight in deciding the question. 34 All. 341, *Expl.* and *Dist.*; 9 L. B. R. 179, *Ref.* (*Chari and Brown, JJ.*). LEONG HONE WAING *v.* LEAN AH FOON. **121 I. C. 796=7 Rang. 720= A.I.R. 1930 Rang. 42.**

—S. 11—Rent decree.

———*Admissibility—Proof of tenancy.*

When an *exparte* rent decree is satisfied by payment of the decretal amount, it is admissible in evidence to show the relevant fact of the existence of the tenancy till the date of the decree and the landlord's rights as arising from such tenancy. (*Greaves and Panton, JJ.*). ANUKUL CHANDRA DHAR *v* KAMALA KANTA ROY. **67 I. C. 787= A. I. R. 1923 Cal. 270.**

—S. 11—Rent suit.

———*Statement as to rent in order for delivery of possession is inadmissible.*

A statement in an order for delivery of possession as to the rent payable in respect of the land is inadmissible in evidence in a suit between the landlord and the tenant in which the rent payable is in dispute. A.I.R. 1924 Cal. 1067, *Foll.* (*Greaves and Mukerji, JJ.*). CHANDRA MOHAN *v.* SHEIK ELIN. **87 I.C. 512=A.I.R. 1926 Cal. 415.**

—S. 11—Scope.

———*S. 11 is controlled by S. 32.*

As a general rule, S. 11 is controlled by S. 32 when the evidence consists of statements of persons who are dead and the test whether such statement is relevant under S. 11, though not relevant under S. 32, is that it is admissible under S. 11 when it is altogether immaterial whether what was said was true or false but highly material that it was said.

EVIDENCE ACT (1872), S. 13—Decrees.

9 Bom. L.R. 1047, *Ref.* (*Cuming and Mukherji, JJ.*). AMBIKA CHARAN *v.* KUMUD MOHAN. **110 I.C. 521=A. I. R. 1928 Cal. 893.**

—S. 11—Self-serving statement.

———*Admissibility.*

Where the question is whether a person is a *benamidar* or real owner of property.

Per *Dawson Miller, C. J.*—Even self-serving statements made by the person are admissible under S. 11 if they render fact in issue highly probable or highly improbable.

Per *Mullick, J.*—Admissions made by the person in his own favour are not admissible.

Per *Foster, J.*—Where the statements are made by the person in the course of his instructions to his local agent who assists him in acquiring the property they are admissible as *res gestae*. (*Dawson-Miller, C. J., Mullick and Foster, JJ.*). HARIHAR PRASAD *v.* KESHO PRASAD. **93 I. C. 454= 5 P. H. C. C. 1=A.I.R. 1925 Pat. 68.**

—S. 11—Statements of living person.

———*Statements of living persons not examined as witnesses being inadmissible under S. 32 cannot be made relevant under S. 11.*

Before a fact can be considered to be relevant under S. 11, it must be shown that it is admissible. It would be absurd to hold that every fact, which even if it be inadmissible and irrelevant, would be admissible under S. 11. If a particular deposition could not be admitted under S. 32, it could not be admissible under S. 11 : 34 All. 341, *Foll.*

Statements of living persons not examined as witnesses are inadmissible in evidence to prove the allegation that the executant was a major at the time when he executed the document. (*Gokaran Nath Misra and Pullan, JJ.*). MUNNA LAL *v.* KAMESHARI DAT. **114 I. C. 801= 5 O. W. N. 1111=A. I. R. 1929 Oudh 113.**

—S. 11—Unregistered deed.

———*Admissibility.*

A deed which is not admissible in evidence on account of its being barred under S. 49, Registration Act, can be admitted in evidence under S. 11 if it is inconsistent with fact in issue. (*Niamatullah and Bennet, JJ.*). SHEO BANDHAN SINGH *v.* SAHDEO PRASAD SINGH. **122 I.C. 895= A.I.R. 1930 All. 130.**

—S. 13.

Decrees.
Documents.
Documents between strangers.
Essentials of assertion.
Judgments inter partes.
Judgments not inter partes.
Miscellaneous.

—S. 13—Decrees.

———*Decree not binding on parties as* res judicata *is not conclusive evidence of enforcement of custom.*

Although the most satisfactory evidence of the enforcement of a custom is a decree, still a decree, which does not bind the parties as *res judicata*, is a mere piece of evidence capable of rebuttal. It does not necessarily prove a custom: A.I.R. 1926 Sind 161, *Rel. on.* (*Aston, A.J.C.*). NIAMAT *v.* ABDUL RAHMAN. **A.I.R. 1930 Sind 193.**

———Decree in a previous suit to which one party in subsequent suit was not party is admissible in evidence for corroboration of fact asserted by party in oral evidence and question of weight to be attached to it is question of fact—Evidence Act, S. 41. 6 Cal. 171 (F.B.), *Dist.* (*Courtney-Terrell, C.J. and James, J.*). RAM LAKHAN UPADHYA *v.* JAI UPADHYA. **A.I.R. 1929 Pat. 749.**

EVIDENCE ACT (1872), S. 13—Decrees.

———A decree not set aside by a competent Court can be used as evidence with regard to the matters dealt with by it. (*Mukerji, J.*). KIRAN CHANDRA *v.* JAGANNATH BANIK. **114 I. C. 670= A I.R. 1928 Cal. 472.**

———*Suit for rent—Decree by another co-sharer admissibility as to rate of rent.*

A decree obtained by a co-sharer landlord in a previous suit is not admissible in evidence as to rate of rent in a subsequent suit for rent by another co-sharer landlord. It does not follow that because one co-sharer was suing for the particular amount as representing his share of the rent, necessarily other co-sharers would be getting the same amount if the shares were identical or a proportionate amount, unless there was one contract by which the tenancy was created : 22 C. W. N. 304, *Not foll.*; 22 Cal. 533 (P. C.), *Dist.*; 25 Cal. 522 (F. B.) and A. I. R. 1923 P. C. 1, *Foll.*; [cf. A. I. R. 1928 Cal. 355 S. A. No. 2452 of 1925—Ed.] Per *Mitter, J.* A decree obtained by a co-sharer landlord is admissible in evidence as to the rate of rent in a subsequent suit for rent by another co-sharer landlord. —Per *Mullick, J.* 22 C.W.N.304 and 22 C. 533 (P.C.), *Foll.*; 10 C. W. N. 1084, *doubted*. KANTO MOHAN MULLICK *v.* JUDAB CHANDRA. **112 I.C. 787= A.I.R. 1928 Cal. 353.**

———*Criminal P. C., Ss. 144 and 145—Rent decree —Evidentiary value.*

The rent-decree is to some extent evidence under S. 13 of Evidence Act as to the landlord having recognised the holding as being in possession of tenant sued. It is not conclusive against third parties. (*Jwala Prasad, J.*). NANDKISHORE SAO *v.* BIKAN SINGH. **65 I.C. 856=3 Pat. L.T. 570= 23 Cr L.J. 200=A.I.R. 1922 Pat. 557.**

—S. 13—Documents.

———*Suit to establish rights as mahant—Papers containing recognition of rights by revenue officers and residents of village—Admissibility.*

Where in a suit in which the rights as mahant were asserted a report containing signatures of revenue officers and residents of the village were filed to prove the said rights.

Held, that it was admissible under S. 13 of the Evidence Act. (*Mears, C.J. and Dalal, J.*). BHAGWAT PRASAD *v.* BINDESHWARI DAS. **1930 A.L.J. 964.**

———*Dispute regarding nature af land—Recitals in sale-deeds in favour of one party to suit showing nature of same land are admissible not only under S. 32 but also under S. 13 (b).*

Where in a suit between two persons the question is whether or not the adjoining piece of land is Nazul land, the recitals made by successive vendors of one of these persons whereby they purported to transfer the house with all the lands, boundaries and rights appertaining thereto but expressly admitted that the land in dispute did not belong to them but was Nazul land are admissible in evidence not only under S. 32 but also under S. 13 (b). 11 A.L.J. 139, *Rel. on* ; 23 Bom. 63; 16 C.W.N. 252; 17 C. W. N. 108; A.I.R. 1924 Cal. 1067; 45 Cal. 159 and A. I. R. 1922 Cal. 251, *Ref.* (*Sulaiman and Kendall, JJ*). TIKA RAM *v.* MOTI LAL. **1930 A.L J. 564= A.I.R. 1930 All. 299.**

———Settlement deed under which pro-note is transferred, if admissible as secondary evidence, may be employed to prove pro-note under S. 32 (7) read with S. 13 (a)—(*Obiter.*) 26 I. C. 747, *Rel. on.*

EVIDENCE ACT (1872), S. 13—Documents.

(*Curgenven, J.*). SUBBARAYULU NAIDU *v.* VENGAMA NAIDU. **A.I.R. 1930 Mad. 742.**

———*Statement in will regarding nature of tenancy may be taken as evidence.*

A statement in the will made by tenant regarding the permanency of his tenancy may be regarded as one made in course of a transaction by which the property was bequeathed to the legatee under the will and consequently the statement made in the will may be taken as evidence under S. 13. (*Mitter and Mallick, JJ.*). PRAMATHA NATH DAS *v.* CHAMPA DASI. **118 I. C. 353=56 Cal. 275= A. I. R. 1929 Cal. 473.**

———*Bengal Estates Partition Act* (8 *of* 1876), *S.* 77 —Batwara, *prepared under provisions of Ch.* 7 *in presence of proprietor—Admissibility.*

A *Batwara* signed by the partition Deputy Collector and containing entries required by the provisions of Ch. 7 of the Bengal Estates Partition Act would be evidence against the proprietors under S. 13, Evidence Act because they were made in their presence. 38 I.C. 205, *Ref.* (*Mullick, Ag. C.J. and Jwala Prasad, J.*). RAMSARUP RAUT *v.* RAMNARAIN TEWARY. **114 I.C. 479=7 Pat. 85= 10 P.L.T. 399=A.I.R. 1929 Pat. 32.**

———*Admissibility of* batwara khasra.

The *Batwara Khasra*, prepared by an Amin and not signed by any gazetted officer, cannot be held to be a public document under S. 35, though, on proper proof, it may be evidence either under S. 18 or 13. 17 C.W N. 779, *Expl.* (*Mullick, Ag. C.J. and Jwala Prasad, J.*). RAMSARUP RAUT *v.* RAMNARAIN TEWARY. **114 I.C. 479=7 Pat. 85=10 P.L.T. 399= A.I.R. 1929 Pat. 32.**

———*Mortgage-deed stating rent payable to superior landlord—Mortgage debt paid off—Superior interest purchased by mortgagee—Suit for recovery of rent at an enhanced rate—No proof of enhanced rent—Mortgage bond is admissible to prove the rent.*

Defendant mortgaged the rent land to the plaintiff in 1899. The mortgage-deed stated the rent in respect of that holding payable to the superior landlord as Rs. 18. In 1904 the mortgage debt was paid off, the plaintiff purchased the superior interest and claimed rent at the rate of Rs. 24, although there was no proof of such enhancement,

Held, that the question as to what the amount of rental was, was one of the essential terms of the mortgage bond. That the document was admissible in evidence as it was a transaction by which the right of the defendant to the land was asserted and for the definition of that right, the amount of rent had to be stated. A.I.R. 1927 Cal. 1, *Dist.* (*Mitter, J.*). ABDUL MUNSER *v.* YAKUB TALUKDAR, **117 I.C. 599=A.I.R. 1928 Cal. 703.**

———*Recital of boundaries in—Admissibility.*

A receipt, stating the disputed property as one of the boundaries to an adjacent plot, executed by a deceased person in the ordinary course of business and consisting of an acknowledgment written or signed by him of the receipt of money, is admissible in evidence under S. 32, and not under S. 13. 19 C. W. N. 468 and A. I. R. 1922 Cal. 251, *Dist.* (*Pullan, J.*). AHMAD SHAJI *v.* JAMAL AHMAD. **113 I. C. 414=5 O. W. N. 174= A.I.R. 1928 Oudh 248.**

———*Dispute concerning land—Landlord's papers prepared in course of business concerning lands are admissible.*

Under S. 13 zemindar's papers prepared in the course of business and in due management of the zemindari are admissible in a dispute concerning the land to which such papers pertain : 9 Cal. 741,

EVIDENCE ACT (1872), S. 13—Documents.

Dist.; 16 C. W. N. 116, *Rel. on.* (*Suhrawardy and Cammiade, JJ.*). SUTU HOWLADAR *v.* ALEP.
101 I. C. 792=A. I. R. 1927 Cal. 576.

———*Chittas made by Government for private use in connexion with resumption proceedings are not admissible.*

Chittas made by Government for its own private use in connexion with resumption proceedings are nothing more than documents prepared for the information of the Collector, and are not evidence against private persons for the purpose of proving that the lands described therein are or not of a particular character or tenure. They are admissible neither under S. 83 nor under S. 13 where it is not known whether they were acted on for the purpose of the resumption proceedings or if in fact reliance was placed upon them by Government for the purpose of resumption proceedings: 9 Cal. 741, *Rel. on.* (*Greaves and Mukerji, JJ.*). UPENDRA NATH CHATTOPADHYA *v.* RADHA GOVINDA BANDOPADHYAY. **98 I. C. 85=A.I.R. 1927 Cal. 189.**

———*Benami transaction is not admissible.*

Per *Cuming and Mookerjee, JJ.*—A benami transaction is a fictitious transaction and as such cannot be let in evidence under S. 13. (*Sanderson, C.J., Panton and Graham, JJ.*). BROJENDRA KISHORE *v.* MOHIM CHANDRA. **99 I.C. 189=31 C.W.N. 32=A.I.R. 1927 Cal. 1.**

———*Rent suit—Chittas are admissible.*

Chittas or the zemindar's private survey papers, though prepared in the absence of the tenants, are not wholly inadmissible in evidence in a rent suit by the zemindar: but there may be a great deal of difference in their probative value, which may range from zero to hundred according to the facts of the particular case. (*Suhrawardy and Cuming, JJ.*). APTABUDDI *v.* SAYED ALLA HAFIJ.
88 I.C. 548=A.I.R. 1925 Cal. 1104.

———*Previous transaction in respect of different property is not "transaction" within the section.*

Where a plot of land was leased and the title of the lessor to the land was disputed, but previous to the lease in question, the lessor had executed a pattah in respect of another plot of land and where his description of the boundary of the land in that pattah showed that he claimed the land in suit as his own,

Held, that the pattah was not a "transaction" as it did not relate to the land in suit. 11 C.W.N. 703, *Foll.* (*Suhrawardy and Cuming, JJ.*). RADHA KRISHNA MARWARI *v.* SARBESWAR NAG.
86 I.C. 674=29 C.W.N. 469=A.I.R. 1925 Cal. 684.

———*Evidence of construction of old houses by old documents.*

Old documents mentioning persons who built certain very old houses may be admitted in evidence under S. 13, Cl. (b) where direct evidence about the construction may not be easily available. (*Kanhaiya Lal, J.*). RAGHUNATH *v.* BINDESHWARI NANDAN. **82 I.C. 582=5 L.R.A. Civ. 231=A.I.R. 1924 All. 526.**

———*Lease-deed—Assertions in—Admissibility.*

An assertion in the *kobala* executed by a tenant in favour of his transferee, that his right in it was a permanent one is admissible under S. 13 in evidence in a suit for ejectment of the tenant where permanent tenancy was claimed. (*Rankin, J.*). JNANENDRA NATH DUTT *v.* NASEA DESAI.
83 I.C. 948=39 C.L.J. 526=A.I.R. 1924 Cal. 991.

———*Batwara Khasra.*

Where *Batwara Khasra* was used to show the past history of the plots long before the landlords

EVIDENCE ACT (1872), S. 13—Essentials of assertion.

predecessors-in-interest obtained a settlement and to show that in 1866 the land was raiyati land,

Held, that there is no reason why the document should not be held admissible under S. 13. (*Adami, J.*). SADHU SARAN *v.* AMBIKA LAL.
68 I.C. 676=A.I.R. 1923 Pat. 163.

———*Police orders are admissible.*

Police orders made under various sections of the Criminal Procedure Code, deciding who was in possession of the disputed land are admissible in evidence under S. 13 of the Indian Evidence Act to show the fact that such orders were made. (*Wazir Hasan, A.J.C.*). GHULAM SARWARKHAN *v.* MOHAMMAD ALI KHAN. **65 I.C. 398=8 O.L.J. 609=A.I.R. 1922 Oudh 98.**

———*Document by third party recognising plaintiff's right is admissible in evidence.*

The plaintiffs claimed the land in dispute as their *man* land and the defendant claimed it as his *jote*. The plaintiffs produced an *ekrarnama* addressed by a third party to an ancestor of the plaintiffs in which the land in suit was described as *man* land,

Held, the *ekrarnama* was admissible under both clauses (*a*) and (*b*) of S. 13. (*Coutts and Ross, JJ.*). SABRAN SHEIKH *v.* ODOY MAHTO. **70 I.C. 18=1 Pat. 375=3 P.L.T. 792=1923 P.H.C.C. 125=A.I.R. 1922 Pat. 488.**

———Assertion of ownership in mortgage-deed is relevant as to ownership under S. 13 and after mortgagor's death under S. 32 (7). (*Sadasiva Iyer and Spencer, JJ.*). NALLASIVA MUDALIAR *v.* RAVAN BIBI. **70 I.C. 389=14 M.L.W. 327=1921 M.W.N. 560=A.I.R. 1921 Mad. 383.**

—S. 13—Documents between strangers.

———*Recitals as to Boundaries—Admissibility.*

A document between strangers to the suit in which mention is made of one of the parties or their predecessors as holding the land lying on the boundaries of the lands belonging to the executants of the document is not admissible in evidence. (*Suhrawardy and Cuming, JJ.*). CHOONI LALL KHEMANI *v.* NILMADHAB BARIK. **86 I. C. 734=41 C.L.J. 374=A.I.R. 1925 Cal. 1034.**

———*Recitals in—Are inadmissible.*

A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence as against the parties who make it. But it is no more evidence as against third persons than any other statement would be. (*Greaves and Chakravarti, JJ.*). PRAMATHA NATH CHOUDHURI *v.* KRISHNA CHANDRA BHATTACHARJEE. **84 I.C. 420=28 C.W.N. 1092=A.I.R. 1924 Cal. 1067.**

—S 13—Essentials of assertion.

———*Mere statement of boundary is not enough.*

A mere statement of boundary cannot be classed with any of the verbs in S. 13 "created, modified, recognised, asserted or denied" and is, therefore, not admissible under S. 13 (a). (*Jackson, J.*). KARUPPANNA KONAR *v.* RANGASWAMI KONAR.
107 I.C. 293=A.I.R. 1928 Mad. 105.

———"*Claim*" *must be asserted in presence of the party to be affected thereby.*

Per *Cuming and Mukerjee, JJ.*—The word "claim" implies that the right is asserted to the knowledge and in the presence of the person whose right will be derogated by the establishment of the claim. The mere assertion of the right in a document, to which the person against whom the right is asserted is not a party and of which he knows nothing is not to claim the right. (*Sanderson, C.J.*,

EVIDENCE ACT (1872), S. 13 — Essentials of assertion.

Panton and Graham, JJ.). BROJENDRA KISHORE *v.* MOHIM CHANDRA. **99 I.C. 189=31 C.W.N. 32= A.I.R. 1927 Cal. 1.**

———*Transaction by which right is asserted is admissible.*

A transaction or instance in which there is a mere assertion of a right or custom does not come within S. 13 but only such a transaction is admissible by which the right or custom is asserted or denied: 11 C.W.N. 703, *Foll.* (*Sanderson, C.J., Panton and Graham, JJ.*). BROJENDRA KISHORE *v.* MOHIM CHANDRA. **99 I.C. 189=31 C.W.N. 32= A.I.R. 1927 Cal. 1.**

———*Mere assertion of right is sufficient—The right may not have been successfully asserted.*

The words of S. 13 are wide enough to cover the mere assertion of a right in a previous suit where that right was in dispute. There is nothing in that section which requires that the right should be successfully asserted. (*Newbould and Graham, JJ.*). RAMKUMAR DAS *v.* HARNARAIN DAS. **92 I.C. 104=A.I.R. 1926 Cal. 727.**

———*"Claim" and Recital—Distinction.*

The word "claim" denotes a demand or assertion in relation to a thing or attribute as against or from some person or persons, showing the existence of a right to it in the claimant. A bare statement may or may not be a claim according to the attending circumstances in which it is made. It may amount to a claim or be a mere statement of claim, though in some circumstances a statement may amount to a claim.

A statement in a pattah that the land to the west of the land demised under that pattah belongs to the executant of the pattah is not a "claim" but a mere recital. 17 C.W.N. 1016 and 31 Cal. 380, *Foll.* (*Suhrawardy and Cuming, JJ.*). RADHA KRISHNA MARWARI *v.* SARBESWAR NAG. **86 I.C. 674=29 C.W.N. 469= A.I.R. 1925 Cal. 684.**

—S. 13—Judgments inter partes.

———*Judgment in which right under dispute was recognized by Court is admissible as relevant fact.*

Where the mortgagee's right to hold a valid charge on the property comprised in a mortgage is in dispute and it is found that in a previous suit the right was asserted by the representatives of the mortgagee and the right claimed was recognized by the Court, the judgment in that suit being an instance in which the mortgagee's right was recognized against the plaintiffs is a relevant fact and as such is admissible in evidence under S. 13. (*Sulaiman and Sen, JJ.*). MUHAMMAD ABDUL KARIM KHAN *v.* BISHAN SAHAI. **121 I.C. 387=1929 A.L.J. 741= A.I.R. 1930 All. 9.**

———*Observations in—Admissibility.*

Observations in a judgment relating to a different matter though connected cannot bind a third party and the judgment itself cannot be evidence against him. (*Ramesam and Cornish, JJ.*). L.V. NARASIMHA SASTRI *v.* OFFICIAL ASSIGNEE, MADRAS. **1930 M.W.N. 396= A.I.R. 1930 Mad. 751.**

———When a similar question regarding the factum and validity of adoption, was raised in a previous proceeding, the judgments in which that adoption was upheld do constitute relevant pieces of evidence under S. 13: A.I.R. 1926 Nag. 109 and 24 Bom. 591, *Foll.* (*Kinkhede and Mohiuddin, A.J.Cs.*). YAMUNABAI *v.* DHANNALAL. **114 I.C. 616 (Nag.).**

EVIDENCE ACT (1872), S. 13—Judgments inter partes.

———Judgment in a previous suit is admissible in evidence under S. 13 to establish the illegitimacy of a certain person, 12 All. 1 (F.B.), *Foll.* (*Stuart, C.J. and Raza, J.*). RAJ FATEH SINGH *v.* BALDEO SINGH. **109 I.C. 310=3 Luck. 416= 5 O.W.N. 143=A.I.R. 1928 Oudh 233.**

———*Evidentiary value of.*

Judgments *inter partes* can be admitted in order to prove the conduct of the parties or to show particular instances of the exercise of rights, or admissions made by parties' ancestors or how the property was dealt with previously as relevant evidence under the provisions of S. 11 or S. 13. They cannot be wholly excluded from consideration because in so far as they explain the nature of possession or throw light on the motives or conduct of parties or reproduce the admissions made by the parties or their ancestors and also embody an authoritative statement of the facts which the investigation then held before the Court brought to light, such judgments have very high evidentiary value and may even shift the burden of proof. 22 W.R. 365; 24 Bom. 591 and A.I.R. 1926 Nag. 109, *Ref.* (*Kinkhede, A.J.C.*). GOPAL RAO *v.* SITARAM. **97 I.C. 694=9 N.L.J. 215=A.I.R. 1927 Nag. 19.**

———*Suit for possession—Prior decision under S. 145, is a relevant fact.*

In a suit for possession the fact that there was a proceeding under S. 145, Criminal Procedure Code, that there was an inquiry into the matter and that there was a decision adverse to the allegations of the plaintiffs, is a relevant fact under S. 13. 29 Cal. 187, *Foll.* (*Mukerjee and Rankin, JJ.*). HASIM ALI *v.* ABJAL KHAN. **82 I.C. 392= 40 C.L.J. 30=A.I.R. 1924 Cal. 1046.**

———It is not the correctness of the previous decision, but the fact that there has been a decision, that is established by the production of the judgment. (*Mukerjee and Cuming, JJ.*). BAIDYA NATH DUTT *v.* ALEFJAN BIBI. **70 I.C. 194= 36 C.L.J. 9=A.I.R. 1923 Cal. 240.**

———*Judgments not operating as* res judicata—*Admissibility.*

A judgment in a prior suit relating to a different *Jama* but between the same parties is admissible in evidence, whether or not it constitutes *res judicata.* (*Suhrawardy and Cuming, JJ.*). SASIMUKHI CHOWDHURANI *v.* SARASWATY SEN GUPTA. **65 I.C. 522 (Cal.).**

———*Prior judgment questioning a right is admissible.*

A judgment given in a previous suit contesting the right of the then Granthi that the property was *wakf* and was attached to the Gaddi, and, therefore could not be treated by the Granthi as his private property, is admissible for the purpose of showing that at that time also, the right of the Granthi to alienate certain property was called in question. 31 Bom. 143, *Foll. Other cases Ref.* (*Scott-Smith and Abdul Raoof, JJ.*). INDAR SINGH *v.* FATEH SINGH. **59 I.C. 734=49 P.L.R. 1921=A.I.R. 1921 Lah. 337.**

———Judgments which are neither *res judicata* nor judgments *in rem*, are not admissible as showing that a particular right was asserted or denied. (*Stuart and Kanhaiya Lal, A.J. Cs.*). MAHAMMAD ALI KHAN *v.* GHAZANFAR ALI KHAN. **60 I.C. 147=7 O.L.J. 474.**

———Judgments not *inter partes* in previous cases in which the right involved in the present litigation was asserted are admissible. (*Hopkinz, S. M. and Porter, J.M.*) KALLUMISIR *v.* BHAGWATI SINGH. **60 I.C. 142=2 U.P.L.R. (B.R.) 81.**

EVIDENCE ACT (1872), S. 13—Judgments not inter partes.

—S. 13—Judgments not inter partes.

———*Judgment that does not fall under Ss. 40, 41 and 42 is not relevant under S. 13 for decision of same point in subsequent suit.*

Where a judgment is not *in rem* nor relating to matters of public nature, nor between the parties to a subsequent suit, the fact that the Court by that judgment decides a point in a particular way is not relevant for the purpose of the decision of the same point in the subsequent suit. A.I.R. 1929 P.C. 99 and 1 Lah. 540, *Rel. on* ; 19 All. 277 (P.C.), *Expl.* ; 22 Cal. 533 (P.C.), *Dist.* ; A.I.R. 1926 Nag. 109, *Overruled* ; 29 Cal. 187 (P.C.) ; 35 Cal. 701 and A.I.R. 1921 Mad. 248, *Ref.* (*Macnair, Offg. J. C. and Jackson and Subhedar, A. J. Cs.*). SHANKAR GANESH *v.* KESHEO. **121 I.C. 644=26 N.L.R. 33=12 N.L.J. 164=A.I.R. 1930 Nag. 1 (F.B.).**

———Judgment in a case in which a similar question was decided is admissible though not *inter partes*. The weight to be attached to it is for the trial Court to decide : (See A. I. R. 1930 Nag. 1 (F.B.)—Ed. (*Das and Adami, JJ.*). SHIBO SINGH *v.* JANKI PRASAD. **A.I.R. 1930 Pat. 231.**

———The Evidence Act does not make finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case where parties are not the same. (*Sir John Wallis*). KUMAR GOPIKA RAM ROY *v.* ATAL SINGH. **114 I.C. 561=1929 A.L.J. 246=49 C.L.J. 327=33 C.W.N. 463=29 M.L.W. 674=10 P.L.T. 301=31 Bom. L.R. 734=56 I.A. 119=56 Cal. 1003=A.I.R. 1929 P.C. 99=56 M.L.J. 562 (P.C.).**

———*Customs—Prior decision negativing is admissible.*

Where a custom was sought to be negatived and prior judgments wherein the custom was negatived were produced in evidence,

Held, that the judgments are admissible in evidence only as particular instances wherein the custom was recognized or departed from. (*Mukerji, J.*). HAR PRASAD *v.* HARI LAL. **116 I.C. 799 (All.).**

———*Jains—Decisions recognizing custom in one place is relevant in establishing same custom in another.*

Judicial decisions recognizing the existence of a disputed custom among the Jains of one place are very relevant as evidence of the existence of the same custom among the Jains of another place, but the evidence that the usage has application to the particular case cannot be dispensed with. 27 Cal. 379, *Ref.* (*Kumaraswami Sastri, Offg. C. J. and Curgenven, J.*). GATEAPPA *v.* ERAMMA. **99 I.C. 503=50 Mad. 228=26 M.L.W. 408=A.I.R. 1927 Mad. 228=51 M.L.J. 757.**

———*Throwing light on title of landlord—Admissibility.*

Where in a suit for ejectment by a jaghirdar, the defendants, sought to rely on judgments decided between the landlord and certain other tenants in other villages on the ground that in those cases although not *inter partes* the relation of the jaghirdar to his tenants and the right under which he held was decided.

Held, that the judgments in the other cases were not admissible in evidence. (*Baker, J.*). BANDU MAHAPAT *v.* SHIVASHANKERDAS. **118 I.C. 702=31 Bom. L.R. 335.**

———Judgment not *inter partes* in which an adoption was upheld constitute relevant pieces of evidence under S. 13 of the Evidence Act. (*Kinkhede and Mohiuddin, A. J. Cs.*). YAMUNABAI *v.* DHANNALAL. **114 I.C. 616 (Nag.).**

EVIDENCE ACT (1872), S. 13—Miscellaneous.

———Judgments in the former litigation though not *inter partes* are admissible under S. 13. 44 Mad. 778; 24 Bom. 591; 45 Cal. 138 and 7 N. L. R. 23, *Rel. on.* (*Kinkhede, A. J. C.*). YESHUANT *v.* DAULAT. **89 I. C. 663=A. I. R. 1926 Nag. 129.**

———Judgments not *inter partes* in suits wherein right had been asserted and recognized or denied are admissible under the section. (*Wadegaonkar, A. J. C.*). RAMDHAN *v.* PURUSHOTTAM. **88 I. C. 699=22 N. L. R. 49=A.I.R. 1926 Nag. 109.**

———*Judgments though not* res judicata *are admissible.*

The fact that certain judgments have been held not to operate as *res judicata* does not, however, mean that the judgments are not admissible in evidence. Judgments relating to a particular right, although not *inter partes*, but dealing with the same question; are clearly admissible under S. 13.

Where in the previous suit one of the main points for the consideration of the Courts was whether the property in suit was a private or public property and all the Courts concurred in holding that the property was a public property, it is clearly both a transaction as well as an instance in which the right, that the property was public property, was clearly asserted and recognized by the Courts. 12 All. 1 (F. B.); 24 Bom. 591; 12 Mad. 9; 22 Cal. 533 (P. C.) and 29 Cal. 197 (P. C.), *Rel. on.* (*Misra, J.*). HARI KISHEN *v.* RAGHUBAR DAYAL. **97 I.C. 853=1 Luck. 489=3 O. W. N. 645=13 O. L. J. 696=A.I.R. 1926 Oudh 578.**

———Judicial decisions recognising custom among Jains of one place are relevant in respect of Jains of another place. (*Baker, Offg. J. C.*). MT. SANO *v.* PURAN SINGH. **78 I.C. 461=A.I.R. 1925 Nag. 174.**

———*Statements in—Admissibility.*

Statements contained in a judgment relating to a case in which the parties were different are not relevant. (*Lindsay and Kanhaiya Lal, JJ.*). MUST. PHULWANTI KUNWAR *v.* JANESHAR DAS. **83 I.C. 782=46 All. 575=22 A.L.J. 521=5 L.R.A. Civ. 785=A.I.R. 1924 All. 625.**

———*Findings in—Admissibility.*

Findings arrived at in a judgment in a prior suit not *inter partes* should not be used against a person in a subsequent suit. (*Chatterjee and Panton, JJ.*). SATISH CHANDRA MUKERJEE *v.* JOYRAM ROY. **65 I.C. 525 (Cal.).**

———A judgment not *inter partes*, but which relates to the subject-matter of a suit and evidences the assertion of a right in controversy is admissible under S. 13 of the Evidence Act. (*Buckland and Cuming, JJ.*). PARBATI MAJHI *v.* DIGPATI MAJHI. **64 I.C. 465 (Cal.).**

—S. 13—Miscellaneous.

———*X making statement in former suit that he was orphan when adopted—His statement was admissible in subsequent suit to prove instance of orphan's adoption.*

In former suit in which the adoption of *X* was attacked, though not on the ground of his being an orphan at the time of adoption, *X* had made a statement that he was a year old when he was adopted and that his father and mother were then both dead.

Held, that this statement of *X* was admissible if produced in a subsequent suit, in which the question of the validity of an orphan's adoption was in question, to prove an instance of an orphan's adoption. (*Sulaiman and Kendall, JJ.*). BRIJ RAJ SARAN SINGH *v.* BASANT SINGH. **118 I. C. 154=A. I. R. 1929 All. 561.**

EVIDENCE ACT (1872), S. 13—Miscellaneous.

———Custom (Punjab)—Custom previously established—Instances showing continuity occurring after institution of suit relating to custom—Instances are important and should be relied upon—(*Jai Lal, J.*). KISHAN SINGH *v.* FAQIR.
112 I.C. 447= A. I. R. 1928 Lah. 966.

———*Assertion of right—Evidence as to, is relevant.*

Evidence, to prove that a disputed title was asserted and enforced is relevant though the title may be asserted against parties other than those who are disputing. (*Daniels and Lyle, A. J. Cs.*). MT. MANJUMAN-UN-NISA *v.* SHAIK ASHIQ ALI.
66 I.C. 222=8 O.L.J. 439=A.I.R. 1922 Oudh 178.

—S. 14—Collateral Offence.

———*Evidence of committing theft—Not relevant to show state of mind in committing dacoity.*

Evidence of commission of other offences such as thefts does not show an intention to commit a different kind of offence, such as dacoity and is therefore not relevant as showing the existence of any relevant state of mind, etc. (*K. Kemp, J.*). EMPEROR *v.* WAHIDUDDIN HAMIDUDDIN (NO. 1).
32 Bom. L.R. 324=A.I.R. 1930 Bom. 157.

———*Evidence of collateral facts—Principles explained.*

It is settled law that under neither of Ss. 14 and 15 can the evidence on facts similar to but not part of the same transaction as the main fact be received for the purpose of proving the occurrence of the main fact, which must be established by evidence directly bearing on it. But when the existence of that fact has been so established and a question arises as to the state of mind of the person who did it, or whether the act in question was done accidentally or with a particular knowledge or intention, evidence of similar acts may, under certain conditions, be admitted. Section 14 is wholly inapplicable to a case where the state of mind or feeling of the accused is not a fact in issue or a relevant fact, and the guilt or innocence depends on proof of actual facts. 6 Cal. 655; 42 Cal. 957; 47 Cal. 671 (F.B.); 12 P.R. 1913 Cr. and *Reg* v. *Richardson*, 8 Cox. 448, *Rel. on.*

Where the accused was charged under S. 409, Penal Code, for embezzling three specific sums.

Held, that evidence of collateral offences in respect of other sums was not admissible. (*Tek Chand, J.*). PRITCHARD *v.* EMPEROR. **112 I.C. 850= 30 Cr. L.J. 18=11 A.I. Cr. R. 405= A.I.R. 1928 Lah. 382.**

—S. 14—Counterfeiting coins.

———Counterfeit coins and instruments found in the house of accused in two districts—Trial in one district—Evidence of such possession in another district admissible. (*Miller, C.J. and Adami, J.*). MISIR GOSAIN *v.* EMPEROR. **61 I.C. 647= 22 Cr. L.J. 407=3 U.P.L.R. (Pat.) 50.**

—S. 14—Former deposition.

———The accused in a case of forgery and conspiracy had previously given evidence in a Civil Court as to the genuineness of the document,

Held, that though the statement could not be admitted as confession, the jury if independently satisfied that the documents are not genuine, the evidence is to be regarded as having high evidentiary value upon the question of intention whether or not they are in conspiracy. (*Rankin, C. J. and Buckland, J.*). AMBER ALI *v.* EMPEROR.
1929 Cr. C. 194=A.I.R. 1929 Cal. 539.

—S. 14—Former judgment.

———*Admissibility for showing criminal tendencies to commit offences.*

EVIDENCE ACT (1872), S. 14—Previous offences.

When offence charged against an accused is that of belonging to a gang of thieves, a former judgment more than 25 years old and convicting him of dacoity is admissible in evidence, though the former judgment is useful only for the purpose of proving that the accused is a person of criminal tendencies to commit theft who may be a member of the alleged gang. The judgment by no means goes to show that he had any habit of committing theft in the period under consideration. 14 Bom. L. R. 373 and 38 Cal. 408, *Foll.* (*Marten and Fawcett, JJ.*). MOTIRAM HARI *v.* EMPEROR.
89 I.C. 527=26 Bom. L.R. 1223=26 Cr. L.J. 1391= A.I.R. 1925 Bom. 195.

—S. 14—Former speech.

———Prosecution based on speech—Previous speech, though made about six months before, is admissible as evidence of intention of speaker if both speeches form part of series of speeches topic on one. (*Tapp, J.*). OM PARKASH *v.* EMPEROR. **A.I.R. 1930 Lah. 867.**

—S. 14—Habitual offender.

———*Trial for being a member of a gang of dacoits—Evidence of thefts—Value.*

In a case where the offence for which the accused are being tried is the particular one of belonging to a gang of dacoits, evidence merely that the accused habitually commits thefts (as opposed to dacoity and possibly robbery) is not evidence indicating an intention to commit the particular crime of which the accused is charged and is therefore inadmissible. But where the accused himself has given evidence that he has a good character such evidence is admissible under S. 54. 32 Mad. 179, *Foll.* (*Fawcett, J.*). EMPEROR *v.* HAJI SHER MAHOMED. **75 I.C. 67= 46 Bom. 958=25 Bom.L.R. 214=24 Cr. L.J. 867= A.I.R. 1923 Bom. 71.**

—S. 14—Intention.

———*Proof of.*

Intention has to be proved like any other fact and may of course be deduced from the conduct of the parties. (*Broadway, J.*). HAZARA SINGH *v.* EMPEROR. **99 I.C. 121=8 L.L.J. 512= 27 P.L.R. 867=28 Cr. L.J. 89.**

—S. 14—Previous conviction.

———Previous conviction—Evidence of, not admissible to show state of mind. But amounts to an evidence of bad character and not admissible under S. 54. 27 Cal. 139; 1 C. W. N. 146, *Foll.* (*Jwala Prasad and Sultan Ahmad, JJ.*). TEKA AHIR *v.* EMPEROR. **60 I. C. 331= 22 Cr. L.J. 219=5 Pat. L.J. 706.**

—S. 14—Previouso ffences.

———Where the evidence of previous conviction or the evidence that a man has been bound over under the preventive sections can be considered only as evidence of character it must be excluded. but where such evidence is admissible *aliunde.* it should not be excluded. Where the accused is charged under S. 400, I.P.C., such evidence is admissible, not as evidence of character but as evidence to prove habit and association. (*Raza and Nanavutty, JJ.*). BACHCHU *v.* EMPEROR.
A.I.R. 1930 Oudh 455.

———*Case of cheating—Previous act of fraud is inadmissible.*

Cheating is a case in which the question of guilt or innocence of the accused depends upon proof of actual facts and not upon the state of the accused's mind. Therefore the evidence as to any previous act of fraud is not admissible under any provision.

EVIDENCE ACT (1872), S. 14—Similar Acts.

of the law. (*Mukerji, J.*). GOKUL KHATIC *v.* EMPEROR. **86 I.C. 970=26 Cr. L.J. 906=29 C.W.N. 483=A.I.R. 1925 Cal. 674.**

—S. 14—Similar Acts.

———*Rash driving of motor car—Evidence regarding similar occurrence previously—Admissibility.*

Where in a prosecution under S. 304-A, I.P.C., it was sought to be proved that the accused had taken part in a similar occurrence just previously by which as a result of the rash driving of his motor car certain persons were injured,

Held, that evidence regarding the previous occurrence was not relevant either under S. 14 or under S. 15 of the Evidence Act.

Per *Waller, J.*—The accused is charged with rashness but the prosecution is not entitled to prove that he was rash generally or in relation to another occurrence. Rashness can be proved with reference to the particular occurrence alone. (*Waller and Ananthakrishna Iyer, JJ.*). COLLETT *v.* EMPEROR. **1929 M.W.N. 395.**

———*Evidence of similar acts of accused in regard to other persons is not admissible.*

Where accused was charged under S. 302, for having administered *Dhatura* to the deceased, the evidence of certain boys that he had previously offered sweets to boys and that one of the boys was afterwards robbed of his jewellery when affected with one of the symptoms of *Dhatura* poisoning, should not be admitted. Section 14 as explained in Illustration (*c*) shows that the fact that the accused offered sweetmeats to other boys and poisoned one of them with *Dhatura* is not evidence that he administered poisoned sweetmeats to the deceased. (*Batten, J. C. and Hallifax, A.J.C.*). KASHIRAM *v.* EMPEROR. **73 I.C. 262=6 N.L.J. 144=24 Cr. L.J. 566=A.I.R. 1923 Nag. 248.**

—S. 14—Statements after offence.

———A statement by an accused person immediately after the occurrence of an offence is relevant as showing his state of mind but a repetition of what some other persons said to the accused, by the accused, is not relevant and it has to be proved by direct evidence of the person who heard it. (*Broadway and Campbell, JJ.*). KAKAR SINGH *v.* THE CROWN. **81 I.C. 717=25 Cr. L. J. 1005=6 L. L. J. 575=A. I. R. 1924 Lah. 733.**

—S. 14—Statements of co-accused.

———Statements implicating co-accused but not incriminating maker are not admissible in evidence —Parts of such statements are admissible against maker as indicating knowledge on his part. (*Aston, A. J. C.*). WAHID BUX BHUTTO *v.* EMPEROR. **120 I. C. 81=30 Cr. L. J. 1121=1929 Cr. C. 678=A. I. R. 1929 Sind 250.**

—S. 14—Subsequent conduct.

———*Relevancy to show state of mind.*

Evidence of subsequent conduct is admissible to show the state of mind of an accused and therefore to show that the accused knew of and was a party to the cheating. (*Ryves, J.*). BECHAI *v.* EMPEROR. **69 I. C. 159=20 A. L. J. 324=23 Cr. L. J. 671=A. I. R. 1922 All. 244.**

—S. 14—Writings.

———*Seditions trial—Prior writings relevant on the question of intention.*

Primarily, anything that an accused tried under S. 124-A, I. P. C., has written is, if it comes within the general words of S. 14, relevant and admissible. At the same time, of course, the writing should be within a reasonable time of the particular occurrence, *i. e.*, the particular article or

EVIDENCE ACT (1872), S. 17—Admission for specific purpose.

other document, in respect of which he is being charged. (*Fawcett, J.*). EMPEROR *v.* PHILLIP SPRATT (No. 3). **108 I.C. 30=30 Bom. L. R. 315=9 A. I. Cr. R. 429=29 Cr. L. J. 320=A.I.R. 1928 Bom. 78.**

—S. 15—Similar Acts.

———*Criminal misappropriation in* 1925—*Evidence adduced of similar acts in common link done in* 1924 —*Evidence is admissible.*

Accused were prosecuted for misappropriation by defalcation of accounts made in 1925 and 1926. Evidence was adduced by the prosecution of similar acts done by the accused before 1925.

Held, that the evidence was admissible under S. 15 to rebut the probable plea of mistake or innocent condition of the mind of the accused, the evidence being that of a system in which there was a common link between the acts of 1924 and those of 1925. 6 Cal. 655 and 42 Cal. 957, *Ref.* (*Johnstone, J.*). RAMKRISHAN *v.* EMPEROR. **111 I. C. 387=29 Cr. L. J. 835=11 A. I. Cr. R. 185=A.I.R. 1928 Lah. 880.**

———Evidence of similar acts is admissible to show intention. (*Fawcett and Madgavkar, JJ.*). EMPEROR *v.* HARJIVAN VALJI. **98 I.C. 407=50 Bom. 174=28 Bom.L.R. 115=27 Cr.L.J. 1335=A.I.R. 1926 Bom. 231.**

———*Dacoity—Accused's plea of innocent or accidental presence at the spot—Evidence of previous armed raids admissible.*

Where the accused who were charged under S. 389, I.P.C., plead that their presence in company and armed at a spot was accidental and innocent, it is open to the prosecution to rebut this theory, and to produce evidence that in the same locality raids have taken place in which one of the gang had been concerned. In the case of actual dacoity the prosecution is bound to prove the accused's commission of all the acts which constitute the offence. Section 15 of the Evidence Act admits the production of any evidence which would determine the construction to be placed upon acts which in themselves might or might not be the preparation for dacoity and evidence that one or more members of the gang had been concerned in previous and similar offences committed at the same place is admissible in evidence for the purpose. (*Pipon, J.*). KHAWAJA HASSAN *v.* EMPEROR. **71 I.C. 360=24 Cr.L.J. 136.**

———*Evidence of intention.*

Where the intention of the accused is a relevant fact, evidence of similar transactions both prior and subsequent to the alleged offence is admissible as evidence of intention. But such evidence is only evidence of intention, it is not evidence that accused committed the offence with which he is charged. Rat. Un. Cr. C. 312 and 11 B.H.C.R. 90 *Diss.* from *Reg.* v. *Ollis*, (1900) 2 Q. B. 758; 36 C. 573: 39 A. 273; *Rex* v. *Fisher*, (1910) 1 K. B. 149, *Foll.* (*Raymond and Aston, A.J.Cs.*). PANE M. VAZ. *v.* EMPEROR. **83 I.C. 889=26 Cr.L.J. 185=16 S.L.R. 197=A.I.R. 1921 Sind 57.**

—S. 16—Execution of injunction.

———Where an injunction was granted and the question was whether it was executed or not,

Held, that it should be presumed as executed. (*Kinkhede, A.J.C.*). BHAIRONPRASAD *v.* MAHANT LAXMI NARAYANDAS. **79 I.C. 609=A.I.R. 1924 Nag. 385.**

—S. 17—Admission for specific purpose.

———*Binding nature of.*

Where an admission was made by defendant-appellant in a compromise filed in the appellate

EVIDENCE ACT (1872), S. 17—Admission of marriage.

Court admitting ownership of plaintiff-respondent over disputed land for a special purpose to shorten proceedings and to avoid further litigation, it cannot be held to be binding in the face of the finding by the High Court in second appeal that the agreement containing the admission was not an agreement within the meaning of O. 23, R. 3 and did not adjust the suit either wholly or in part. The statement was at the most an admission which could constitute a fresh piece of evidence coming up for consideration for the first time in the appellate Court in which case it must be shown that it was formerly produced and admitted under O. 41, R. 27. (*Campbell, J.*). WAHID BAKSH *v.* LALTA PERSHAD. **73 I.C. 387=A.I.R. 1924 Lah. 316.**

—S. 17—Admission of marriage.

———*Mahomedan Law—Probative value.*

The effect of an acknowledgment of paternity validly made as establishing marriage between the parents of the acknowledgee may be a matter of substantive Mahomedan Law; but the effect of an admission of marriage, as proof of such marriage, is a question merely of adjective law governed by the Indian Evidence Act. Its probative value must necessarily depend on the surrounding circumstances. (*Rupchand Bilaram and Lobo, A.J.Cs.*). MT. HAKIMA *v.* MT. JIANDI. **103 I.C. 870=A.I.R. 1927 Sind 209.**

—S. 17—Admissions.

———*Evidential value.*

Ashworth, J.—Admissions are of no evidential value once they are proved untrue. This admission as to receipt, in the deed is proved untrue by the Sub-Registrar's endorsement that a lesser sum was paid at time of Registration. The admission must, therefore, be rejected entirely. (*Mukerji and Ashworth, JJ.*). BAZ BAHADUR SINGH *v.* RAGHUBIR PRASAD. **100 I.C. 1037=49 All. 707=25 A.L.J. 572= A.I.R. 1927 All. 385.**

—S. 17—Admission—What is.

———*Vague admission is no admission.*

In answer to the question put to the accused as to whether three packets of cocaine were recovered from him he replied that three packets were recovered from him, but he went on to say that they were handed to him by a man named Babu and that the accused did not know what these packets actually contained,

Held, that his statement does not amount to an admission that he had cocaine in his possession. (*Sulaiman, J.*). WALI MUHAMMAD *v.* KING EMPEROR. **83 I.C. 904=21 A.L.J. 869=5 L. R. A. Cr. 9=26 Cr. L.J. 200=A I. R. 1924 All. 198.**

———*Casual statements are not.*

Applications for mutation of names by two different agents of the plaintiff, in each of which he is stated to be six years old at the time, cannot be called admissions by persons auhorised to make them as the agents had no authority to make any statement in regard to the plaintiff's age beyond that he was still a minor. Similar is the case of the casual statemants that the plaintiff was then seven years old made in the *Mukhtiarnama* executed on his behalf by plaintiff's guardian. These statements can be proved only to corroborate or contradict depositions given in the suit by the persons who made them. (*Hallifax, A.J.C.*). SHANKARGIR *v.* CHINNUJI. **71 I.C. 140=6 N.L.J. 1=A.I.R. 1923 Nag. 164.**

EVIDENCE ACT (1872), S. 17—Partition lists.

—S. 17—Erroneous admission.

———*Binding nature of.*

An erroneous admission does not bind the person making such admission. (*Banerji and Gokul Prasad, JJ.*). MANGRU RAI *v.* SHIVANAND LAL. **77 I.C. 875=A.I.R. 1923 All. 575.**

—S. 17—Evidentiary value.

———The effect of an admission is to shift the burden of proof to the party making the admission. What a party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted the fact admitted must be taken to be established. 29 All. 184 *P.C., Foll.* (*Tek Chand and Bhide, JJ.*). BHAG SINGH *v.* JAI SINGH. **116 I.C. 903=10 Lah. 694=30 P.L.R. 750=A.I.R. 1929 Lah. 318.**

———*Admission of fact shifts burden of proof.*

B sued *W* to recover a sum of money wrongly paid to him. *W's* admission in a previous suit between *B* and a third person that he had received the money from *B* was proved against him. In the present suit *W* pleaded that he had not received the money and that the receipt executed by him in favour of *B* was obtained from him under undue influence,

Held that *W's* admission in the previous suit shifted the burden of proving non-receipt of the money and existence of undue influence on *W*. (*Broadway and Campbell, JJ.*). WASAKHI RAM *v.* HUSSAIN KHAN. **75 I. C. 1027=A.I.R. 1924 Lah. 650.**

———Admissions are always evidence against the party who makes them but they are evidence which varies very much in value according to the circumstances and a Court is quite at liberty to reject them if it is satisfied from other circumstances that they were untrue. (*Daniels, J.C.*). GOKUL PRASAD *v.* KAILAS NATH. **65 I.C. 345=8 O.L.J. 596=A.I.R. 1922 Oudh 55.**

—S. 17—Former deposition.

———Evidence given by an accused on his own behalf in extradition proceedings is an admission by an accused person and is, therefore, *prima facie* admissible in evidence under S. 21; and it is, therefore, for the accused to show why it should not be so admitted. No particular formality is required to enable an admission by an accused person to go in as an admission. (*Percival, A.J.C.*). EMPEROR *v.* E.C.D. WHEELER. **112 I.C. 50=22 S.L.R. 458=29 Cr.L.J. 962=A.I.R. 1929 Sind 15.**

—S. 17—General statement.

———*Particulars of admission not given—Admission is valueless.*

A general statement by a witness that a number of persons admitted having committed a crime, is valueless without some indication as to which of the persons made the admission in question, with some particulars of what was actually said. (*Abdul Raoof and Fforde, JJ.*). SAJJAN SINGH *v.* CROWN. **90 I.C. 145=7 L.L.J. 259=6 Lah. 437=26 P.L.R. 601=26 Cr. L.J. 1489=A. I. R. 1925 Lah. 418.**

—S. 17—Partition lists.

———Partition lists indicating properties which fell to the share of each party though signed by all the co-sharers and attested require no registration provided they do not contain words that can be construed as creating a partition of the status of the parties. A.I.R. 1923 Mad. 160, *Foll.* (*Odgers and Hughes, JJ.*). GNANAMUTHU NADAN *v.* VEILUKANDA NADATHI. **79 I.C. 2=19 M L.W. 494=1924 M.W.N. 451=A.I.R. 1924 Mad. 542.**

EVIDENCE ACT (1872), S. 17—Proof of admission.

—S. 17—Proof of admission.

———*Admission must be proved by producing statement made.*

Where a previous admission of a party is sought to be used against him, the statement containing the admission must be put in Court's order referring to the admission is not sufficient proof. (*Dalip Singh, J.*). MOLAR *v.* RANPARSHAD.
102 I.C. 198=28 P.L.R. 196=
A.I.R. 1927 Lah. 377.

—S. 17—Statement in will.

———A statement in a will suggesting an inference as to a fact in issue, cannot be proved by or on behalf of the person who made it or his representative-in-interest. Even where two executors, who were members of the family, acted upon the will, still the statement cannot be treated as an admission by the members of the family that the statement in the will is true. (*Sir Lawrence Jenkins*). NALAM PATTABHIRAM RAO *v.* MANDAWILLI NARAYAN MOORTI. **100 I.C. 85=26 C. W.N. 273=**
15 M.L.W. 404=A.I.R. 1922 P.C. 102.

—S. 18—Batwara papers.

———It would also be evidence against the proprietors under Ss. 18 and 13, Evidence Act because they were made in their presence. 38 I.C. 205, *Ref.* (*Mullick, Ag. C. J. and Jwala Prasad, J.*). RAMSARUP RAUT *v.* RAMNARAIN TEWARY.
114 I.C. 479=7 Pat. 85=10 P.L.T. 399=
A.I.R. 1929 Pat. 32.

—S. 18—Burden of proof.

———Recital in mortgage bond as to receipt of consideration being admissible against subsequent purchaser, *onus* of proving want of consideration lies on him. 6 Cal. 268, *Expl.*; A.I.R. 1921 Cal. 435 and 6 C.L.J. 659, *Not appr.* (*Das and Fazl Ali, JJ.*). JAMUNA PRASAD *v.* FAIJDAR. **10 P.L.T. 183=**
8 Pat. 766=A.I.R. 1929 Pat. 254.

—S. 18—Business books.

———*Admission that are books of the firm—Effect.*

Where all the parties by their memorandum admit that certain books produced in evidence are books of the firm, that admission must, unless there is anything on the face of them to the contrary, be taken to be an admission that they were books kept in the regular course of business. (*Phillips and Thiruvenkatachariar, JJ.*). VENKATANANDAM *v.* T. DHANARAJU. **117 I.C. 298=**
A.I.R. 1929 Mad. 689.

—S. 18—By agent.

———Statements made by an agent to a party to proceedings in circumstances, which show that they are expressly or impliedly authorized to make the admissions are admissible in evidence. (*Stuart, C. J. and Raza, J.*). RAJ FATEH SINGH *v.* BALDEO SINGH. **109 I.C. 310=3 Luck. 416=5 O.W.N. 143=**
A.I.R. 1928 Oudh 233.

———*Statement of an attorney.*

A statement in a case drawn up by an attorney for the opinion of a pleader is admissible in evidence as it must be regarded as a statement of the persons on whose behalf he was acting, and what is said or done by him in the course of his business and within the scope of his authority is said or done by the persons on whose behalf he was acting. (*Das and Foster, JJ.*). CHANDRESHWAR PRASAD NARAIN SINGH *v.* BISHESWAR PRATAB NARAIN SINGH. **101 I.C. 289=5 Pat. 777=8 P. L. T. 510=**
A.I.R. 1927 Pat. 61.

———*Admission*—Mukhtear.

A party is not bound by the statement or admission made by his *Muktear Aam*, unless it is shown to have been made within the scope of the authority conferred by the *Mukhtearnamah*. (*Jwala Prasad and Adami, JJ.*). SITARAM TEWARI *v.* GYA PRASAD. **A. I. R. 1923 Pat. 37.**

EVIDENCE ACT (1872), S. 18—By counsel.

—S. 18—By co-heir.

———*Buddhist Law (Burmese)—Admission by one heir.*

Admission by a person that one of the heirs has absolute right to the property to which the person along with others is an heir, cannot affect the other heirs. (*Chari, J.*). MAUNG THU *v.* MAUNG SHWE HLA. **A.I.R. 1929 Rang. 272.**

—S. 18—By co-party.

———An admission or even a confession of judgment by one of the several defendants in a suit is no evidence against the other defendants. 2 I.A. 113 and A.I.R. 1928 Lah. 769, *Rel. on.* (*Tek Chand and Agha Haidar, JJ.*). DINA NATH *v.* SAYAD HABIB.
117 I.C. 884=10 Lah. 816=A. I. R. 1929 Lah. 129.

———An admission, or even a confession of judgment, by one of several defendants in a suit is no evidence against the other defendants: 2 I.A. 113, *Foll.* (*Agha Haidar and Broadway, JJ.*). NARENDAR SINGH *v.* C. M. KOUNG. **115 I.C. 425=**
10 L.L.J. 339=29 P.L.R. 715=A.I.R. 1928 Lah. 129.

———*Conditions for admissibility.*

To make the admission by one party admissible against his co-party, it is absolutely necessary that the admission should relate to the subject-matter in dispute and that it should be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered and that the requirement of the identity in legal interest between the joint owners is of fundamental importance. (*Suhrawardy and Mukerji, JJ.*). BRAJABALLAV *v.* AKHOY BAGDI.
93 I. C. 115=30 C.W.N. 254=A. I. R. 1926 Cal. 705.

———*Admission by defendant does not bind others where he does not represent them.*

Admission by one of defendants that the land in suit is ancestral is not binding on the others when they are not represented by him and have independent rights of their own. (*Tek Chand, J.*). KISHAN SINGH *v.* LACHHMAN DAS. **122 I.C. 109=**
A.I.R. 1930 Lah. 238.

—S. 18—By counsel.

———Where the pleader of a party makes an admission, whether the admission is of law or an admission of fact, that party is bound thereby and it would be doing great injustice to a Subordinate Court of law to re-open a matter in appeal, which has been decided by that Court on the admission of a pleader of a party. (*Dalal, J.*). NAND KISHORE RAI *v.* B. GANESH PRASAD RAI. **118 I.C. 166=**
A.I.R. 1929 All. 446.

———*Admission on question of law is not binding on client.*

Per *Patkar, J.*—The pleader's admission on a pure question of law is not binding on his client and amounts to no more than his view that the question is unarguable: 28 Bom. 408, *Rel. on.* (*Mirza and Patkar, JJ.*). PUNJABAI BHILASA *v.* BHAGWAN DAS KISAN DAS. **117 I.C. 518=**
53 Bom. 309=31 Bom. L. R. 88=
A.I.R. 1929 Bom. 89.

———*Questions of law and fact.*

Ananthakrishna Ayyar, J.—Though a party might not be bound by admissions made by his counsel on pure questions of law, yet on questions of fact, parties are bound by admissions made by their counsel, whether the admissions be made in the course of the trial in the first Court or in the course of the hearing of the appeal before

EVIDENCE ACT (1872), S. 18—By counsel.

the lower Appellate Court: 25 Mad. 367 (P. C.), *Ref.* (*Beasley and Ananthakrishna Ayyar, JJ.*). ULICHI KOTTAYYA *v.* NALLAMALLI SREERAMULU. **109 I. C. 178=A. I. R. 1928 Mad. 900.**

———*Admission in lower Court cannot be set aside by engaging another pleader in appeal.*

Where in the lower Court the pleader for a party admitted the correctness of the accounts filed by the opposite party:

Held, it is not open to a party in appeal to try to go behind an admission made by his pleader, who represented him in the Trial Court, by engaging a fresh counsel in the appellate Court: 9 W. R. 485; 2 M. I. A. 253; 6 C. W. N. 82; 21 Mad. 274 and 22 Mad. 538, *Foll.* (*Broadway and Agha Haidar, JJ.*). RISAL SINGH *v.* MANOHAR LAL. **102 I. C. 283= A.I.R. 1927 Lah. 748.**

———An admission by counsel on a question of law, *e. g.*, period of limitation cannot bind his clients. (*Addison, J.*). FATEH DIN *v.* AHMAD DIN. **100 I. C. 833=A.I.R. 1927 Lah. 284.**

———*Point of law.*

An admission made by the counsel on a point of law cannot in any way bind client. (*Martineau and Moti Sagar, JJ.*). NANAK CHAND *v.* MIR MUHAMMAD KHAN. **75 I. C. 1048= A. I. R. 1924 Lah. 702.**

———*Power of counsel to make admissions on client's behalf fully explained.*

A counsel has authority to make admissions to Court on behalf of his client on matters of fact relevant to his issues in the case in which he is engaged. Admissions on questions of law would not bind the client.

A counsel has no power to make an admission in or compromise or refer to arbitration a suit if he is instructed not to do so, without express authority from his client. (*Kumaraswami Sastry and Devadoss, JJ.*). MUTHIAH CHETTI *v.* KARUPPAN CHETTIAR. **105 I. C. 5=50 Mad. 786=26 M.L.W 465= 39 M. L. T. =240=A. I. R. 1927 Mad. 852= 53 M.L.J. 606.**

———A party cannot be bound by any wrong admission of his pleader as to law, inasmuch as the parties must be presumed to know what is correct law. (*Ashworth and Gokaran Nath Misra, JJ.*). CHANDOO *v.* MURLIDHAR. **92 I.C. 732=13 O.L.J.138= A.I.R. 1926 Oudh 311.**

—S. 18—By minors.

———*Admission necessary to the case though made by minors is binding.*

Defendants, who were the plaintiffs in previous suits, made a case that the lands were recognised by village custom as *zerait* lands,

Held, in any case the admission made on behalf of the defendants, who were then minors, would bind them in this suit, if the allegation was a necessary allegation and was essential to the case of the defendants. (*Das and Kulwant Sahay, JJ.*). KESHO PRASAD SINGH *v.* PERMESHRI PRASAD SINGH. **71 I.C. 902=4 P. L. T. 135= 1923 P.H.C.C. 65=1 Pat. L. R. 111= 2 Pat. 414= A.I.R. 1923 Pat. 276.**

—S. 18—By party.

———Statement of accused on oath at a Coroner's inquest is admissible at his trial. (*Fawcett, J.*). EMPEROR *v.* RAMNATH MAHABIR. **93 I. C. 690=50 Bom. 111= 28 Bom. L.R. 111=27 Cr. L. J. 466= A.I.R. 1926 Bom. 151.**

———An admission made by some defendants in their character of persons jointly interested with the other defendants in the matter in respect of

EVIDENCE ACT (1872), S. 18—Karnavan and tarwad.

which the admission is made, is binding on the other defendants, 45 Cal. 159, *Foll.* (*Le-Rossignol and Martineau, JJ.*). BHIKA MAL *v.* PURAN MAL. **69 I.C. 35=A. I. R. 1923 Lah. 123.**

—S. 18—By third party.

———Recitals regarding the boundaries in a document not *inter partes* are statements made by third parties and cannot be admitted. A.I.R. 1926 Cal. 948, *Foll.* (*Cuming and Roy, JJ.*). SARAT CHANDRA *v.* SURALA BALA GHOSH. **105 I. C. 61=A.I.R. 1928 Cal. 63.**

—S. 18—By third person.

———*Admissibility of recitals.*

Recitals in a deed regarding the ownership of adjoining land are not admissible against the persons who were no parties to it: A.I.R. 1925 Cal. 1034 and A.I.R. 1927 Lah. 448, *Foll.* (*Tek Chand, J.*). HAKIM ALI *v.* AMRIK SINGH. **108 I.C 264 (Lah.).**

———Admission in a previous suit by a non-party to the subsequent suit is not admissible. (*Campbell, J.*). AHMAD KHAN *v.* JAWAHAR SINGH. **84 I.C. 257=A.I.R. 1923 Lah. 16.**

—S. 18—Debtor and creditor.

———*Creditor's admission of receipt is not of much weight in saving limitation.*

When a creditor comes into Court with a claim which is capable of being regarded as a stale or time-barred claim, it is to his interest to make allegations which would save the claim from the bar of limitation. Having this view, the mere fact that the statement of receipt of interest is against the pecuniary interest of the person making the admission cannot be regarded as of great weight. (*Srinivasa Ayyangar and Curgenven, JJ.*). AMMALU AMMA *v.* NARAYANAN NAIR. **111 I.C. 210= 51 Mad. 549=29 M.L.W. 460= A.I.R. 1928 Mad. 509.**

—S. 18—Divorce proceedings.

———*Admissions of a party must be received with the utmost circumspection and caution.*

The admissions of a party in a divorce proceeding, unsupported by corroborative proof, should be received with the utmost circumspection and caution. Not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such admissions if, though unsupported, they would effect their purpose, are sufficient to render it the duty of the Court to proceed with the utmost caution in giving effect to statements of the kind, *Robinson* v. *Robinson and Lane*, (1859) 29 L. J. P. & M. 178, *Rel. on.* (*Aston, Rupchand Bilaram and DeSouza, A. J. Cs.*). MRS L. *v.* W.L. **105 I.C. 416= 22 S. L. R. 261=A. I. R. 1928 Sind 55.**

—S. 18—Donor and donee.

———Neither the declaration of a donor nor the declaration of the donee made in their own favour can be admitted in evidence as against the person disputing the gift. A. I. R. 1922 P. C. 56, *Rel. on.* (*Wazir Hasan and Nanavutty, JJ.*). MAHOMED HAIDAR *v.* MOTI LAL. **110 I. C. 26= A.I.R. 1928 Oudh 414.**

—S. 18—Karnavan and tarwad.

———*Admission of an Anandravan.*

A statement made by a person when he was a mere junior *Anandravan* cannot be used as an admission against the *Tarwad* of which he subsequently becomes the *karnavan*. (*Spencer and Devadoss, JJ.*). ABUVAKKAR *v.* KUNHI KUTTIYALI. **74 I. C. 27=16 M. L. W. 768= 31 M. L. T. 389=A.I.R. 1923 Mad. 153.**

EVIDENCE ACT (1872), S. 18—On custom.

—S. 18—On custom.

———*Admission regarding a question of succession, based upon custom is binding on a party.*

An admission on a pure question of law is not binding upon a party, but the question whether a particular custom does or does not prevail in any particular tribe is a matter on which the tribesmen themselves are in the best position to pronounce an opinion and a question of succession based upon custom does not stand on the same footing as the question of law. (*Broadway and Agha Haidar, JJ.*). GHULAM SARVAR KHAN *v.* ABDUL MAIJJID KHAN.
113 I.C. 99=11 L.L.J. 24=30 P.L.R. 178=
A. I. R. 1928 Lah. 779.

—S. 18—On law point.

———*Admission on law point not binding.*

An admission to the effect that an appeal was understamped is not binding being an admission of a point of law. (*Tek Chand and Hellow, JJ.*). SURAIN SINGH *v.* SUNDAR SINGH. **120 I.C. 532=**
A. I. R. 1929 Lah. 879.

———*Admission of points of law cannot bind person.*

Admission by a person that a Brahmin widow was admitted into the caste of Ahirs and that she was Kari wife of an Ahir, includes an admission of a point of law which would not bind him. (*Jackson, A.J.C.*). GULABCHAND *v.* BHAIYALAL.
119 I.C. 698=A.I.R. 1929 Nag. 343.

—S. 18—Predecessor-in-interest.

———*Statements are admissible only during the continuancy of interest.*

Statements made by persons from whom the parties to the suit have derived their interest in the subject-matter of the suit are admissible as admissions, only when the admissions are of a date prior to the date of the transfer. Statements made by persons in possession of property and qualifying or affecting their title thereto are receivable against the persons claiming through them by title subsequent to the admission. (*Jalal and Simpson, A.J. Cs.*). GALSTAUN *v.* MIRZA AHID HUSAIN.
73 I.C. 428=10 O.L.J. 263=A.I.R. 1924 Oudh 19.

—S. 18—Procedure.

———If a statement is to be relied upon as an admission, the whole statement must be taken. (*Sir George Lowndes.*) (BABA) JWALA DAS. *v.* PIR SANT DAS. **A.I.R. 1930 P.C. 245.**

———*Admission must be taken as a whole.*

It is a well established principle of law that if a plaintiff wishes to rest his case solely on the admission of a defendant with regard to a particular transaction, he must accept the admission as to that transaction as a whole. It is not open to him to pick out such part of the admission as may be favourable to himself and to neglect the rest. (*Brown, A.J.C.*). MG SHWE MYIN *v.* MA NAING.
70 I.C. 911=4 U.B.R. 114=1 Bur. L.J. 248=
A.I.R. 1923 Rang. 24.

—S. 18—Scope.

———Section 18 does not by itself make the admission therein mentioned relevant. (*Drake Brockman, C.*). GULAB THAKUR *v.* FADALI. **68 I.C. 566=**
A.I.R. 1921 Nag. 153.

—S. 18—Suggestion.

———*Suggestion is no admission.*

Where the admission is merely a suggestion made in the course of a negotiation and is not even unconditional, it is no admission at all. (*Coutts and Das, JJ.*). RAMPATI RAUT *v.* MAHANTH HANUMAN SARAN. **76 I.C. 1049=1923 P.H.C.C. 142=**
1 Pat. L.R. 235=5 P.L.T. 347=
A.I.R. 1923 Pat. 303.

EVIDENCE ACT (1872), S. 20—Statement agreed to be accepted.

—S. 18—Vendor and vendee.

———An admission by vendor in favour of third party is not binding on the vendee, if made subsequent to the sale. (*Pratt, J.*). MAUNG AUNG *v.* MAUNG SHWE LIN. **73 I. C. 1039=**
1 Bur. L.J. 203=A.I.R. 1923 Rang. 51.

———*Recitals in sale-deed as to source of purchase money.*

Recitals in a sale-deed by the owner of a limited estate that the property was acquired with funds belonging to the estate may be taken to be against the pecuniary interest of vendor. (*Wallis, C.J. and Oldfield, J.*). RAMAYYA *v.* MAHALAKSHMI.
64 I. C. 481=14 M.L.W 33=1921 M.W.N. 434=
A.I.R. 1922 Mad. 357.

—S. 18—Withdrawal of.

———The admission, if gratuitous, can be withdrawn at any time and therefore such a confession, though against the interest of the party making it, is of little value : 78 P. R. 1904, *Rel. on.* (*Tek Chand and Bhide, JJ.*). BUDHU RAM *v.* UTTAM CHAND.
109 I.C. 26=A.I.R. 1928 Lah. 726.

—S. 19—By party.

———Title suit—Proceedings in previous title suit between defendant and third person are relevant and pleadings of defendant admissible as admissions. (*Rowland, J.*). JAIRAM MAHATON *v.* LOKENATH MAHATON. **A.I.R. 1930 Pat. 405.**

—S. 19—By predecessor-in-interest.

———An admission made by a person having a reversionary interest in the property at the time is evidence against another person claiming the reversionary interest under a title derived from the former. (*N. R. Chatterjea and Suhrawardy, JJ.*). SREEMATY TARAMONI CHAUDHURANI *v.* CHARU CHANDRA CHAUDHURI. **64 I.C. 334 (Cal.).**

—S. 19—By trustee.

———Admission and conduct of trustee of public institution cannot be allowed to prejudice institution's case materially. A. I. R. 1927 P. C. 230, *Dist.* (*Addison and Bhide, JJ.*). BALAK RAM HIGH SCHOOL, PANIPAT *v.* NANU MAL.
31 P.L.R. 509=A.I.R. 1930 Lah. 579.

—S. 20—Common representative.

———*Statement by a common representative of both parties is an admission.*

Where both the parties and their legal advisers agreed in writing that a certain Vakil should hear the dispute between them and that they would abide by the statement that he might make before the Court,

Held, that the statement of the Vakil was an admission made in a suit by a nominee of a party and is as effectual as an admission made in pleadings either orally or in writing. (*Sulaiman and Kanhaiya Lal, JJ.*). HIMANCHAL SINGH *v.* JATWAR SINGH.
80 I.C. 16=5 L.R.A. Civ. 439=46 All. 710=
A.I.R. 1924 All. 570.

—S. 20—Statement agreed to be accepted.

———*Agreement to be bound by the statement of a referee—Statement is an admission.*

Where parties to a proceeding agree to abide by the statement of a third person, the statement made by such person is a statement within the meaning of S. 20. It is true that ordinarily, mere admissions are not conclusive, as is provided in S. 31; but admissions of this kind must be taken to be admissions made in a suit by the nominee of a party thereto. Such admissions, therefore, are as conclusive and effectual as admissions made by the parties in their written or oral pleadings. The effect is to prevent each party from resiling from

EVIDENCE ACT (1872), S. 21—Admission and confession.

the statement made by such a nominee. A.I.R. 1924 All. 570, *Foll.* (*Dalal, J.*). GORDHAN DAS *v.* HUSAINA. **103 I.C. 34=A.I.R. 1927 All. 659.**

—S. 21—Admission and confession.

———*Distinction.*

Admission is usually applied to a civil transaction, and to those matters in criminal cases which do not involve a criminal intent. While the term confession is usually used in criminal Court as denoting an acknowledgment of guilt. Admission in a civil suit that a document is genuine cannot in the forgery case be regarded as confession at all. 37 Cal. 467, *Ref.* (*Rankin, C.J. and Buckland, J.*). AMBAR ALI *v.* EMPEROR. **1929 Cr.C. 194=A.I.R. 1929 Cal. 539.**

—S. 21—Admission by counsel.

———*Admission on a point of law.*

An admission made by the counsel on a point of law cannot in any way bind client. (*Martineau and Moti Sagar, JJ.*). NANAK CHAND *v.* MIR MUHAMMAD KHAN. **75 I.C. 1048= A.I.R. 1924 Lah. 702.**

—S. 21—Admission by Mukhtear.

———A fact admitted by the defendant's Muktear prior to the framing of the issues is not conclusive, for the Court may require it to be proved otherwise. (*Scott-Smith, A.C.J.*). VIR SINGH *v.* BHOLA SINGH. **82 I.C. 617=6 L.L.J. 358= A I.R. 1924 Lah. 744.**

—S. 21—Admission by pleader.

———*Criminal case—Pleader's admission is binding on the party.*

A pleader has authority to admit certain fact so as to dispense with the necessity of further proof in a criminal case at the appellate stage: 3 Bom. L. R. 467, *Foll.*; 2 Bom. L.R. 751, *Dist.* (*Fawcett and Mirza, JJ.*). BANSILAL GANGARAM VANI *v.* EMPEROR. **112 I.C. 110=11 A.I. Cr. R. 243= 29 Cr. L.J. 990=52 Bom. 686=30 Bom. L.R. 646= A.I.R. 1928 Bom. 241.**

—S. 21—Bond and consideration.

———Executant of a bond or his representative is bound by admission made therein as to the receipt of consideration—Burden of proving want of consideration is on him. A.I.R. 1925 Lah. 471 (F. B.); 35 All. 194 and 35 All. 353, *Rel. on.* (*Jai Lal, J.*). KHETU RAM *v.* HARPOOL. **105 I.C. 847= 29 P.L.R. 110=9 L.L.J. 511= A.I.R. 1927 Lah. 800.**

—S. 21—By insolvent.

———The admissions, of an insolvent, if made after the Act of Insolvency, cannot furnish evidence against another insolvent or as against the Official Assignee. (*Mukerjee and Panton, JJ.*). LUCHIRAM MOTILAL BOID *v.* RADHA CHARAN PODDAR. **66 I.C. 15=49 Cal. 93=34 C.L.J. 107= A.I.R. 1922 Cal. 267.**

—S. 21—Cess return.

———Road cess returns are admissible only against the maker. 39 Cal. 995; 39 Cal. 1005 and 18 C.L.J. 633, *Ref.* (*Ashutosh Mookerji and Rankin, JJ.*). SWARNAMOYI *v.* SOURINDRA NATH MITRA. **89 I. C. 747=42 C. L. J. 14= A. I. R. 1925 Cal. 1189.**

———*Return cannot be used in favour of person making statements therein.*

Section 95 of the Cess Act restricts the provisions of S. 21 of the Evidence Act and makes the exception to that section inapplicable to the case of these returns. A return cannot be used under any circumstances in favour of the person making it but it can be used by others for a purpose not

EVIDENCE ACT (1872), S. 21—Creditor and debtor.

directly connected with the statements made in the return. (*Suhrawardy and Chotzner, JJ.*). CHANDRA MOHAN MAITI *v.* KINARAM MAITI. **79 I.C. 412=A.I.R. 1925 Cal. 408.**

———*Admissibility against landlord who signed it.*

Where the Road Cess Return was signed by the landlords, it would be admissible as against them. (*Adami, J.*). SADHU SARAN *v.* AMBIKA LAL. **68 I. C. 676=A.I.R. 1923 Pat. 163.**

—S. 21—Condition for use.

———Admissions cannot be used against a party unless they are put to him and an opportunity is afforded to him to explain them if they are capable of explanation. 123 I. C. 278 and 11 Cal. 580, *Foll.* (*Shadi Lal, C. J. and Abdul Qadir, J.*). SHAFIUDDIN *v.* MUHAMMAD ILAHI. **31 P. L. R. 472= 12 L. L. J. 149=A. I. R. 1930 Lah. 714.**

—S. 21—Construction of document.

———*Party's improper construction—No admission.*

It does not matter what view a plaintiff or a defendant may take of his obligations. In questions of construction of documents it does not matter in the least whether a litigant calls a document "a contract" or by any other name; its true construction is entirely for the Court. Where a manifestly improper construction (to his own prejudice) was originally apparently admitted by a party,

Held, that the Court should apply the right construction only. (*Mears, C.J. and Knox, J.*). FIRM RAM KUNWAR, RAMESHAR DAS *v.* FIRM NARAIN DAS LACHMAN DAS. **A.I.R. 1921 All. 399.**

—S. 21—Co-party.

———An admission of judgment by one of several defendants is no evidence against his co-defendant: 2 I. A. 113; 6 All. 395; 45 Cal. 159, *Ref.*; A. I. R. 1923 Lah. 123 and 44 Cal. 130, *Dist.* (*Tek Chand and Agha Haider, JJ.*). RASHDUDDIN *v.* NAZIRUDDIN. **11 L. L. J. 404=A. I. R. 1929 Lah. 721.**

———The fact, that one of the defendants was present at the time when measurement was made and map prepared and took part in the *batwara* proceedings in which the land in dispute was mentioned as plaintiff's, is certainly evidence though not binding as an admission upon the defendants who claim under an independent title. (*Chatterjea and Panton, JJ.*). ABDUL HAMID *v.* BROJENDRA KUMAR. **90 I. C. 643=A. I. R. 1926 Cal. 290.**

———The admission of one party may be given in evidence against another, when the party against whom the admission is sought to be used has a joint interest with the party making his admission in the subject-matter of the thing to which the admission relates. 45 Cal. 159, *Ref.* (*Newbould and Ghose, JJ.*). NAGENDRANATH *v.* LAWRENCE JUTE CO., LTD. **61 I.C. 544=25 C.W.N. 89= A.I.R. 1921 Cal. 197.**

—S. 21—Co-reversioner.

———*Admission by one does not bind another.*

One reversioner should not be regarded as deriving his interest from another in whom no interest ever vested, even though that other was his own father. So, an admission made by one reversioner does not bind another even though that other is his son. 22 All. 33 and 28 Mad. 57, *Ref.* (*Drake-Brockman, J. C.*). GULAB THAKUR *v.* FADALI. **68 I.C. 566=A.I.R. 1921 Nag. 153.**

—S. 21—Creditor and debtor.

———Entry in a bond that no other sum is due is not binding on creditor but is only an admission in favour of debtor. (*Campbell, J.*). GURDITTA MAL *v.* NABI BAKSH. **93 I.C. 996= A. I. R. 1926 Lah. 381.**

EVIDENCE ACT (1872), S. 21—Evidentiary value.

—S. 21—Evidentiary value.

———*Admission are not conclusive unless amounting to estoppel.*

An admission made in a Court of law no doubt carries with it great weight but it is not conclusive and binding on the party making it, unless it operates as an estoppel. The burden of proof, however, rests heavily upon the party and after him, his heirs, to show that the admissions were untrue. (*Mirza and Baker, JJ.*). BAI DEVMANI *v.* RAVISHANKAR KAR OGHADBHAI. **116 I.C. 236= 53 Bom. 321=31 Bom. L.R. 109= A. I. R. 1929 Bom. 147.**

———*Every admission is evidence against a party making it.*

Every admission which a party makes, is evidence against him, and may properly be acted on without necessarily accepting other admissions on other statements which he may have made. (*Simpson, A. J. C.*) LACHHMAN DAS *v.* BHAGIRATH. **90 I.C. 487=A. I. R. 1926 Oudh 41.**

———*Admission in* 1903 *of existence of door cannot mean that it existed prior thereto.*

In 1903, the plaintiff's predecessors-in-title made an admission in a case brought by them against their step-mother to the effect that a door existed at A in the court-yard now in dispute and that it had been opened by the father of the present defendant.

Held, that this admission alone was not sufficient to prove that the door was opened by defendant's father at any time prior to 1903. (*Moti Sagar, J.*). HIRA NAND *v.* AHMAD YAR. **A.I.R. 1923 Lah. 608.**

—S. 21—Execution purchaser.

———*Bound by admission of judgment-debtor.*

A purchaser at an ordinary execution sale is in privity with and the representative-in-interest of the judgment-debtor within the meaning of section 21 of the Evidence Act, so as to be bound by his admissions. He cannot contend that the terms of the bargain were unconscionable. 18 W.R. 166 : 22 Cal. 909, *Foll.* (*Baker, Offg. J.C.*). HAR BHAGAT *v.* PANDIT NARAYAN RAO. **78 I.C. 338= A.I.R. 1924 Nag. 208.**

—S. 21—Favourable admission.

———*Admission in favour of person making it when admissible.*

The question was when A died. A mortgage-deed executed by A's son in a 1892, in which, A is described as dead is admissible, and will be used in favour of A's son as it is relevant otherwise than as an admission under S. 11 (2). (*Mookerjee, C.J. and Rankin, J.*). SAYERUDDIN AKONDA *v.* SAMERUDDIN AKONDA. **72 I.C. 985=A.I.R. 1923 Cal. 378.**

—S. 21—Joint family.

———*One member stating family is not joint—Statement is not admissible against others who contend otherwise.*

The admission of a member of a Hindu family that the family is not joint and that certain properties belong exclusively to a certain other member thereof is not admissible against other members who contend that the family is joint. (*Newbould and Ghose, JJ.*). NAGENDRA NATH *v.* LAWRENCE JUTE CO., LTD. **61 I.C. 544=25 C.W.N. 89= A.I.R. 1921 Cal. 197.**

—S. 21—Oral confession.

———Oral confession to Magistrate is relevant and may be proved by testimony of the Magistrate. 21 P.R. 1881 (Cr.); 52 P.R. 1887 (Cr.) ; 11 P.R. 1918 (Cr) ; A.I.R. 1925 Lah. 557 ; A.I.R. 1922 Mad. 40, *Foll.* ; *Opinion of Shah, J.* in 21 Bom. L.R. 1065 and

EVIDENCE ACT (1872), S. 21—Solicitor's accounts.

A.I.R. 1922 Cal. 342, *Diss. from.* (*Tek Chand, J.*). BHAGEL SINGH *v.* EMPEROR. **121 I.C. 497= 1929 Cr. C. 426= 31 Cr.L.J. 269 A.I.R. 1929 Lah. 794.**

—S. 21—Pedigree.

———*Production—Admission of relationship.*

From the mere fact that a pedigree is filed by a person, it cannot be assumed that he admitted all the relationship stated in it to be correct. (*Lyle, A.J.C.*). BHIMA SINGH *v.* MT. SUNDAR. **69 I.C. 421=9 O.L.J. 186= 26 O.C. 109=A.I.R. 1922 Oudh 218.**

—S. 21—Police file.

———Plaintiffs having to prove loss of certain account book in his custody cannot put in police file of alleged theft from his house. (*Wilberforce, J.*). BARU *v.* SUKHA SINGH. **4 L.L.J. 418= A.I.R. 1921 Lah. 332.**

—S. 21—Recitals in deed.

———Recital in deed executed by Hindu widow is admissible as evidence of legal necessity. 44 Cal. 186 ; 1922 A. 436, *Foll.* (*Mukerji and Dalal, JJ.*). DARBARILAL *v.* GOBIND SARAN. **80 I.C. 31= 46 All. 822=22 A.L.J. 753=5 L.R.A. Civ. 556= A.I.R. 1924 All. 902.**

———An assertion in the *kobala* executed by a tenant in favour of his transferee, that his right in it was a permanent one is admissible under S. 13 in evidence in a suit for ejectment of the tenant where permanent tenancy was claimed. (*Rankin, J.*). JNANENDRA NATH *v.* NASEA DASI. **83 I.C. 948. 39 C.L.J. 526=A.I.R. 1924 Cal. 991.**

—S. 21—Scope and construction.

———*Section should be strictly construed.*

S. 21 (3), which lays down that an admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission, is an exception to the general rule and as such should be strictly construed. That clause is intended to apply to cases in which the statement is sought to be used in evidence otherwise than as an admission, for instance as part of the *res gestae*, as a statement accompanying or explaining a particular conduct but it cannot be held that a statement which is inadmissible in evidence under the general rule can be made admissible as such by reference to S. 21 (3). (*Raza and Srivastava, JJ.*). ALICE GEORGINA PASCHAND *v.* EMMA BERTHA PASCHAND NIXON. **A.I.R. 1930 Oudh 441= 7 O.W.N. 683.**

—S. 21—Self-serving statement.

———*Admission in his own favour—Admissibility.*

Where the question is whether a person is a *benamidar* or real owner of property :

Per *Dawson Miller, C. J.*—Even self-serving statements made by the person are admissible under S. 11 if they render fact in issue highly probable or highly improbable.

Per *Mullick, J.*—Admissions made by the person in his own favour are not admissible.

Per *Foster, J.*—Where the statements are made by the person in the course of his instructions to his local agent who assists him in acquiring the property they are admissible as *res gestae*. (*Dawson Miller, C. J., Mullick and Foster, JJ.*). HARIHAR PRASAD SINGH *v.* MAHARAJ KESHO PRASAD SINGH. **93 I. C. 454=5 P. L. T. Sup. 1= A.I.R. 1925 Pat. 68 (F.B.).**

—S. 21—Solicitor's accounts.

———*Entries in—Are admissible.*

Entries in solicitor's books of account regarding object of purchase for client are neither inadmissible

EVIDENCE ACT (1872), S. 21—Statement by deceased person.

nor irrelevant nor hearsay. (*Viscount Sumner*). HARIRAM SEROWGEE *v.* MADAN MOHAN BAGLA.
114 I.C. 565=1929 A.L.J. 406=49 C. L. J. 335=33 C. W. N. 493=31 Bom. L.R. 710=1929 M.W.N. 422=30 M.L.W. 835=A.I.R. 1929 P.C. 77=57 M.L.J. 581 (P.C.).

—S. 21—Statement by deceased person.

———*Statement that a document is a copy of the original is admissible.*

The statement that a document is a copy of the original is admissible where made by a deceased person in a document relating to a relevant fact and also as an admission under S. 21. (*Lord Atkin*). V. SEETHAYA *v.* P. SUBRAMANYA SOMAYAJULU.
117 I. C. 507=52 Mad. 453=56 I. A. 146=33 C. W. N. 578=29 M.L. W. 804=31 Bom. L. R. 756=49 C. L. J. 566=1929 M. W. N. 553=A. I. R. 1929 P. C. 115=56 M. L.J.730 (P.C.).

—S. 21—Unregistered deed.

———*Statement in unregistered compromise is admissible as admission.*

A compromise-agreement operating as a lease requires registration notwithstanding the fact that it has been embodied in a decree, and such an agreement, if unregistered, will not be admissible as a lease, although a statement in it may be admitted as an admission. When such a statement is admitted as an admission it is only a piece of evidence and it is open to the party who has made the admission to show that it was made in circumstances which did not make the admission binding on him or her as the case may be: A.I.R. 1919 P.C. 79, *Rel. on.* (*Mitter, J.*). SAILESH CHANDRA SARKAR *v.* BIRESWAR CHATTERJEE. **A. I. R. 1930 Cal. 559.**

—S. 21—Use in evidence.

———It is unsafe, if not unjust, in a case where an estimate is to be arrived at from the materials at the disposal of the Court to rely upon the admission of the defendant alone. (*Ross and Wort, JJ.*). RAMESHWAR KUER *v.* LACHMAN PRASAD SAHI.
107 I. C. 844.

—S. 21—Will.

———*Statement in a will cannot be proved in maker's favour.*

A statement in a will suggesting an inference as to a fact in issue, cannot be proved by or on behalf of the person who made it or his representative-in-interest. Even where two executors, who were members of the family, acted upon the will, still the statement cannot be treated as an admission by the members of the family that the statement in the will is true. (*Sir Lawrence Jenkins*). NALAM PATTABHIRAM RAO *v.* MANDAVILLI NARAYANAMOORTHY.
100 I.C. 835=26 C.W.N. 273=15 M.L.W. 404=A.I.R. 1922 P. C. 102.

—S. 23—Admission in compromise.

———*S. 23 is no bar to use of admissions in compromise which is not rejected.*

The parties to a suit agreed to compromise it and executed a statement to that effect. A petition was presented stating that the case had been compromised with a prayer for decree. But it was signed by one defendant only; the other defendants disagreeing with its terms. Thereupon Court framed an issue to ascertain whether the compromise was binding on all the parties. Against the order of the Court framing an issue and directing that enquiry to be made, the plaintiff filed an appeal which was dismissed, the Court holding the inquiry. As a result of the inquiry by Trial Court, it was held that the compromise was not binding on all the defendants and the suit was dismissed. On appeal, the District Judge held that as the compromise had been rejected and held not binding, and the appeal from the order was also dismissed, the admissions in the agreement could not be used as evidence as S. 23 acted as bar.

Held, that the agreement between the parties to compromise had been reduced to writing and had been filed in Court. It was wrong to say that the compromise was rejected and held not binding and that an appeal from that order was dismissed. The appeal was against the decision of the Trial Court to make an inquiry against the binding nature of the compromise. Therefore, there had been no final adjudication by the District Judge that the compromise was not binding. It was necessary for the District Judge to decide whether the compromise propounded by the plaintiff was binding on the defendants and S. 23 did not present any bar to the proof of the compromise, if it was made as alleged by the plaintiff. (*Jai Lal. J.*). SADHU RAM *v.* BOTHA RAM.
11 L.L.J. 446=A.I.R. 1930 Lah. 293.

EVIDENCE ACT (1872)—S. 23—Letters.

———Admissions to a person to whom the parties went for compromise are not inadmissible in evidence unless there was an express agreement that the evidence of the statements was not to be given. (*Campbell, J.*). FIRM BULAKI RAM *v.* BHAGAT RAM.
95 I. C. 363=A.I.R. 1926 Lah. 548.

—S. 23—Land Acquisition proceedings.

———*Negotiations—Offer without prejudice—Admissibility.*

Where after a notification for the compulsory acquisition of land, negotiations are started with the owner of the property by the Government regarding price and certain offers are made by the Government expressly "without prejudice" evidence of these offers is not admissible in an appeal by the owner from an award as to the price made by the District Judge. (*Jai Lal and Abdul Raoof, JJ.*). RANZOR SINGH *v* SECRETARY OF STATE.
92 I.C. 319=A.I.R. 1926 Lah. 509.

—S. 23—Letters.

———*S. 23 does not cover case of letters merely because of the inscription "without prejudice."*

Letters having the inscription "without prejudice" were accepted in evidence in lower Court. It was argued that they were inadmissible in evidence.

Held, that the provisions of S. 23 under which the privilege was claimed did not cover the case. The provisions excluded from category of relevant evidence, such admissions as are made, either upon an express condition that evidence of it is not to be given or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given."

Moreover, where the defendant's counsel admits the letters in the Trial Court, the privilege is withdrawn and the letters are free to be used in as evidence in a judicial proceeding. (*Stuart, C. J. and Wazir Hasan, J.*). LUCKNOW IMPROVEMENT TRUST *v.* P. L. JAITBY & CO.
6 O.W.N. 1088=A.I.R. 1930 Oudh 105.

—S. 24.

Acceptance in part.
Approver.
Confession in custody.
Duty of Court.
Evidentiary value of.
Free confession.
Inducement.
Person in authority.

EVIDENCE ACT (1872), S. 24—Acceptance in part.

Proof of.
Retracted.
Scope.
Value of confession.
What is confession.
Miscellaneous.

—S. 24—Acceptance in part.

———*Confession not full—Court can reject portions that are false and deduce guilt.*

Where the confession is anything but a full confession, the Court is at liberty to use the confession as it stands and derive a deduction of the guilt of the man who made it even while rejecting portions of it which are false. (*Stuart, C.J. and Raza, J.*). MATA DIN *v.* EMPEROR.
123 I. C. 886=31 Cr. L.J. 575=6 O.W.N. 1017=A.I.R. 1930 Oudh 113.

———When a confession is given in evidence, the whole of it must be given. But it cannot be said that if the Courts believe the confession it must also accept the circumstances alleged by the accused in extenuation, however improbable may be the Oourt can believe that part of it which tells against the accused and reject that part which tells in his favour. (*Waller and Reilly, JJ.*). LAKSHMAYYA *v.* EMPEROR. **1930 M.W.N. 785.**

———*Criminal Trial—Confession must be considered as a whole.*

If accused is to be convicted on his confession, it must be taken as a whole and it would be unsafe to use the part against him and discredit the part in his favour. 39 Cal. 855 and 21 Cal. 955, *Foll.* (*Kumaraswami Sastri, J.*). T.R. SRINIVASA ROW *v.* EMPEROR. **109 I.C. 605=27 M.L.W. 318=1928 M.W.N. 161=9 A.I. Cr. R. 493=29 Cr.L.J. 589=1 Mad. Cr. C. 113=A.I.R. 1928 Mad. 493=54 M.L.J. 607.**

———*Confession must be read as a whole—Exception.*

A confession or statement of an accused person must be read and accepted as a whole unless there is evidence to contradict any portion thereof in which case such portion may be rejected. (*Jai Lal and Dalip Singh, JJ.*). WARYAM SINGH *v.* EMPEROR. **99 I.C. 71=28 Cr. L.J. 39=A.I.R. 1926 Lah. 554.**

———*Confession must be accepted as a whole.*

Where the only evidence against the accused is his confessional statement, the Court must accept the whole of the confessional statement. (*Devadoss and Wallace, JJ.*). KATIRI, *In re.* **88 I.C 455=26 Cr. L.J. 1143=A.I.R. 1925 Mad. 1069.**

———*Discovery.*

Though, no doubt, when portions of the statement are admitted, the persons affected thereby may demand that the statement should be admitted and considered in its entirety, yet the principle that portions of a statement or confession may be admitted and others excluded is recognised in the Evidence Act itself. If and when certain facts are deposed to as discovered in consequence of information received from the accused when in custody of the Police, so much of the information as relates distinctly to the fact or facts thereby discovered will become admissible. (*Teunon and Ghose, JJ.*). LEGAL REMEMBRANCER *v.* LATIF MOHAN SINGH ROY. **49 Cal. 167=A.I.R. 1922 Cal. 342.**

—S. 24—Approver.

———*Approver's confessional statement induced as a result of undue pressure—S. 24 does not exclude such statement made under Criminal P. C., S. 339 (2).*

An approver's disclosure is in its very nature always the result of an inducement or promise, namely, the inducement to confess upon a promise of pardon; but should it appear that it was extorted as the result of undue duress, such as threats or violence, to that extent the provisions of S. 24 would be applicable and the confessional statement would have to be ruled out of evidence. Such a statement is not excluded from evidence by S. 24, Evidence Act: 5 A.L.J. 691, *Foll.* (*Fforde and Jai Lal, JJ.*). RAM NATH *v.* EMPEROR. **108 I. C. 514=9 Lah. 608=10 A.I.Cr.R. 76=29 Cr. L. J. 413=29 P. L. R. 165=A.I.R. 1928 Lah. 320.**

EVIDENCE ACT (1872), S. 42—Duty of Court.

———Approver tried on the basis of his statement—Statement retracted must be corroborated by other evidence. (*Fforde and Jai Lal, JJ.*). RAM NATH *v.* EMPEROR. **108 I. C. 514=9 Lah. 608=10 A. I. Cr. R. 76=29 Cr. L. J. 413=29 P. L. R.165=A. I. R. 1928 Lah. 320.**

———The hope of being made an approver does not show that the confession is not voluntary. (*Adami and Bucknill, JJ.*). NILMADHAB CHAUDHURY *v.* EMPEROR. **96 I. C. 509=7 A.I.Cr.R. 75=5 Pat. 171=27 Cr. L.J. 957=A.I.R. 1926 Pat. 279.**

———*Inducement by police officer—Tender of pardon—Statement made by approver.*

The accused made a confession in which he implicated three persons in an offence of murder. At the trial of the three persons the accused was granted a conditional pardon and examined as a witness for the prosecution. The three persons were acquitted and the accused was tried for the offence of murder,

Held, the confession made by the accused in the first murder trial was inadmissible in evidence against him under S. 24 of the Evidence Act. The statements made by the accused in the first murder trial as a witness under a tender of pardon are admissible for they were removed from the operation of S. 24 by virtue of S. 339, Cl. (2) of the Cr. P. Code. The statements made by the accused in the trial of the Police officer concerned in the investigation of the case could be admitted in evidence against him on his own trial for murder. (*Heaton, A.C.J., Shah and Hayward, JJ.*). EMPEROR *v.* CUNNA. **59 I. C. 324=22 Cr. L. J. 68=22 Bom. L.R. 1247.**

—S. 24—Confession in custody.

———Statements of accused in Excise case in custody and after their removal to Excise barracks were held inadmissible. (*C. C. Ghose and Duval, JJ.*). BAITASI MONI DASSI *v.* EMPEROR. **98 I.C. 401=53 Cal. 706= 30 C.W.N. 854=27 Cr.L.J. 1329=A.I.R. 1926 Cal. 1163.**

———*Accused in police custody—Presumption that his confession is induced is not correct.*

The mere fact of a person being in custody cannot be a good basis for a presumption that any confession he may make is caused by an inducement, threat or promise having reference to the charge against him, proceeding from some police officer and sufficient to make him believe that he would be benefitted in the trial by making it. (*Hallifax and Kinkhede, A.J.Cs.*). DADI LODHI *v.* EMPEROR. **95 I.C. 59=27 Cr.L.J. 731=A.I.R. 1926 Nag. 368.**

—S. 24—Duty of Court.

———Case entirely resting on confession—Manner in which confession obtained uncertain—Acoused should get benefit of doubt. (*Broadway and Agha Haidar, JJ.*). RAHMAN *v.* EMPEROR. **119 I.C. 420=1930 Cr.C. 104=30 Cr.L.J. 1080=A.I.R. 1930 Lah. 88.**

EVIDENCE ACT (1872), S. 24—Duty of Court.

———*Admissibility of confession must be decided before contents of confession are looked at.*

When the admissibility of a confession depends upon a conclusion as to the truth about conflicting evidence antecedent to the making of the confession and tending to show that it is liable to rejection under S. 24, the trial Judge must make up his mind upon this issue, and decide the question of admissibility before relying upon the contents of the confession. (*Walsh and Sulaiman, JJ.*), FATEH CHAND *v.* EMPEROR. **86 I.C. 1001=26 Cr. L. J. 937=6 L. R. A. Cr. 89=A. I. R. 1925 All. 606.**

———*Doubt as to—Admissibility—Court should lean in favour of accused.*

In a case of doubt on the question of admissibility of evidence when it is of such vital importance to the prisoners as their own confessions one should not hold them as admissible unless one is affirmatively satisfied as to their relevancy. *R. v. Warringham*, 2 Den. C. C. 447-*n*, (1851) *Foll.* (*Mukerji, J.*). EMPEROR *v.* PAUCKKARI DUTT. **86 I. C. 414=52 Cal. 67=29 C. W. N. 300=26 Cr. L. J. 782=A.I.R. 1925 Cal. 587.**

———*Three-fold function.*

In scrutinising a case from the point of view of S. 24, the Court will have to perform a three-fold function. It will have, as a Court, to determine the sufficiency of the inducement, threat, or promise as affording certain grounds; it will have again to clothe itself with the mentality of the accused to see whether the grounds would appear to the accused reasonable for a supposition that is mentioned in the section; lastly, it will have to judge, as a Court, if the confession appears to have been caused in consequence of the inducement, threat or promise: [52 Cal. 67, *Rel.*]. There is no rule of law which compels a Court to raise an inference of improper inducement from the mere fact that a confession is retracted. (*Broadway and Addison, JJ.*). PARTAB SINGH *v.* EMPEROR. **93 I. C. 978=7 L. L. J. 482=6 Lah. 415=27 Cr. L. J. 514=A. I. R. 1925 Lah. 605.**

—S. 24—Evidentiary value of.

———Although the evidence of admission of guilt to villagers is sufficient to justify the conviction, still the evidence that such an admission was made must be closely scrutinized like all other evidence which is used to prove a case of murder. A.I.R. 1928 Oudh 393 and A.I.R. 1929 Oudh 167, *Ref.* (*Raza and Pullan, JJ.*). TAULE *v.* EMPEROR. **117 I.C. 737=6 O.W.N. 309=30 Cr. L.J. 829=1929 C. Cr. 14=A. I. R. 1929 Oudh 272.**

———*Extra-judicial confession is of great importance.*

No doubt the extra-judicial confession is of great importance but it must be a true extra-judicial confession and not one fabricated in order to provide additional evidence for what rightly or wrongly the investigation officer considers to be a weak case. (*Raza and Pullan, JJ.*). TAULE *v.* EMPEROR. **117 I.C. 737=6 O.W.N. 309=30 Cr. L.J. 829=1929 Cr. C. 14=A. I. R. 1929 Oudh 272.**

———*Extra judicial confessions are not entitled to any weight—To base conviction on such a confession is not safe.*

Apart from the question whether or not extra-judicial confessions are inadmissible in evidence, they are not of such a nature as entitle them to any weight, because it is impossible to ascertain the exact words used by the person. To base a

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conviction on such a confession is not safe: 14 P. R. 1911 (Cr.), *Rel. on.* (*Broadway and Agha Haidar, JJ.*). DEO RAJ *v.* EMPEROR. **111 I.C. 449=29 P.L.R. 486=29 Cr. L.J. 865=A.I.R. 1928 Lah.. 858.**

———Confession before villagers who are trustworthy witnesses may be as strong evidence against accused as confession before Magistrate and requires no corroboration. (*Stuart, C. J. and Raza, J.*). EMPEROR *v.* BADAL. **112 I.C. 897=5 O.W.N. 698=30 Cr. L.J. 33=11 A.I.Cr. R. 520=A.I.R. 1928 Oudh 393.**

———*All the parts of a confession are not entitled to equal weight—Some may be believed while others rejected.*

After the entire statement of a prisoner has been given in evidence, any part of it may be contradicted by the prosecution if they choose to do so, and then the whole testimony is left open for consideration precisely as in other cases where one part of the evidence contradicts another. Even without such contradiction it is not supposed that all the parts of a confession are entitled to equal credit. If sufficient grounds exist the part that charges the prisoner may be believed, while that which is in his favour may be rejected: 40 Cal. 873, *Foll.* (*Stuart, C. J. and Raza, J.*). NIRBHAY NATH *v.* EMPEROR. **98 I. C. 178=1 Luck. 417=29 O. C. 369=13 O. L. J. 809=3 O. W. N. 800=27 Cr. L. J. 1282=A. I. R. 1926 Oudh 618.**

—S. 24—Free confession.

———Confession, when not in police custody, to respectable person and not obtained as a result of duress is admissible and sufficient to convict the confessor. (*Stuart, C. J. and Raza, J.*). SHEO BALAK *v.* EMPEROR. **99 I. C. 232=3 O. W. N. 301=28 Cr. L. J. 104=7 A. I. Cr. R. 238.**

———*Threats made but not influencing accused—Confession is admissible.*

Where threats are made to the accused but the accused makes the statements deliberately, *i.e.*, uninfluenced by the threats, S. 24 does not apply: 25 Bom. 168, *Foll.* (*Crump, J.*). EMPEROR *v.* ANANDRAO GANGARAM. **89 I. C. 1046=27 Bom. L. R. 1034=49 Bom. 642=26 Cr. L. J. 1478=A. I. R. 1925 Bom. 529.**

—S. 24—Inducement.

———Accused making confession to witness—Judge rejecting it thinking that accused made it under belief that it would be to his advantage—Confession is not invalid and should not be rejected. (*Coutts-Trotter, C.J. and Walsh, J.*). PUBLIC PROSECUTOR *v.* CHANDAY A SHETTY. **2 M.Cr. C. 56=A.I.R. 1929 Mad. 92.**

———*Village Panch telling that truth has come out and the accused had better say what he knew—Confession was held inadmissible.*

Whether any threat or inducement was offered or not in a particular case is a question of fact and has to be decided with reference to the circumstances of that case and that it is not safe to make any generalisations merely on the ground that certain set of words used in a particular case or particular cases have been held to be in the nature of an inducement.

Where a village Panch told the accused that the truth had come out, that the villagers were being worried about the affair and he had better say what he knew and the accused thereupon made a confession,

Held, that there was veiled threat as well as inducement and the confession was inadmissible: 9 Bom. H.C. 358; *R.* v. *Thomas*, (1834) 6 C. & P. 351.

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R. v. *Felon*, 7 Q. B. D. 147 and *R.* v. *Thompson*, 2 Q. B. D. 12, *Rel. on*; A. I. R. 1923 C. 458, *Foll.* (*Courtney-Terrell, C. J. and Fazl Ali, J.*). KUNJA SUBUDHI *v.* EMPEROR. **116 I.C. 770=8 Pat. 289=10 P.L.T. 549=30 Cr. L.J. 675=1929 Cr.C. 62=13 A.I. Cr. R. 143=A.I.R. 1929 Pat. 275.**

———*Confession should not be accepted, when evidence does not show that it was not caused by inducement.*

Where the Court is not satisfied on evidence that the confession made by the accused was not caused by any inducement, threat or promise proceeding from any person in authority, the confession should not be accepted. (*Barlee, J.C. and Kalumal, A.J.C.*). EMPEROR *v.* PANJAL. **1929 Cr.C. 539=A.I.R. 1929 Sind 245.**

———*Statement of accused before a Magistrate*: "*I want to make a clean breast of everything for the reason that if I serve the Government in any way, the Government may take pity on me*" *was held not in itself inadmissible.*

In order to make a confession inadmissible there must be something from which it should be inferred that the inducement or promise was given to the accused by some person who had authority to give it. It is not enough for the accused to entertain a hope, which may turn out to be an idle hope, that in consequence of his giving certain information, he would be rewarded by the Government, it must be shown that the hope was directly inspired by some one who had authority to make the promise.

Where an accused in making a confession to a Magistrate said: "I want to make a clean breast of everything for the reason that if I serve the Government in any way, the Government may take pity on me,"

Held, that this was not in itself sufficient to render the confession inadmissible having regard to the provisions of S. 24. (*Chotzner and Gregory, JJ.*). SAMIUDDIN *v.* EMPEROR. **109 I.C. 225=32 C.W.N. 616=10 A. I. R. Cr. 223=29 Cr. L.J. 497=A.I.R. 1928 Cal. 500.**

———*Mukhia of a village, confessed to—Confessor volunteering to make the statement—There is no inducement.*

Where, although the Mukhia, the person confessed to, is undoubted by a man in authority, and would appear to a villager as a person who was able, or likely to be able, to promise a pardon or some other inducement, the confessor volunteered to make the statement if he could get some assurance from the Mukhia that he, the Mukhia, would do his best to help him,

Held, that it is not an inducement proceeding from the person in authority within the meaning of the section so as to make the confession either inadmissible or irrelevant. (*Walsh and Pullan, JJ.*). EMPEROR *v.* MT. HAR PIARI. **97 I.C. 44=49 All. 57=24 A.L.J. 958=27 Cr. L.J. 1068=7 L.R.A. Cr. 156=A I. R. 1926 All. 737.**

———*Pressure by police inducing accused to suppose that he would get a temporal benefit—Confession is irrelevant.*

If the pressure exercised by a police officer in extorting confession from an accused is sufficient to give the accused grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature, the confession would not only be

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weak in value, but wholly irrelevant under S. 24. (*Sulaiman, J.*). DIP SINGH *v.* EMPEROR. **91 I.C. 894=7 L.R.A. Cr. 1=27 Cr. L.J. 158=A.I.R. 1926 All. 246.**

———*Person in authority telling accused that if he gives true account he will be pardoned—Accused's confession is irrelevant, unless the inducement has ceased to operate.*

If a man is told by a person in authority that if he gives a true account of the matter he will be pardoned, that is a continuing offer, the thread of which continues unbroken until it is accepted by the confession which completes the bargain, unless there is some circumstance which breaks it so as to show that the inducement no longer operates, and that the person confessing has no longer any hope of gaining anything from the authorities by making confession. (*Walsh and Sulaiman, JJ.*). FATEH CHAND *v.* EMPEROR. **86 I.C. 1001=26 Cr. L.J. 937=6 L.R.A. Cr. 89=A.I.R. 1925 All. 606.**

———*Moral exhortation by direct superior of accused is not objectionable.*

If a person who is suspected of an offence is examined by a person in direct authority over him and if it is only in consequence of an inducement by way of benefit or a threat that the person under suspicion makes self-incriminating statements such are, broadly speaking, not receivable in evidence because they are not in law regarded as strictly of a voluntary nature but as having been perhaps induced in the one case by a false hope and in the other by fear. On the other hand a merely moral exhortation to tell the truth is in no way objectionable. (*Bucknill and Kulwant Sahay, JJ.*). EMPEROR *v.* AKHILESHWAR PRASAD. **89 I.C. 961=4 Pat. 646=26 Cr. L.J. 1441=A.I.R 1925 Pat. 772.**

———*Promise to consider the prayer for being taken as approver—Confession is inadmissible.*

Where accused is told by a person in authority that if he makes a voluntary confession which is considered to be full and true, his prayer for being made an approver will receive due consideration,

Held, the confession made under such circumstances is inadmissible. (*Walsh and Kanhaiya Lal, JJ.*). TARA *v.* KING-EMPEROR. **74 I.C. 529=45 All. 633=21 A.L.J. 585=24 Cr. L. J. 785=A.I.R 1924 All. 72.**

———*Confession under inducement of being made approver is not admissible.*

At the end of his confession accused said that he had been told by the *darogha* that he would be made an approver. He explained to the Magistrate in the most convincing fashion that he was telling the truth for this reason, and that he knew that what he said might procure his conviction or his release. The Magistrate wrote the usual certificate in an unusual form. He said "I believe the above statement was voluntarily made although it is quite possible that the police officers may have told him that he will be made an approver,"

Held, that this confession should not have been admitted in the face of this. Section 24 of the Evidence Act makes a confession inadmissible, if it appears to have been caused by any inducement or promise. (*Walsh, J.*). KHETAL *v.* EMPEROR. **73 I.C. 62=21 A.L.J. 143=45 All. 300=4 L.R.A.Cr. 13=24 Cr.L.J. 526=A.I.R. 1923 All. 352.**

———*Confession on a promise of release is not admissible.*

Where the accused told the Magistrate that he had been told to tell the truth by a *Saheb* who told him to tell the truth and he would be released,

EVIDENCE ACT (1872), S. 24—Inducement.

Held, that the confession was made under an inducement. (*Macleod, C.J. and Shah, J.*). DINANATH SUNDERJI *v.* EMPEROR. **60 I.C. 1006=45 Bom. 1086=23 Bom. L.R. 338=22 Cr.L.J. 318=A.I.R. 1921 Bom. 70.**

———*Confession—Fear encouraged by Police officer—Offer of pardon—Statements are inadmissible.*

A confession made by an accused person under fear, encouraged by a police officer in a subtle way in the hours that elapsed before the accused reached the Magistrate, is inadmissible in evidence. Accused made an incriminating statement before a Magistrate and was sent to jail. An application for bail was refused at the instance of the Police. The accused was suddenly released on nominal bail and thereafter he made himself useful to the Police by pointing out various places and in other ways. Subsequently he made a second statement before the Magistrate more detailed than the first, much in the fashion of an approver's statement.

Held, that under such circumstances it was difficult to believe that the accused was not given to understand that a pardon was going to be offered to him. The second statement by the accused was inadmissible in evidence. A confession made by an accused person on an inducement by a Police Officer that he would be offered a pardon is admissible in evidence. The evidence of an accomplice, if suspicious, requires corroboration. (*Walmsley and Shamsul Huda, JJ.*). EMPEROR *v.* ANANT KUMAR BANERJEE. **60 I.C. 417=22 Cr.L.J. 225=32 C.L.J. 204.**

—S. 24—Person in authority.

———*Co-villager exercising no influence or authority is not "person in authority."*

It would be doing violence to the terms of S. 24, to hold that a co-villager who does not exercise any influence or authority in the village is a person in authority, although the accused might have thought him to be such a person: A.I.R. 1923 Cal. 458; 11 C.W.N. 904 and A.I.R. 1922 Lah. 263, *Rel. on.* (*Rankin, C.J. and C.C. Ghose, J.*). EMPEROR *v.* KUTUB BUX. **57 C. 488=A.I.R. 1930 Cal. 633.**

———*Inamkhor is no person in authority.*

An Inamkhor, who is in a position inferior to that of an ilaqadar cannot be treated as a person in authority. (*Shadi Lal, C. J. and Agha Haidar, J.*). GULAM MD. *v.* EMPEROR. **114 I. C. 719=30 P. L. R. 269=30 Cr. L. J. 375=1929 Cr. C. 102=A.I.R. 1929 Lah. 558.**

———Where the monigar took the accused aside and asked him not to cry but to speak the truth,

Held, that the statement made under those circumstances was not induced by any threat or promise and that it was admissible in evidence.

Quaere whether the monigar was a person in authority within the meaning of S. 24. (*Waller and Cornish, JJ.*). KUTTIAPPA CHETTY *v.* EMPEROR. **1929 M. W. N. 791.**

———*Ziladar serving under a great estate is person in authority.*

A Ziladar serving under a great estate (such as that of Kapurthala) is a person in authority and if such a person holds out inducement to the accused, the admissions made to him would not be admissible: A. I. R. 1926 All. 737, *Rel. on.* (*Raza and Pullan, JJ.*). TAULE *v.* EMPEROR. **117 I. C. 737=6 O. W. N. 309=30 Cr. L. J. 829=1929 Cr. C. 14=A. I. R. 1929 Oudh 272.**

EVIDENCE ACT (1872), S. 24—Person in authority.

———A village Panch is a person in authority, A.I.R. 1923 Cal. 458 and 20 C. W. N. 572 *Rel. on.* (*Courtney Terrell, C. J. and Fazl Ali, J.*). KUNJA SUBUDHI *v.* EMPEROR. **116 I. C. 770=8 Pat. 289=10 P. L. T. 549=30 Cr. L. J. 675=1929 Cr. C. 62=13 A. I. Cr. R. 143=A. I. R. 1929 Pat. 275.**

———*Third party sent by police to induce accused.*

Where a third person was sent by police to make the accused confess by an inducement that he would be dealt with leniently if he confessed,

Held, that the inducement proceeded from a person in authority. (*Addison and Coldstream, JJ.*). BALAGI *v.* EMPEROR. **112 I.C. 347=9 Lah. 671=29 Cr. L.J. 1019=11 A.I. Cr. R. 284=A.I.R 1928 Lah. 476.**

———*Zamindar of the village who was also a Magistrate.*

Where a confession was made to the Zamindar of the village who was also a Magistrate and was regarded as an important person in the village having authority in the matter,

Held, the Zamindar must be regarded as a person in authority within S. 24. (*Das and Scroope, JJ.*). DEVENDRA BHATTACHANDRYA *v.* EMPEROR. **101 I.C. 881=28 Cr. L.J. 497=8 P.L.T. 566=8 A.I Cr. R. 151=A.I.R. 1927 Pat. 257.**

———A Vakil's clerk is not a person in authority within S. 24. (*Daniels, J.C.*). KING EMPEROR *v.* RAM AVADH. **88 I.C. 514=12 O.L.J. 495=2 O.W.N. 398=26 Cr L.J. 1154=A.I.R. 1925 Oudh 597.**

———*Whether includes village headman—Accused speaking truth of her own accord—No proof of inducement—Admissibility of confession.*

Where the accused made the confession apparently out of remorse and under an overwhelming impulse to speak the truth and it did not appear that the village headman to whom the statement had been made had told her that if she would tell the truth, she would be let off,

Held, that though the headman was a person in authority within the meaning of the section there was no inducement proved which vitiated the confession, and that it was consequently admissible. (*Stuart, C. J. and Raza, J.*). MT. UM RAI *v.* EMPEROR. **6 O.W.N. 947.**

———*Panchayatdars are not persons in authority.*

Panchayatdars are not persons in authority within the meaning of S. 24. Considering the nature of the functions of panchayatdars they are practically private detectives helping the police in finding out the criminals. They cannot be treated as men having any authority over the accused. (*Krishnan and Wallace, JJ.*). MULIMAYANDI THEVAN *v.* EMPEROR. **76 I.C. 829=18 M.L.W. 886=25 Cr. L.J. 269=A.I.R. 1924 Mad. 230=45 M.L.J. 845.**

———*Collecting and Assistant panchayats are persons in authority within the section.*

The collecting panchayat and the assistant panchayat are both persons in authority within the meaning of the section. Consequently the confession which the accused made after he had been assured that he would be saved from the consequences, was not admissible by reason of provisions of S. 24 of the Evidence Act. It is difficult for High Court to come to the conclusion that if the accused was induced by the promise which was

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made to him by assistant panchayat and others to make the first confession that inducement, was not to some extent the cause of his making the confession before the Magistrate. (*Sanderson, C. J. and Panton, J.*). EMPEROR *v.* GANESH CHANDRA GOLDAR. **74 I.C. 264=50 Cal. 127=24 Cr. L.J. 760= A.I.R. 1923 Cal. 458.**

———*Confession to Lambardar under threats is inadmissible.*

A Lambardar being a person in authority a confession induced by him by the use of threats is inadmissible in evidence under S. 24 of the Evidence Act. (*Scott Smith and Abdul Raoof, JJ.*). MD. YAR *v.* EMPEROR. **81 I.C. 555=4 Lah. L.J. 235=25 Cr. L. J. 939=A.I.R. 1922 Lah. 263.**

—S. 24—Proof of.

———*Extra-judicial confession.*

The duty of the Court before which an extra-judicial confession, not incorporated in a document, is relied upon is to scrutinise the whole of the material before it, and then to decide whether there is sufficient evidence to prove the confession. A mere general statement to the effect that the prisoner had confessed, is too uncertain a foundation to sustain a finding against him and the Trial Court ought to ascertain as far as possible the very words spoken by an accused who is said to have confessed. There may however be cases in which the evidence gives the substance, though not the actual words of the statement made by the accused and if that evidence is reliable there is no rule of law which precludes the Court from holding, that the confession has been proved: 10 B.L.R. 322, *Ref.* (*Shadi Lal, C. J. and Fforde, J.*). NUR ALI *v.* THE CROWN. **81 I.C. 530=5 Lah. 140=6 L. L. J. 208=25 Cr. L. J. 914=A.I.R. 1924 Lah. 498.**

—S. 24—Retracted confession—Admissibility.

———*Confession duly recorded after taking all precautions—Retraction without sufficient explanation as to how the accused came to make the confession, does not make it inadmissible.*

Where an accused makes a confession after all the precautions necessary have been taken by the Magistrate recording the confession, the mere fact that the confession has been retracted will not make it inadmissible unless the accused gives any sufficient reason as to how he came to make the confession.

A man of sound mind and full age, who makes a statement in ordinary simple language, must be bound by the language of the statement and by its ordinary plain meaning. A. I. R. 1925 All. 627 (F. B.), *Foll.* (*Stuart, C. J. and Raza, J.*). RAJ BAHADUR SINGH *v.* EMPEROR. **98 I.C. 106=3 O.W.N. 818=27 Cr.L.J. 1258=A. I. R. 1927 Oudh 17.**

—S. 24—Retracted confession—Conviction on.

———*Person making confession may be convicted when Court thinks that it is voluntary and true.*

There is nothing in law to prevent a Court from convicting a person upon a confession which has been subsequently retracted, provided that the Court is convinced that the statement is voluntary and true. If there be anything from the barest suspicion to positive evidence that the confession has been obtained by threat, persuasion, etc., such confession has of course to be discarded. But where a confession is made by a person who is *sui juris* before a Magistrate in an atmosphere untainted by the influence of the police or by any other influence and there are no suspicious features about it there is no reason why the statement should not be accepted. (*Young and Sen, JJ.*). MT. KHUBAN *v.* EMPEROR. **120 I.C. 257=31 Cr.L.J. 26=1930 Cr.C. 45=A.I.R. 1930 All. 29.**

EVIDENCE ACT (1872), S. 24—Retracted confession—Conviction on.

———*Rule of Practice.*

It is a rule of practice not to rely on a retracted confession unless it is corroborated by some evidence to show that the confession is true As a matter of law it cannot be laid down that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence, and a prisoner may be convicted on his own confession without any corroborative evidence and even when a confession has been retracted, if the jury believe that the confession contains a true account of the prisoner's connexion with the crime. (*Rankin, C.J. and C. C. Ghose, J.*). EMPEROR *v.* KUTUB BUX. **57 Cal. 488=A.I.R. 1930 Cal. 633.**

———*Retracted confession made voluntarily is sufficient to warrant conviction.*

A confession made voluntarily without any pressure having been brought to bear upon the accused, is sufficient to warrant the conviction of the accused even although such confession may subsequently be retracted. (*Broadway and Agha Haidar, JJ.*). RAHMAN *v.* EMPEROR. **119 I.C. 420=1930 Cr.C. 104=30 Cr.L.J. 1080=A.I.R. 1930 Lah. 88.**

———Where the confession was retracted but on the evidence there was no possible doubt as to the truth of the confession,

Held, that the confession could be the basis of a conviction. (*Waller and Cornish, JJ.*). KUTTIAPPA CHETTY *v.* EMPEROR. **1929 M.W.N. 791.**

———*Detailed and voluntary confession subsequent retraction—Parts not found to be true—Sufficient for conviction.*

Confession made by an adult man who understood what he was doing, though retracted, is sufficient for the conviction of the person making it, even although certain parts of it are not found to be true, provided that there was a detailed confession and it was made voluntarily and in spite of the fact that he was explained the consequences of making it. (*Stuart, C.J. and Raza, J.*). NAWAB *v.* EMPEROR. **118 I.C. 757=6 O W N. 545=30 Cr. L.J. 967=1929 Cr. C. 220=A.I.R. 1929 Oudh 381.**

———*Conviction may be based on retracted confession though it must be dealt with caution.*

A retracted extra judicial confession can in law be a sufficient basis to support a conviction. Though utmost caution must be used in dealing with retracted confessions, there is no rule that they are not by themselves legal evidence sufficient to justify a conviction : A.I R. 1921 Sind 129, *Foll.* (*Rupchand and Barley, A.J.Cs.*). SANWALDAS *v.* EMPEROR. **1929 Cr. C. 682=A.I.R. 1929 Sind 253.**

———Accused retracting his confession—Court believing it to be true and voluntarily made—Conviction on such retracted confession although uncorroborated by independent evidence is not illegal. (*Zafar Ali and Coldstream, JJ.*). MAJHI *v.* EMPEROR. **104 I.C. 247=28 Cr. L. J. 807=A.I.R. 1927 Lah. 682.**

———*Conviction based on that confession alone is not illegal.*

A conviction based alone on a retracted confession of the accused himself is not bad where the trial

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Court is satisfied that the confession was made voluntarily and that the accused was under no inducement or threat at the time when he made the confession, that he was informed clearly that if he confessed he would not get a pardon and he stated that he quite understood all these circumstances ; that he wished to make his statement voluntarily and that he had no idea that he would get a pardon. A. I. R. 1925 All. 627 (F. B.); A.I.R. 1926 Oudh 622 and A.I.R. 1927 Oudh 17, *Foll.* (*Stuart, C.J. and Raza, J.*) MAHIPAT SINGH *v.* EMPEROR. **103 I.C. 800=1 L.C. 223= 8 A.I. Cr. R. 416=28 Cr. L.J. 752= A.I.R. 1927 Oudh 597.**

———*Retracted confession may be used against person making it as well as against his co-accused—Retracted confession may form basis of conviction as against person making it, and no corroboration is necessary—Weight to be given to such confession depends upon circumstances.*

A retracted confession may be used as evidence, not only against the person making it, but as against persons tried jointly with the confessing accused for the same offence. As against the person making it, a retracted confession may form the basis of a conviction, even without any corroborative evidence. From the point of view of legality alone the fact that a confession has been retracted is immaterial. The weight to be given to such confessions both as against the person making it and the persons being tried jointly with him is another question and must depend on the circumstances of each case. In deciding whether a retracted confession is to be admitted in evidence, it is doubtless necessary to examine, not only the statement made by the prisoner as to how he came to make the confession, but all the circumstances of the case. (*Broadway and Addison, JJ.*). PARTAP SINGH *v.* EMPEROR. **93 I.C. 978= 6 Lah. 415=7 L.L.J. 482=27 Cr.L.J. 514= A.I.R. 1925 Lah. 605.**

———*Legality of.*

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to it must depend on the circumstances under which the confession was given and retracted including the reasons given for retracting. There is no statutory bar to a conviction on such evidence, but a confession must not be regarded in the same light as an admission in a civil Court.

A retracted confession may be impugned on the ground it was not made voluntarily or was not true. (*Pipon, J.C.*). MOTI RAM *v.* EMPEROR. **75 I.C. 152=24 Cr.L.J. 904.**

———*Confession voluntary—Material particulars—Corroboration is not necessary.*

A retracted confession need not be supported in independent and material particulars. The one question which the Judge has to decide is whether the confession tendered in evidence before him has been voluntarily made and a conviction can be based on such confession. 23 Bom. 316; 29 All. 434 and 21 Mad. 83, *Foll.*; 10 Mad. 295 and 12 Mad. 123, *Diss. from.* (*Kincaid, J.C. and Raymond, A.J.C.*). MAHMUD *v.* EMPEROR. **81 I.C. 62= 25 Cr. L.J. 574=16 S.L.R. 67= A.I.R. 1921 Sind 129.**

EVIDENCE ACT (1872), S. 24—Retracted confession—Corroboration.

—S. 24—Retracted confession—Corroboration.

———A confession, although retracted at the very first possible moment, is sufficient to warrant conviction if corroborated by the production of articles for which the accused can offer no explanation. (*Broadway and Agha Haidar, JJ.*). ARJAN SINGH *v.* EMPEROR. **119 I.C. 325=30 P.L.R. 646= 30 Cr.L.J. 1046=11 Lah. 106= A.I.R. 1930 Lah. 257.**

———*Absence of—Conviction cannot be based on such confession.*

The weight to be given to a retracted confession must depend upon the circumstances under which the confession was originally made and the circumstances under which it was attracted, including the reasons given by the prisoner for its retraction. Unless the confession is corroborated in material particulars by credible independent evidence, or unless the character of the confession and the circumstances under which it was taken indicate its truth it would be unsafe to rely on it.

The accused was appointed approver in a case of murder. He made several confessional statements implicating himself and the other accused in the murder. But at the Sessions trial he unreservedly retracted his previous statements as approver and that he knew nothing of the murder and that he was tutored by the police into making those statements which were false. The conditional pardon granted to him was withdrawn and he was put on his trial on the previous charge of murder. There was no evidence to corroborate his confession and further the various confessional statements made by him were wanting in those natural details which one would ordinarily expect in a free and voluntary confession. The statements also contradicted one another on several important points,

Held, that there was not sufficient evidence to justify his conviction ; 31 Mad. 83 ; 13 C.P.L.R. 107 ; 20 All. 133 ; 15 Bom. 452 ; 22 Cal. 50 ; A.I.R. 1925 Cal. 587 and 53 I.C. 929, *Rel. on.* (*Findlay, J. C., and Subhedar, A.J.C.*). SHEIKH SHAFI *v.* EMPEROR. **124 I.C. 459= A.I.R. 1930 Nag. 259.**

———There is no absolute rule that a retracted confession requires corroboration. If the Court is satisfied that a confession was, in the first instance, voluntarily made, the fact that it has on second thought, been retracted is of little significance. (*Waller and Reilly, JJ.*). LAKSHMAYYA *v.* EMPEROR. **1930 M. W. N. 785.**

———*Criminal P. C., S. 164—Corroboration is not necessary in every retracted confession.*

That a confession, having been retracted, cannot be acted upon without material corroboration, is not an absolute rule. If the reasons given by an accused person for having made a confession, which he subsequently withdraws, are, on the face of them false, it is not apparent why that confession should not be acted on, as it stands and without any further corroboration. (*Waller and Cornish, JJ.*). KESAVA PILLAI *v.* EMPEROR. **1929 Cr. C. 485= 30 M.L.W. 642=2 M. Cr. C. 298= 1929 M.W.N. 901=A.I.R. 1929 Mad. 837= 57 M.L.J. 681.**

———*In the absence of corroboration in material particulars conviction is not safe.*

It is not illegal to base a conviction even on the retracted confession of an accused person : but in the absence of corroboration in material particulars, it is not safe to convict on a confession, unless from the peculiar circumstances in which it was

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made and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine: 30 P. R. 1914 Cr., *Foll.* (*Bhide, J.*). PALA SINGH *v.* EMPEROR. **107 I. C. 614=29 Cr.L.J. 267=9 A.I.Cr.R. 527=A.I.R. 1928 Lah. 329.**

———Where confessions do not stand uncorroborated, and the accused are unable to explain away their confessions though retracted, the confessions alone are sufficient for conviction: A.I.R. 1926 Oudh 622, *Foll.* (*Stuart, C.J. and Raza, J.*). SITAI *v.* EMPEROR. **114 I. C. 123=5 O. W. N. 968=30 Cr. L. J. 228=12 A. I. Cr. R. 229.**

———Conviction based on a retracted confession which was voluntary and was sufficiently corroborated is legal. (*Fforde, J.*). IQBAL KHAN *v.* EMPEROR. **103 I. C. 112=28 Cr. L. J. 656=A. I. R. 1927 Lah. 780.**

———*No proper corroboration—Accused should be acquitted.*

Where the whole case rested on the confession of the accused, which was retracted and there was no corroboration of the confession, but there were many suspicious circumstances about it,

Held, that there was by itself no evidence sufficient to base a conviction. (*Adami and Scroope, JJ.*). KARU *v.* GWALER. **101 I. C. 479=8 P. L. T. 555=8 A. I.Cr. R. 92=28 Cr. L. J. 447= A.I.R. 1927 Pat. 429.**

—S. 24—Retracted confession—Value of.

———Confession of a co-accused, though subsequently retracted is admissible in evidence against his co-accused: A. I. R. 1929 Oudh 167, *Foll.* (*Agha Haidar, J.*). SARDARA *v.* EMPEROR. **A. I. R. 1930 Lah. 667.**

———It is a rule of practice not to rely on a retracted confession unless it is corroborated by some evidence to show that the confession is true. But as a matter of law it cannot be laid down that a confession made and subsequently retracted by a prisoner cannot be accepted without independent corroborative evidence and a prisoner may be convicted on his own confession without any corroborative evidence. (*Rankin, C. J. and C. C. Ghose, J.*). EMPEROR *v.* KUTUB BUX. **57 C. 488.=A.I.R. 1930 Cal. 633.**

———The mere fact of the retraction of a confession is not in itself sufficient to make it appear that it was unlawfully induced but will be a corroboration of the approver's statement. (*Addison and Dalip Singh, JJ.*). RAHMAT *v.* EMPEROR. **113 I. C. 65=11 L. L. J. 5=30 Cr. L. J. 49.**

———Accused's confession retracted on first opportunity—Confession due probably to promise of pardon and not corroborated by independent evidence—No motive for offence committed established by prosecution—Only evidence against accused being he was last seen in company of victim—Confession is inadmissible in evidence and accused cannot be convicted on the remaining evidence. (*Zafar Ali and Coldstream, JJ.*). MAJHI *v.* EMPEROR. **104 I.C. 247=28 Cr. L. J. 807=A.I.R. 1927 Lah. 682.**

———*Retracting confession of will not necessarily indicate invalidity or illegality but probative force depends on circumstances.*

The mere fact that a confession is retracted will not raise an inference that it was obtained by improper inducement, threat or promise. Such a conclusion can only be arrived at from the evidence on the record or from the surrounding circumstances and not upon surmise or conjecture: A. I. R. 1925 Lah. 605, *Foll.*

The fact that a confession has been retracted is immaterial as regards the legality of the admission of the confession as evidence against the person who made it. But the weight to be attached to a retracted confession depends upon the circumstances of each particular case: A. I. R. 1925 Lah. 605, *Foll.*

As regards the person making it a retracted confession may without corroboration form the basis of a conviction and though corroboration may be necessary as regards co-accused, it is not necessary that this corroborative evidence should by itself be sufficient to support a conviction: 30 P. R. Cr. 1914 and 29 All. 434, *Foll.* (*Abdul Raoof and Addison, JJ.*). MOHAR SINGH *v.* EMPEROR. **96 I. C. 647=27 P. L. R. 387=27 Cr. L. J. 983.**

EVIDENCE ACT (1872), S. 24—Scope.

———*Retracted confession is effective against the accused.*

When the accused in full possession of his faculties makes admissions of guilt to various persons, they are not ineffective only because they are subsequently retracted: A. I. R. 1925 All. 627 (F. B.), *Rel. on.* (*Stuart, C.J. and Raza, J.*). EMPEROR *v.* MT. RAJ KATI. **98 I. C. 250=1 Luck. 577=3 O. W. N. 813=27 Cr. L. J. 1306=29 O. C. 396=7 A. I. Cr. R. 283=A.I.R. 1926 Oudh 622.**

———*No inflexible rule that it cannot be acted upon without corroboration though generally it has very little weight.*

It cannot be laid down as an inflexible rule that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must depend on the circumstances under which the confession was originally given and the circumstances under which it was retracted including the reasons given by the prisoner for its retraction. It is unsafe for a Court to rely on and act on a confession which has been retracted unless, after a consideration of the whole of the evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated by credible independent evidence. A retracted confession should carry practically no weight as against a person other than its maker. (*Newbould and Pearson, JJ.*). KING-EMPEROR *v.* BISESHWAR DEY. **71 I.C. 497==26 C.W.N. 1010=24 Cr. L.J. 145=A.I.R. 1923 Cal. 217.**

———*Retracted confession carries little weight.*

Per *Shah, J.*—A retracted confession carries much less weight than one which has been adhered to.

Per *Crump, J.*—A confession is after all an evidence in so far as it bears upon the crime into which the Court is at the time enquiring and circumstances corroborating the confession in material points are themselves equally material. (*Shah and Crump, JJ.*). GANGARAM *v.* EMPEROR. **62 I.C. 545=22 Cr.L.J. 629=22 Bom. L.R. 1274.**

—S. 24—Scope.

———*For rejecting confession positive proof of threat etc., is not necessary.*

Per *Mukerji, J.*—The language of S. 24 will show that to reject a confession it is not necessary that there should be positive proof to establish that the confession has been obtained by use of threat, persuations, etc. Anything from a barest suspicion to positive evidence would be enough for a confession.

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being discarded. The weight, therefore, that has to be attached to a confession, in the view of the legislature, is small. A.I.R. 1925 Cal. 587, *Foll.* (*Mears, C.J., Mukerji and Banerji, JJ.*). RAGHA *v.* EMPEROR. **89 I. C. 903= 23 A.L.J. 821=26 Cr.L.J. 1431= 6 L.R. A.Cr. 161=A.I.R. 1925 All. 627 (F.B.).**

———*Voluntary nature is test of admissibility—Factors to determine—Mentality of accused—Sufficiency of inducement and its relation with confession as cause and effect—Proof of inducement is not necessary.*

The test of admissibility of a confession is its voluntary nature and not its falsity or truth. To determine the voluntary nature or otherwise of a confession, the mentality of the accused is to be judged rather than that of the person in authority. Not merely actual words but words accompanied by acts or conduct as well on the part of the person in authority which may beconstrued by the accused person, situated as he then is, as amounting to an inducement, threat or promise, will have to be taken into account. A perfectly innocent expression, coupled with acts or conduct on the part of the person in authority, together with the surrounding circumstances may amount to inducement threat or promise. In scrutinising a case from the point of view of S. 24 of the Evidence Act the Court will have to perform a three-fold function, (1) to determine the sufficiency of the inducement, threat or promise, (2) the mentality of the accused, and (3) whether the confession appears to have been caused in consequence of the inducement, threat or promise. The section does not require positive proof (as defined in S. 3 of the Act) of improper inducement to justify the rejection of the confession, the word "appears" indicating a lesser degree of probability than would be necessary if "proof" had been required. (*Mukerji, J.*). EMPEROR *v.* PANCHKARI DUTT. **86 I. C. 414=52 Cal. 67=29 C.W.N. 300= 26 Cr. L. J. 782=A.I.R. 1925 Cal. 587.**

———*S. 24 will override S. 27 when they conflict.*

A statement though admissible under S. 27 should be excluded if under S. 24 the accused at the time of making the statement was under the influence of the village Magistrate's promise to save him from punishment. (*Spencer, Offg. C. J. and Reilly, J.*). SEMALAI GOUNDAN, *In re.* **86 I.C. 664=26 Cr. L.J. 840=21 M.L.W. 199= A.I.R. 1925 Mad. 574.**

———*Criminal P. C., S. 337—No analogy exists between approver's statement and confession of accused.*

Necessarily in every case where an accused is made an approver it must be ascertained whether he is willing to tell the truth or not. No analogy exists between the case of a confession obtained from an accused person by any inducement and the case of an approver. If it were so, practically all approvers' evidence would be inadmissible. (*Baker, J. C.*). ISMAIL PANJU *v.* KING-EMPEROR. **88 I.C. 283= 26 Cr. L. J. 1115=A. I. R. 1925 Nag. 337.**

———*Conflict between—None exists.*

There is no conflict between S. 24 and S. 80 of the Act. Where the conditions specified in S. 80 are complied with it must be presumed that the document is genuine and the confession duly taken but nevertheless the Court is bound to treat it irrelevant if it should appear to the Court that the confession was procured by inducement, threat or promise. A Court cannot say except on evidence that a confession 'appears' to it to have been caused by inducement, etc. Such a conclusion cannot be reached on surmise or conjecture. (*Das and Adami, JJ.*). EMPEROR *v.* DEWAN KAHAR. **72 I.C. 961= 4 P.L.T 186=24 Cr. L.J. 497= A.I.R. 1923 Pat. 13.**

EVIDENCE ACT (1872), S. 24—What is confession.

———The mere fact that there was a race for pardon does not detract from the value of the confession, if that race for pardon does not appear to have been caused by an inducement or promise held out by one in authority. (*Addison and Dalip Singh, JJ.*). RAHMAT *v.* EMPEROR. **113 I.C. 65= 11 Lah. L.J. 5=30 Cr. L.J. 49.**

———A man of sound mind and full age, who makes a statement in ordinary simple language, must be bound by the language of the statement and by its ordinary plain meaning. If the statement is believed by the Court to be true, and if the Court is satisfied that there was nothing of the nature referred to in S. 24 of the Evidence Act, no improper conduct of any body but that the man of his own notion made a confession, and if that confession can legally be receivable in evidence and is corroborated, the plain simple meaning of the words used by him must have their full and proper significance, and the act spoken should be given its legal consequence. (*Mears, C. J., Mukerji and Banerji, JJ.*). RAGHA *v.* EMPEROR. **89 I. C. 903=23 A.L.J. 821= 26 Cr.L.J. 1431=6 L.R.A.Cr. 161= A.I.R. 1925 All. 627 (F.B.).**

———A confession in its normal state, is an entirely suspicious article. A retracted confession is worse. The Court should not lose sight of the fact that assuming that a prisoner had been induced to confess he will not unlikely assure the Magistrate that his confession was volunteer knowing that he will leave the Magistrate's presence in the custody of the police and remain in their custody for many days to come. (8 B.H.C.R. 126, *Ref.*). The use to be made of a confession is really a mattter of prudence rather than law. 19 Bom. 728, *Foll.* (*Mears, C.J., Mukerji and Banerji, JJ.*). RAGHA *v.* EMPEROR. **89 I. C. 903=23 A.L.J. 821= 26 Cr. L.J. 1431=6 L. R. A. Cr. 161= A. I. R. 1925 All. 627 (F.B.).**

———*Stolen articles recovered from accused and other named by him—Confession if rendered untrue because accused minimised his share in offence.*

Where a person confessed he had taken part in a dacoity and named his associates and the Police recovered stolen articles from the house of the person making the confession and from the persons named by him,

Held, that the confession was not rendered untrue merely because the person making the statement minimised his share in the dacoity. (*Raza and Pullan, JJ.*). AUTAR *v.* EMPEROR. **7 O.W. N. 456,**

—S. 24—What is confession.

———*Definition.*

A confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime. (*Young and Sen, JJ.*). MT. KHUBAN *v.* EMPEROR. **120 I. C. 257=31 Cr. L. J. 26=1930 Cr. C. 45= A.I.R. 1930 All. 29.**

———Admissions by party in case in which charge is baseless and prosecution is carried only to harass party are not voluntary and therefore not binding. (*Tek Chand and Agha Haidar, JJ.*). SECY. OF STATE *v.* G. T. SARIN & CO. **120 I.C. 615= A.I.R. 1930 Lah. 364.**

EVIDENCE ACT (1872), S. 24—What is confession.

———*Oral confession—Accused not shown to know language in which questions put but in answer making signs—Conduct held did not amount to confession.*

Where an accused, not shown to have understood English, is asked in broken English as to whether he was responsible for the act and he nods his head and salams in reply, the conduct does not amount to confession. It is impossible to determine what the accused understood to be the meaning of remarks addressed to him as to his complicity in the crime and without being satisfied that the accused exactly understood the meaning and the import of the question addressed to him, the signs made by him, standing by themselves are meaningless. He might have completely misunderstood what was sought to be conveyed to him and have thus made the signs which were intended to be in answer to something which was entirely different from what his questioners were anxious to put him and therefore confession remains unproved and so is no confession. (*Shadi Lal, C.J. and Agha Haidar, J.*). EMPEROR *v.* SOOPI **120 I.C. 539= 1930 Cr.C. 100=31 Cr.L.J. 141= 31 P.L.R. 391=A.I.R. 1930 Lah. 84.**

———*Confession after being warned—Accused is bound down by language of confession.*

When a man of sound mind and full age makes a confessional statement in ordinary simple language after he has been warned, he must be bound by the language of the statement and by its ordinary plain meaning: A.I.R. 1927 Oudh 17, *Foll.* (*Raza and Nanavatty, JJ.*) HAZARI *v.* EMPEROR. **7 O.W.N. 527=A.I.R. 1930 Oudh 353.**

———Where an accused charged under S. 380 was asked whether he had stolen the mare and he was arrested while riding it and the accused said "yes": *Held*, that the answer did not amount to a confession. (*Tek Chand, J.*). HASNI *v.* EMPEROR. **103 I.C. 847=28 Cr.L.J. 767= A.I.R. 1927 Lah. 650.**

———*Exculpatory statement made to Magistrate is not confession.*

The statement made by the accused to the Magistrate by way of confession but of self-exculpatory nature is not really a confession. (*Newbould and B. B. Ghose, JJ.*). KERAMAT MONDAL *v.* EMPEROR. **92 I.C. 439= 42 C.L.J. 524=27 Cr.L.J. 263= A.I.R. 1926 Cal. 320.**

———Any statement by a person which would suggest an inference as to his guilt may be a confession within S. 24 of the Act. If it is found that a confession recorded under S. 164 of the Cr. P. C. was procured by a Police Officer by the offer of an inducement, it becomes inadmissible under S. 24 of the Evidence Act.

Per *Shah, J.*—S. 24 will apply even if the person confessing was not a accused person at the time of confession. It is sufficient if he ultimately comes to be the accused person with reference to the charge in respect of which he is said to have confessed. Though a statement of an approver may be given in evidence against him under S. 339 (2) of the Cr. P. C. it cannot be said that the operation of S. 24 is altogether excluded, if it is shown that some influence was proceeding from some authority, simultaneously with the legal tender of pardon, which would invite the application of S. 24 of the Evidence Act, then the confessional part of statement would be inadmissible by virtue of the section. Per *Heaton, A.C.J.*—(*Hayward, J.*) *Semble*:—A statement falling within S. 339 (2) of the Code excludes the operation of S. 24 of the Evidence Act. (*Heaton, A.C.J., Shah and Hayward, JJ.*). EMPEROR *v.* CUNNA. **59 I.C. 324= 22 Bom. L.R. 1247=22 Cr.L.J. 68.**

—S. 24—Miscellaneous.

———*Question of admissibility of confession comes when statement is made to police officer or while in police custody.*

The question whether or not a statement is to be regarded as admissible as being a confession or not usually arises in the case of a statement made to a police officer or in the case of statement made to a man while in custody of the police. (*Rankin, C. J. and Buckland, J.*). AMBAR ALI *v.* EMPEROR. **1929 Cr.C. 194=A I.R. 1929 Cal. 539.**

———*Admissibility in evidence is a matter which is to be decided after a full consideration of the evidence and the particular circumstances of each case.*

It is not possible for a Court to say that the making of a confession appears to have been caused by any inducement, threat or promise except upon evidence before it. The inference may be suggested by the confession itself or by the evidence of the prosecution or by the evidence adduced by the accused person or by the surrounding circumstances which the Court is always bound to take into consideration, but the conclusion cannot be reached on surmise or conjecture. Whether or not a confession is admissible in evidence is a matter which is to be decided after a full consideration of the evidence and the particular circumstances of each case: A.I.R. 1923 Pat. 13. *Appr.*; A.I.R. 1925 Lah. 605, *Ref.* and A.I.R. 1925 Cal. 587, *Dist.* (*Broadway and Coldstream, JJ.*). BUDHOO *v.* EMPEROR. **108 I.C. 387=29 Cr.L.J. 385= A.I.R. 1928 Lah. 676.**

———*Onus of proving absence of inducement, etc., is on prosecution.*

If it appears to the Court that there is reason to suspect that the confession was obtained by inducement so as to bring it under the provisions of Section 24, the prosecution must show that the confession was freely made. (*Newbould and Suhrawardy, JJ.*). ASHUTOSH DUTT *v.* EMPEROR. **68 I.C. 413=26 C.W.N. 54= A.I.R. 1921 Cal. 458.**

—S. 25—Admissibility.

———*Confession to police may be used by the Court to bring on record by evidence any material fact that may come to its knowledge.*

Confession recorded in a police diary cannot be used for anything other than to assist the presiding Judge in the enquiry or the trial or for the purpose of enabling the defence under certain circumstances to contradict the witnesses for the Crown. It is the duty of Judge to bring on record by evidence any material fact that may come to his knowledge and it is for that purpose that he can and should use the confession. (*Boys and Iqbal Ahmad, JJ.*). KARAN SINGH *v.* EMPEROR. **106 I.C. 442=8 A.I. Cr. R. 426= 8 L.R.A. Cr. 153=26 A.L.J. 92= 29 Cr. L. J. 26=A.I.R. 1928 All. 25.**

—S. 25—Admissibility in evidence.

———*Confession to police can be used to contradict judicial confession.*

Section 25 lays down that a confession made to police officer shall not be used as against a person making it. It does not lay down that such a confession shall be inadmissible for all purposes. The confession to the police may be used for the purpose of arriving at a conclusion as to whether

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the subsequent judicial confession should be believed or not. But it is unsafe to act upon a retracted confession. (*Scott Smith and Zafar Ali, JJ.*). GULAB *v.* THE CROWN. **75 I.C. 693= 6 L.L.J. 54=25 Cr. L.J. 5=A.I.R. 1923 Lah. 315.**

—S. 25—Confession before witness.

———*Statement made once before a witness and repeated before him and police is admissible.*

The incriminating statement by accused was made to witness in the absence of the police and subsequently repeated before him and the police officer,

Held, the confession is undoubtedly admissible but the weight to be given to it is a matter of consideration. (*Broadway, J.*). WADHAWA SINGH *v.* THE CROWN. **76 I.C. 819=25 Cr. L.J. 259= A.I.R. 1923 Lah. 389.**

—S. 25—First information report.

———A confessional statement made to the Police immediately after a murder and which was recorded in the first information Report is inadmissible in evidence. (*Scott-Smith and Zafar Ali, JJ.*). NUR MAHAMMAD *v.* EMPEROR. **90 I.C. 148=26 Cr. L.J. 1492.**

—S. 25—Incriminating statement.

———*Incriminating statement to police officer, though on face of it, self-exculpatory is inadmissible.*

An incriminating statement made to a police officer cannot be proved against an accused person even where such statement is on the face of it self-exculpatory. 6 Bom. 34, *Foll.* (*Crump, J.*). EMPEROR *v.* ANANDRAO GANGARAM. **89 I.C. 1046=27 Bom. L.R. 1034=49 Bom. 642= 26 Cr. L.J. 1478=A.I.R. 1925 Bom. 529.**

———*Criminal P. C., S.* 161—*Inquiry under S.* 161 *Criminal P. C.—Incriminating statement by accused is inadmissible.*

Any incriminating statement made by an accused person at an inquiry held under S. 161, Cr. P. C., would be excluded at the trial under S. 25 of the Evidence Act, as having been made to a Police Officer, and as such of no material use at the trial. (*Rupchand Bilaram, A. J. C.*). UMER DURAZ MUNSHI *v.* EMPEROR. **86 I. C. 410= 26 Cr. L.J. 778=19 S.L.R. 142= A.I.R. 1925 Sind 237.**

—S. 25—Object of.

———*Object is to prevent the abuse of powers by Police.*

The object of S. 25 is to prevent the abuse of their powers by the police in extorting confessions from persons in their custody Per Marten, C.J. (*Marten, C.J., Shah, Fawcett, Kemp and Mirza, JJ.*). NANOO SHEIKH *v.* EMPEROR. **99 I.C. 330=51 Bom. 78= 28 Bom. L.R. 1196=28 Cr. L.J. 122= 7 A.I. Cr. R. 249=A.I.R. 1927 Bom. 4 (F.B).**

—S. 25—' Police officer.'

———*Officer exercising powers of police is Police officer* (*Per Shah, J., Kemp, J., contra*).

The Police officer within the meaning of S. 25 is an officer who exercises the powers of the police conferred upon him by law, whether he is called a Police officer or he is called by any other name and exercises other functions also under other provisions of law. (*Marten, C. J., Shah, Fawcett, Kemp and Mirza, JJ.*). NANOO SHEIKH *v*, EMPEROR. **99 I.C. 330=51 Bom, 78=28 Bom. L.R. 1196= 28 Cr. L.J. 122=7 A.I. Cr. R. 249= A.I.R. 1927 Bom. 4. (F.B.).**

———"*Police officer*" *in S.* 25 *is wider than in Police Act* (1861), *S.* 1.

Primarily the term "Police Officer" in S. 25 of the Evidence Act means the same as it does in the

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Police Act but it can be extended beyond the definition in S. 1 of the Police Act to cover only those persons who, like Police Officers, coming within that definition, are so much more interested in obtaining convictions than any member of the community is, that they might possibly resort to improper means for doing so. (*Hallifax and Mitchell, A. J. Cs.*). EMPEROR *v.* AKAIA. **101 I.C. 599=23 N.L.R. 23=28 Cr. L.J. 471= 8 A.I. Cr. R. 66=A.I.R. 1927 Nag. 222.**

———*Whether includes person invested with police powers—Confession made to such person—Admissibility.*

Where a confession was made to an Assistant Superintendent of the Pokkoku Hill Tracts who exercised the powers of Additional District Magistrate and who was also an Assistant Commandant of Military Police.

Held, that the confession was made to a police officer and was therefore inadmissible in evidence. (*Carr and Brown, JJ.*). JAS BAHADUR THAPA *v.* EMPEROR. **8 R. 52.**

———*Excise Officer is not police officer and admission to him is admissible.—Burma Excise Act* (5 *of* 1917), *Ss.* 53, 54, 55, 56.

Although under Burma Excise Act 5 of 1917 an Excise Officer has power of arrest, search and granting bail he is not a police officer and an admission made to him is admissible in evidence: (1907-9) U.B.R. 1. *Held, no longer good law*, (*Baguley J.*). MAUNGSAN MYIN *v.* EMPEROR. **121 I. C. 715=7 Rang. 771=31 Cr.L.J. 303 A. I. R. 1930 Rang. 49.**

———*Abkari officer exercising powers of Police is a Police officer within S.* 25.

An Abkari officer, who, in the conduct of investigation of an offence punishable under the Bombay Abkari Act, exercises the powers conferred by the Code of Criminal Procedure, 1898, upon an officer in charge of the Police station for the investigation of a cognizable offence, is a Police officer within the meaning of S. 25 and therefore a confession made to him is inadmissible. 28 Bom. L. R. 674, *Overruled*; 46 Cal. 411, *Dist.*; 1 Cal. 207, *Rel. on.* (*Marten, C.J., Shah, Fawcett, Kemp and Mirza. JJ.*). NANOO SHEIKH *v*; EMPEROR. **99 I.C. 330= 51 Bom. 78=28 Bom.L.R. 1196=28 Cr.L.J. 122= 7 A.I.Cr.R. 249=A.I.R. 1927 Bom. 4 (F.B.).**

———An Excise Officer is not a Police Officer within S. 25 of the Evidence Act. 46 Cal. 411, *Foll.* (*Suhrawardy and Mitter, JJ.*). HARBHAJAN SAD *v.* EMPEROR. **102 I.C. 547=54 Cal. 601= 31 C.W.N. 667=28 Cr.L.J. 579=8 A.I.Cr.R. 114= A.I.R. 1927 Cal. 527.**

———*Excise officer is not a police officer—Confession made to him is good evidence.*

An excise officer is not a police officer within the meaning of the Evidence Act and hence a confession of guilt made to him is good evidence against the accused. 46 Cal. 411 and A.I.R. 1925 Sind 70, *Foll.* (*Kincaid, J.C. and Barley, A.J.C.*). EMPEROR *v.* BUDHO. **99 I.C. 594=7 A.I. Cr.R. 290= 28 Cr.L.J. 162=A.I.R. 1927 Sind 112.**

———Statement made to excise officer is admissible as he is not a police officer. 46 Cal. 411, *Foll.* (*Macleod, C.J. and Crump, J.*). RAPHAEL PEREIA *v.* EMPEROR. **97 I.C. 665=28 Bom.L.R. 674= 27 Cr.L.J. 1145=A.I.R. 1926 Bom. 517.**

———Excise officers are not police officers within the section. 46 Cal. 411, *Foll.* (*Kennedy and Rupchand Bilaram, A. J .Cs.*). TILLIBAI *v.* EMPEROR. **82 I. C. 151=18 S. L. R. 75=25 Cr. L.J. 1223= A.I.R. 1925 Sind 70.**

EVIDENCE ACT (1872), S. 25—Police officer.

———*Excise Peon is police officer and confession made to him is inadmissible.*

An excise peon having the power to detain, search, seize and arrest any person whom he believes to be guilty of any offence under Opium Act of Bombay Abkari Act has powers which are very similar to those exercised by a police officer. Any confession made to him is therefore inadmissible under the provisions of S. 25. A. I. R. 1927 Bom. 4 (F.B.), *Appl.* (*Mirza and Baker, JJ.*). EMPEROR *v.* DINSHAW KURSHETJI. **117 I. C. 331= 31 Bom. L. R. 49=30 Cr. L. J. 783= A. I. R. 1929 Bom. 70.**

———*Patel in Berar is Police Officer.*

A Patel in Berar is a Police Officer, and the fact that powers are conferred upon him by rules made under the Berar Patels and Patwaris Law, 1900 makes no difference. Consequently the confession made by an accused to a Patel is inadmissible. (*Baker, J. C.*). MT. MECHI *v.* KING EMPEROR. **88 I.C. 32=26 Cr. L.J. 1088=A.I.R. 1925 Nag. 340.**

———*Police Patel in Berar is not Police Officer.*

A Police Patel in Berar cannot be regarded as a Police Officer for the purposes of S. 24 : A. I. R. 1925 Nag. 340, *Diss. from.* (*Hallifax and Mitchel, A. J. Cs.*). EMPEROR *v.* AKAIA. **101 I.C. 599=23 N.L.R. 23=28 Cr.L.J. 471= 8 A. I. Cr. R. 66=A.I.R. 1927 Nag. 222.**

———*Kotwar in C. P. is not a police officer.*

The widest and most comprehensive extension of the term "police officer" cannot make it include a Kotwar in the Central Provinces. He is popularly regarded as a subordinate police officer and even that idea arises mainly from the fact that it is his duty to make, or rather to carry, frequent reports to the police. But the making of reports to a department of the Government does not constitute a person who makes them, a member of that department even in the popular sense and therefore a confession made before him is admissible in evidence. 17 B. 485; 26 Cal. 569 and 1 Cal. 207, *Cons.* (*Baker, J.C. and Hallifax, A.J.C.*). SUKHWARI CHAMARIN *v.* EMPEROR. **76 I.C. 291=25 Cr. L J. 147=A.I.R. 1924 Nag. 29.**

———*Constabulary—Frontier constabulary is a police officer.*

For the purpose of Ss. 25 and 26 of the Evidence Act a member of the Frontier Constabulary is a police officer and confession made to him while the accused was in his custody and not in the presence of a Magistrate is inadmissible. The term Police officer in this respect must be construed not in any strict technical sense but according to its most comprehensive and popular meaning. The mere fact that the powers of the police officers have not been actually conferred on certain members of the frontier constabulary does not make them any the less police officers. (*Pipon, J.C.*). KHWAJA HASSAN *v.* EMPEROR. **71 I.C. 360=24 Cr. L.J. 136.**

———*Village Headman is not a "Police officer" though invested with power of arrest.*

The mere bestowal on a village Headman of some powers of arrest as are given to a police officer, does not make him a police officer any more than it makes a Magistrate a police officer. A confession, therefore, made to him is not inadmissible in evidence, but the weight to be attached to such confession will depend on the circumstances of the case and the part he has taken in the elucidation of the crime. 1 L.B. R. 65, *Affirmed.* (*Young, Offg. C.J., Heald and May Oung, JJ.*). NGA MYIN *v.* EMPEROR. **81 I.C. 540=2 Rang. 31=3 Bur. L.J. 11= 25 Cr.L.J. 924=A.I.R. 1924 Rang. 245 (F.B.).**

EVIDENCE ACT (1872), S. 25—Statement and confession.

—S. 25—Police officer acting as Magistrate.

———*Police Officer acting also as Magistrate—Confession to him is illegal.*

An Assistant Superintendent having all the powers of a District Superintendent of Police cannot cease to be a police officer simply because he is also a Magistrate and is acting in that capacity and therefore confession made to him is inadmissible in evidence: 7 Bur. L.R. 100 and 1 Cal. 207, *Rel. on.* (*Carr and Brown, JJ.*). JAS BAHADUR THAPA *v.* EMPEROR. **8 Rang. 52=1930 Cr. C. 705= A. I. R. 1930 Rang. 227.**

—S. 25—Presence of police officer.

———*Confession made to person asked by police officer to take confession—Police officer in near proximity—Confession comes under S. 25.*

A confession made to another person in the presence of a police officer, who has asked or instructed that other person to take the confession in such a way as to be his agent where the confession takes place under such circumstances that the police officer is in such proximity as to make his presence likely to affect the mind of the confessing person, is in substance a confession to a police officer. (*Walsh and Pullan, JJ.*). EMPEROR *v.* MT. HAR PIARI. **97 I. C. 44=49 All. 57= 27 Cr. L. J. 1068=24 A.L.J. 958= 7 L.R.A. Cr. 156=A.I.R. 1926 All. 737.**

—S. 25—Repetition to Magistrate.

———Confession made to police officer—Accused merely repeating before Magistrate the fact and contents of the previous confession—Statement to Magistrate is inadmissible in evidence. (*Crump, J.*). EMPEROR *v.* ANANDRAO GANGARAM. **89 I.C. 1046=27 Bom. L.R. 1034=49 Bom. 642= 26 Cr. L.J. 1478=A. I. R. 1925 Bom. 529.**

—S. 25—Statement and confession.

———*Every statement is re-confession.*

Every statement made by any accused person to a Police Officer is not a confession and is not *ipso facto* excluded from being received in evidence. Where the prosecution do not rely upon the statements of the accused either as true or as containing any incriminating circumstances to prove their guilt or for the purpose of avoiding their obligation of proving one of the ingredients of the offence with which the accused are charged but the statements are relied on as false and not as confessions they are admissible. 5 Bom.L.R. 312, *Rel. on.* (*Kennedy, J.C. and Rupchand Bilaram, A.J.C.*). ADHO *v.* EMPEROR. **86 I.C. 961=19 S.L.R. 6= 26 Cr L.J. 897=A.I.R. 1925 Sind 257.**

———*Question whether statement is confession should be decided on merits of each case.*

Each case must be decided as it arises with reference to the question whether a particular statement positive or negative, verbal or expressed by conduct, is or is not a confession. (*Rupchand Bilaram, A.J.C.*). UMER DURAZ MUNSHI *v.* EMPEROR. **86 I.C. 410=19 S.L.R. 142= 26 Cr.L.J. 778=A.I.R. 1925 Sind 237.**

———*Statement by accused to Police that co-accused gave him ammunition bundle is inadmissible.*

A distinction must be made between statements which are self-exculpatory, and statements, which, although intended to be made in self-exculpation and not as a confession, nevertheless contain an admission of incriminating circumstances, on which the prosecution relies.

It is for the Court to decide, according to the particular circumstances of each case, whether a statement of an accused amounts to a confession

EVIDENCE ACT (1872), S. 25—Statement and confession.

or not. Where an accused stated to the police that he got the ammunition bundle from the co-accused *held*, that the mere fact that the accused in making this statement may have intended it to be self-exculpatory is insufficient to take it out of the section. The statement in effect amounts to an admission that the accused associated with the other accused and is therefore not admissible. (*Fawcett, J.*). EMPEROR *v.* HAJI SHER MAHOMED.
75 I.C. 70=46 Bom. 961=25 Bom. L.R. 214=24 Cr. L. J. 870=A.I.R. 1923 Bom. 65

———*Explanatory statement of the circumstances is not a confession.*

Where the Sub-Inspector of Police deposed to the effect that the accused came with cattle and made a statement to him that they were present in the fight.

Held, that the statement of the accused does not amount to a confession in as much as it was only an explanatory statement of the circumstances under which cattle had been seized and was not an admission of guilt but rather in the nature of complaint against the victim of the fight to the effect that he had illegally attempted to interfere with the arrest of the cattle. (*Le Rossignol and Zafar Ali, JJ.*). JALAL *v.* EMPEROR.
81 I.C. 347=25 Cr.L.J. 811=A.I.R. 1923 Lah. 232.

———*Statement not amounting to a confession is admissible against accused.*

A statement made by an accused to a police officer if it does not amount to a confession may nevertheless be used against him and more particularly if the statement made turns out to be false in the light of the other evidence in the case. (*Ryves, J.*). RAMHIT *v.* EMPEROR. **65 I.C. 849=20 A.L.J. 178=23 Cr. L.J. 193=A.I.R. 1922 All. 24.**

———*Statement containing confession—Portions not confession are also admissible.*

Where in a murder case, the first information was lodged by the accused himself, and the accused had stated therein that he had committed the murder,

Held, that the preliminary portions of the first information giving a history or narrative of events preceding the night of occurrence were admissible as statements or admissions not being confessions.

Though when portions of a statement are admitted the persons affected thereby may demand that the statement should be admitted and considered in its entirety, yet the principle that portions of a statement or confession may be admitted and others excluded is recognised in the Evidence Act itself, *e.g.*, S. 27. 10 B. L. R. App. 2; 15 Cal. 589; 41 Cal. 601 and 37 Cal. 467, *Ref.* (*Teunon and Ghose, JJ.*). EMPEROR *v.* LALIT MOHAN.
62 I.C. 578=25 C.W.N. 788=22 Cr. L.J. 562=A.I.R. 1921 Cal. 111.

—S. 25—Village Magistrate.

———*Confession recorded by Village Magistrate even after investigation has begun is admissible.*

Rule 195 is not a rule of law, but merely a rule for the guidance of Village Magistrates and therefore, a confession recorded by a Village Magistrate after the police investigation has begun is admissible apart from the fact whether the Magistrate knew that the investigation had begun. (*Ramesam, and Jackson, JJ.*). KUPPATHAN *v.* KING EMPEROR. **105 I. C. 667=1927 M.W.N. 824=28 Cr. L.J. 955=9 A.I. Cr. R. 148=A.I.R. 1927 Mad. 974=53 M.L.J. 739.**

EVIDENCE ACT (1872), S. 26—Magistrate.—S. 25—Miscellaneous.

———*House searched—Possession of house being in question—Fact of accused's having put his signature on recovery list is inadmissible.*

Where a house was searched and the accused put his signature on the recovery list,

Held, that the fact of the accused putting his signature on the recovery list is not admissible in evidence against him in a case in which the possession of the house was in question because it would be an incriminating statement of the nature of a confession to a police officer and could not be proved by reason of the prohibition contained in S. 25. (*Campbell, J.*). BEHARI LAL *v.* EMPEROR.
100 I.C. 707=8 Lah. 326=28 P.L.R. 119=28 Cr. L.J. 323=7 A. I. Cr. R.291=A.I.R. 1927 Lah. 343.

—S. 26—'Custody of police.'

———*Actual arrest and detention is not necessary.*

There are found several cases in which police officers have, after detaining a person accused of an offence, put forward the plea that the latter was not in custody, because he had not yet been formally arrested. The object of this seems to be either to avoid the operation of S. 26 or to shorten the period of time between the arrest and the confession subsequently made to a Magistrate or to postpone the necessity for applying for a remand order. The idea of "free detention" is altogether mistaken and sometimes even hypocritical. It is an infringement of the spirit, while appearing to conform to the strict letter of the law. As soon as an accused or suspected person comes into the hands of a police officer he is in the absence of clear and unmistakable evidence to the contrary, no longer at liberty and is therefore in custody within the meaning of Ss. 26 and 27. (*May Oung, J.*). MAUNG LAY *v.* EMPEROR. **77 I.C. 429=1 Rang. 609=25 Cr. L.J. 381=A.I.R. 1924 Rang. 173.**

———*Person is not in police 'custody' merely because he has been invited to explain certain circumstances, unless he has been arrested or is under police supervision.*

The meaning of words "in custody of the Police" should not be extended by implication to cases beyond what is absolutely necessary, *i.e.*, where the man is really under arrest or in strict supervision and is merely allowed to go out for a few moments. But where the case is not so and the accused is not arrested or under supervision, he merely being invited to explain certain circumstances, he should not be deemed to be in Police custody. It, however, by no means follows, that because the statement is admissible, therefore, it should not be considered with considerable care to see how far reliance should be placed on such extra-judicial confession. The weight to be given to it depends very much on the circumstances of the case, whether suspicion attached to the accused at the time, whether accused was intelligent or ignorant of the possible result of the confession, and the like. (*Kennedy, J. C. and Kemp, A.J.C.*). EMPEROR *v.* MAHOMED BUX. **85 I C. 833=26 Cr. L.J. 609=16 S.L.R. 743=A.I.R. 1921 Sind 145.**

—S. 26—Magistrate.

—*'Juge d' instruction' is a Magistrate—General Clauses Act, Cl.* 31.

'Juge d' instruction' is a Magistrate and so statements made in his immediate presence are admissible in evidence. The term Magistrate is not restricted to the Magistrates exercising jurisdiction

EVIDENCE ACT (1872), S. 26—Magistrate.

under Cr. P. Code: 22 Bom. 235, *Rel. on.* (*Waller and Pandalai, JJ.*).) PANCHANATHAM PILLAI *v.* EMPEROR. **121 I.C. 157=52 Mad. 529=29 M. L. W. 645=1929 M.W.N. 383=2 M.Cr.C. 150=31 Cr. L.J. 223=A.I.R. 1929 Mad. 487=56 M.L.J. 628.**

———The word "Magistrate" in S. 26 of the Evidence Act includes Magistrates in Native States. 22 Bom. 235, *Foll.* (*Hallifax and Macnair, A.J.Cs.*). GOVINDA *v.* EMPEROR. **69 I.C. 257=17 N.L.R. 113=A.I.R. 1921 Nag. 39.**

—S. 26—Oral and written confession.

———S. 26 as it stands makes no distinction between an oral and written confession but embodies a substantive rule of law. (*Jai Lal and Currie, JJ.*). JOG RAI *v.* EMPEROR. **A.I.R. 1930 Lah. 534.**

—S. 26—Oral confession to Magistrate.

———*Admissibility.*

A confession or an incriminating statement made in the presence of a Magistrate by an accused person while in police custody who is not produced before the Magistrate with a view to record his confession can be proved by oral testimony of the Magistrate when it has not been reduced to writing. In absence of any provision of law making it obligatory on the part of a Magistrate to record a confession it is not a matter required by law to be reduced to the form of a document. (*Jai Lal and Currie, JJ.*). JOG RAI *v.* EMPEROR. **A. I. R. 1930 Lah. 534.**

—S. 26—'Police officer' and 'Magistrate.'

———The words "Police officer" and "Magistrate" in S. 26 of the Evidence Act include the police officers and Magistrates of Native States. 22 Bom. 235, *Foll.* but doubted. (*Crump, J.*). EMPEROR *v.* ANAND RAO GANGARAM. **89 I.C. 1046=27 Bom. L.R. 1034=49 Bom. 642=26 Cr. L. J. 1478=A. I. R. 1925 Bom. 529.**

—S. 26—Presence of police.

———*Statement made in presence of police officer is not admissible.*

A statement made in the presence of a Sub-Inspector and a constable who had the accused under arrest at the time and not recorded by Magistrate under S. 164, Cr. P. Code, is not admissible in evidence. (*Mears, C.J. and Bennet, J.*). NATHU *v.* EMPEROR. **118 I. C. 46=1929 Cr. C. 408=10 L. R. A. Cr. 141=30 Cr. L. J. 867=12 A.I.Cr.R. 323=A.I.R. 1929 All. 855.**

———*Incriminating admissions of accused before police officers are inadmissible in evidence.*

Incriminating admissions of an accused, under admitted circumstances that he took the whole of the investigating staff of the police officers round the scene of offence and admitted before them his own guilt, are inadmissible in evidence under S. 26. (*Subhedar, A.J.C.*). SHAMLAL *v.* EMPEROR. **120 I.C. 210=31 Cr. L. J. 15=13 A. I. Cr. R. 157=1929 Cr. C. 673=A.I.R. 1929 Nag. 350.**

—S. 26—Scope.

———*S. 26 does not make admission dependent upon knowledge of accused as to identity of Magistrate.*

S. 26 does not make the admissibility of the confession dependent upon the knowledge of the accused as to the identity of the Magistrate, the main consideration being the presence of the Magistrate and the making of the confession in his presence. (*Jai Lal and Currie, JJ.*). JOG RAI *v.* EMPEROR. **A.I.R. 1930 Lah. 534.**

EVIDENCE ACT (1872), S. 27—Accused.

—S. 26—Statements to police.

———*Statements to police of incriminating nature are inadmissible.*

Statements of accused while in custody of the police officer, and of his having pointed out the places where he committed the offence, are not admissible as being of an incriminating nature, (*Newbould and B. B. Ghose, JJ.*). KERAMAT MONDAL *v.* EMPEROR. **92 I.C. 439=42 C.L.J. 524=27 Cr. L. J. 263=A.I.R. 1926 Cal. 320.**

—S. 26—To foreign administrator.

———*Confession while in police custody made before Portuguese Administrator is inadmissible.*

Administrator in Portuguese territories is not a Magistrate and therefore confession made by an accused before him while in Police custody is not admissible. (*Macleod, C.J. and Fawcett, J.*). EMPEROR *v.* MAHABLI RAMA SAIL. **87 I.C. 520=26 Bom. L.R. 706=26 Cr. L.J. 984=A.I.R. 1924 Bom. 480.**

—S. 26—To Magistrate.

———*Confession to Magistrate while in police custody is not inadmissible.*

If a confession is made to Magistrate, while the accused is in police custody, such confession is not inadmissible, as it is one in the immediate presence of a Magistrate, within S. 26. (*Martineau and Zafar Ali, JJ.*). NAZIR SINGH *v.* EMPEROR. **91 I.C. 806=7 L.L.J. 428=26 P.L.R. 767=27 Cr. L.J. 134=A.I.R. 1925 Lah. 557.**

—S. 26—To Postal officer.

———*Confession made by accused not to Magistrate but Superintendent of Post Offices is not admissible.*

Confession made by an accused not to a Magistrate but to the Superintendent of Post Offices, at his house, where he was taken temporarily by the police and was again removed back to police lock-up, is inadmissible in evidence; 20 Bom. 165, *Foll.* (*Shadi Lal, C.J. and Agha Haider, J.*). EMPEROR *v.* SHEO RAM. **108 I.C. 398=10 L.L.J. 174=29 Cr. L.J. 386=10 A.I. Cr. R. 115=A.I.R. 1928 Lah. 282.**

—S. 26—Voluntary statement.

———*Coroners Act, S. 20—Voluntary statement by accused in inquest proceedings is admissible against the accused on his trial.*

There is no provision of law which renders a statement made voluntarily by an accused, a suspect, in inquest proceedings before a Coroner inadmissible against the accused on his trial for the offence: A.I.R. 1926 Bom. 144, *Dist.*; A.I.R. 1926 Bom. 151, *Ref.* (*Shah, J.*). EMPEROR *v.* AZIMKHAN ZAINKHAN. **110 I.C. 107=30 Bom. L.R. 84=10 A.I. Cr. R. 419=29 Cr. L.J. 651=A.I.R. 1928 Bom. 52.**

—S. 27.

Accused.
Co-accused.
Conviction on.
Discovery.
Discovery of irrelevant fact.
Duty of Court.
Interpretation.
Presence of police.
Scope.
Several accused.
Statement.
What can be proved.

—S. 27—Accused.

———*Person not accused at the time of making statement—Statement is not admissible.*

EVIDENCE ACT (1872), S. 27—Co-accused.

In order to bring the statement within S. 27 the person making it must not only be in the custody of the police but the statement must be of a person who was then an accused : 6 All. 509 (F.B.), *Rel. on.* (*Adami and Wort, JJ.*). DEONANDAN DUSADH *v.* EMPEROR. **111 I. C. 118= 7 Pat. 411=9 P. L. T. 533= 10 A. I. Cr. R. 466=29 Cr. L. J. 790= A. I. R. 1928 Pat. 491.**

—S. 27—Co-accused.

———*Statement by one accused is not admissible as against co-accused.*

A statement made by an accused to a police officer is inadmissible in evidence against a co-accused. *Emperor* v. *Kangul Mali*, 41 Cal. 601, *Foll.* (*Ryves, J.*). RAMHIT *v.* EMPEROR. **65 I.C. 849= 20 A. L.J. 178=23 Cr. L. J. 193= A.I.R. 1922 All. 24.**

—S. 27—Conviction on.

———*Person convicted on mere evidence that he pointed out places from which portions of stolen property were recovered—Legality.*

The only evidence on which a person's conviction was based was that he pointed out three places from which portions of the stolen property were recovered. Person's father and brother were also suspected and eventually discharged.

Held, that as his relations were also concerned in the crime, it was possible for the person to have knowledge of the places without himself being guilty of any offence and so the recoveries alone were not sufficient to justify the conviction : 18 P. R. 1917, Cr. *Dist.* (*Bhide, J.*). SOHAN SINGH *v.* EMPEROR. **11 L. L. J. 439=1930 Cr. C. 107= A.I.R. 1930 Lah. 91.**

———*Offence under Ss.* 457 *and* 380, *Penal Code—Tank indicated by statement of accused—Vessels recovered from the tank not within sole control of accused—Evidence is insufficient for conviction of accused.*

Where an accused arrested on the charges under Ss. 457 and 380, makes a statement indicating a tank from which vessels, corresponding to the description of articles stolen, are recovered, but where the tank is not the particular property, or within the sole control of the accused, but accessible to the public in general and it is doubtful whether the accused or some other person concealed the stolen articles, such evidence of itself is not sufficient for a conviction : 17 All. 576, *Rel. on*; 16 C. W. N. 238; 1 P. R. 1917 Cr. and A.I.R. 1923 Lah. 335, *Ref.* (*Curgenven, J.*). PUBLIC PROSECUTOR *v.* PAKKIRISWAMI. **30 M. L. W. 791=1929 M.W.N. 785= 2 M. Cr. C. 307=1929 Cr. C. 614= A.I.R. 1929 Mad. 846=57 M. L. J. 548.**

———*Weapon forbidden under Arms Act discovered by reason of information from accused—His conviction is valid.*

Where an article, the possession of which is forbidden by the Indian Arms Act, has been discovered by reason of information given by an accused person his conviction based upon that evidence is valid : 72 P.L.R. 1916, *Foll.* (*Fforde, J.*). NAURANG SINGH *v.* EMPEROR. **100 I.C. 122= 9 L.L.J. 211=28 P.L.R. 626= 28 Cr.L.J. 250=A.I.R. 1927 Lah. 900.**

—S. 27—Discovery.

———*Places already known are not places "discovered" within S.* 27.

Incriminating admissions of an accused before police officers cannot be said to lead to the discovery of several places pointed out by the accused where they are already known and cannot be said to have been "discovered" in consequence of the said admissions within the meaning of S. 27. 12 Mad. 153, *Foll.* (*Subhedar, A.J.C.*). SHAMLAL *v.* EMPEROR. **120 I.C. 210=31 Cr. L.J. 15= 13 A. I. Cr. R. 157=1929 Cr.C. 673= A.I.R. 1929 Nag. 350.**

———*Fact known to police cannot be re-discovered on statement of accused.*

A fact known to the police cannot be re-discovered on the statement of an accused person so as to make such statement or such incriminating conduct admissible under S. 27. (*Aston, A. J. C.*). WAHID BUX *v.* EMPEROR. **120 I.C. 81= 1929 Cr. C. 678=30 Cr. L. J. 1121= A. I. R. 1929 Sind 250.**

———*Accused admitting possession of property—Property produced by accused himself—Statement of accused is admissible.*

The statement of an accused that he had in possession certain stolen property is admissible in evidence even though he himself produced the property. (14 M. L. W. 418, *Foll.*). It makes no difference whether the accused himself digs out the property from the place where it is hidden or whether on information given by him some one else digs up the ground and produces the property. 26 M. L. J. 352, *Appr.* (*Spencer, Offg. C. J.*). SOGIAMUTHU PADAYACHI, *In re.* **93 I. C. 42= 50 Mad. 274=27 Cr. L. J. 394= A.I.R. 1926 Mad. 638.**

———*Discovery of articles by accused in his house is a fact discovered within S.* 27.

The discovery of the ornaments at his house by accused is clearly a fact discovered within the meaning of S. 27, and is admissible in evidence. (*Walsh, J.*). KHETAL *v.* EMPEROR. **73 I. C. 62=21 A.L.J. 143=45 All.300= 4 L. R. A. Cr. 13=24 Cr. L. J. 526= A.I.R. 1923 All. 352**

———*Knowledge of facts by persons other than the police is immaterial.*

Though facts are already known to persons other than police officers, such facts cannot be said to be not discovered in consequence of information received within the meaning of S. 27 of the Evidence Act. The language of the section and its place in the Evidence Act make it clear that the discovery therein referred to is discovery to or by police officers. (*Teunon and Ghose, JJ.*). LEGAL REMEMBRANCER *v.* LALIT MOHAN SINGH. **49 Cal. 167=A.I.R. 1922 Cal. 342.**

———*Information leading to discovery of property—Person made to show the places where discovery had already been made—Evidence is not admissible.*

Once property has been discovered in consequence of information received from a suspected person, it cannot be re-discovered in consequence of information received from another suspected person. It is only the information that was given by the first person and which led to the actual discovery which may be proved under the terms of S. 27 of the Evidence Act. (*Scott-Smith, J.*). BUDHA *v.* EMPEROR. **64 I.C. 502=9 P.L.R. 1922= 23 Cr.L.J. 22= A.I.R. 1922 Lah. 315.**

———*"Discovery" means discovery to or by Police.*

If and when certain facts are deposed to as discovered in consequence of information received from the accused when in custody of the police, so much of the information as relates distinctly to the fact or facts thereby discovered will become admissible. The discovery referred to in S. 27 is discovery to or by Police Officers. 11 Cal. 635, *Foll*

EVIDENCE ACT (1872), S. 27—Discovery of Irrelevant fact.

(*Teunon and Ghose, JJ.*). EMPEROR *v.* LALIT MOHAN. **62 I. C. 578=25 C. W. N. 788=22 Cr. L. J. 562=A.I.R. 1921 Cal. 111.**

—S. 27—Discovery of irrelevant fact.

———Section 27 has nothing to do with the question whether the fact discovered is or is not relevant. (*Shadi Lal, C. J. Harrison, Fforde, Tek Chand Jai Lal, Dalip Singh and Agha Haidar, JJ.*). SUKHAN *v.* EMPEROR. **115 I. C. 6=10 Lah. 283=30 P. L. R. 197=11 L. L. J. 159=30 Cr. L. J. 414=12 A. I. Cr. R. 382=A.I.R. 1929 Lah. 344 (F. B.).**

———*Confession to police—Discovery of fact irrelevant to inquiry does not make confession admissible.*

In a case where an accused is charged with murder by poisoning, the fact that at some previous date the accused had treated another person with arsenic for a bad leg is not relevant in any way and the discovery of the fact in consequence of a statement made by the accused to the police cannot make this statement admissible. (*Ross and Wort, JJ.*). GOKUL CHAMUR *v.* EMPEROR. **105 I. C. 683=6 Pat. 611=9 P. L. T. 377=28 Cr. L. J. 971=9 A. I. Cr. R. 118=A. I. R. 1928 Pat. 22.**

—S. 27—Duty of Court.

———Per *Broomfield, J.*—In order to apply S. 27 it is necessary to know exactly what the statements relied upon are; because they are admissible only so far as they lead to the discovery of some fact and no further. 11 B.H.C.R. 242, *Rel. on.* (*Mirza and Broomfield, JJ.*). EMPEROR *v.* SHIVPUTRAYA BASLINGAYA. **32 Bom.L.R. 574=A.I.R. 1930 Bom. 244.**

———*Court must be very cautious.*

(*Obiter*). Bald evidence introduced through the mouth of a prosecution witness to prove the confessions of an accused under cover of S. 27 ought to receive very little credence by the Court, more especially when the accused stands charged with grave offence as an attempt to murder and particularly, when more direct evidence to prove the same points are available to the prosecution and which they do not take care to produce before the Court. (*Subhedar, A.J.C.*). SHAMLAL *v.* EMPEROR. **120 I.C. 210=13 A.I.Cr.R. 157=31 Cr.L.J. 15=1929 Cr.C. 673=A.I.R. 1929 Nag. 350.**

—S. 27—Interpretation.

———'*Fact*'.

The expression "fact" as defined in S. 3 includes not only the physical fact but also the psychological fact or mental condition of which any person is conscious. It is in the former sense that the word is used in S. 27. (*Shadi Lal, C.J., Harrison, Fforde, Tek Chand, Jai Lal, Dalip Singh and Agha Haidar, JJ.*). SUKHAN *v.* EMPEROR. **115 I.C. 6=10 Lah. 283=30 P.L.R. 197=11 L.L.J. 159=30 Cr.L.J. 414=12 A.I.Cr.R. 382=A.I.R. 1929 Lah. 344 (F. B.).**

———'*Information.*'

Fforde, J.—The word 'statement' is used interchangeably with the word 'information'. A.I.R. 1929 Lah. 338, *Diss. from.* (*Shadi Lal, C.J., Harrison, Fforde, Tek Chand, Jai Lal, Dalip Singh and Agha Haidar, JJ.*). SUKHAN *v.* EMPEROR. **115 I.C. 6=10 Lah. 283=30 P.L.R 197=11 L.L J. 159=30 Cr.L.J. 414=12 A.I. Cr.R. 382=A.I.R. 1923 Lah. 344 (F.B.).**

———'*Information.*'

The word "information" cannot be used as synonymous with the word "statement." The word "information" as distinct from the word "statement" connotes two things, namely, a statement or other means employed for imparting knowledge possessed by one person to another, and the knowledge so derived by the other person. (*Harrison and Dalip Singh, JJ.*). KARAM DIN *v.* EMPEROR. **115 I.C. 1=30 Cr.L.J. 385=A. I. R. 1929 Lah. 338.**

EVIDENCE ACT (1872), S. 27—Scope.

———'*Confession.*'

In construing S. 27 the word "confession" does not necessarily mean a complete confession of guilt but means and includes any incriminating statement. (*Harrison and Dalip Singh, JJ.*). KARAM DIN *v.* EMPEROR. **115 I.C. 1=30 Cr.L.J. 385=A. I. R. 1929 Lah. 338.**

———'*Discovered.*'

Even more important is the word 'discovered'. It is used in a peculiar sense. The test is that the fact discovered must be discovered in the sense, that the proof of the existence of that fact no longer rests on the credibility of the accused's statement but rests on the credibility of the witnesses who depose to the existence of that fact. The rest of the information is not admissible. (*Harrison and Dalip Singh, JJ.*). KARAM DIN *v.* EMPEROR. **115 I.C. 1=30 Cr.L.J. 385=A.I.R. 1929 Lah. 338.**

———'*Distinctly.*'

Under S. 27 the information to be proved must relate distinctly to the fact thereby discovered. The word 'distinctly' in S. 27 is used in some sense other than the word 'directly'. It is meant to exclude certain things and to limit and confine the information which may be proved within the definite limits and not necessarily to include everything which may relate to that information. (*Harrison and Dalip Singh, JJ.*). KARAM DIN *v.* EMPEROR. **115 I. C. 1=30. Cr.L.J. 385=A.I.R. 1929 Lah. 338.**

———*Section must be strictly construed.*

S. 27 must be very strictly construed. Where one accused has agreed to point out a place where a fact would be discovered, in pursuance of his statement to point out that place, the section does not cover similar statements of the other accused in police custody. (*Prideaux, A.J.C.*). KUDAON *v.* EMPEROR. **91 I.C. 236=21 N.L.R. 86=27 Cr. L.J. 60=A.I.R. 1925 Nag. 407.**

———'*Custody.*'

The submission to the custody of a police officer within the meaning of S. 46 is 'custody' within the meaning of S 27, Evidence Act. (*Teunon and Ghose, JJ.*). LEGAL REMEMBRANCER, BENGAL *v.* LALIT MOHAN SINGH ROY. **49 Cal. 167=A.I.R. 1922 Cal. 342.**

—S. 27—Presence of police.

———Accused's statement in presence of police is relevant in so far as it relates to material facts discovered in consequence. 26 M. L. J. 352, *Foll.* (*Spencer, J.*). NAINAMALAI KONAN, *In re.* **69 I.C. 377=14 M.L.W. 418=A.I.R. 1921 Mad. 679.**

—S. 27—Scope.

———*Out of statement containing confession only such portion as leads to discovery is admissible.*

Per *Graham, J.*—Section 27 being a proviso to the preceding sections must be strictly construed and any relaxation must be sparingly allowed, care being exercised to see that the purpose and object of Ss. 25 and 26 are not rendered nugatory by any lax interpretation.

A statement made by an accused while in police custody which contains a confession of guilt and also supplies information in consequence of which

EVIDENCE ACT (1872), S. 27—Scope.

a discovery is made is not admissible in its entirety under S. 27, but only so much of it is admissible as relates distinctly or immediately to the discovery.

Per *Lort-Williams, J.*—S. 27 is not a proviso to either S. 24 or S. 25. It follows that some restricted or limited meaning narrower than the natural meaning must be attached to the words in S. 27.

The practice in England now is and doubtless was at the time when the Evidence Act was passed to allow to be stated in evidence that in consequence of information received from the prisoner certain facts had been discovered, thus to the extent of fixing the prisoner with knowledge. To this extent evidence under S. 27 may be given. (*Graham and Lort-Williams, JJ.*). SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* BHAJOO MAJHI.

34 C.W.N. 106=A.I.R. 1930 Cal. 291.

———The provisions of S. 27 must be construed as favourably to the accused as possible for it is a section which makes an exception against the accused contrary to the general sections, namely, 25 and 26, which are in his favour.

When the accused stated "I buried the shirt, which was my share of the stolen property, under the beri tree." The shirt was accordingly found under the tree.

Held, that the fact that the accused buried that shirt or the fact that it was his share of the stolen property was not "discovered" within S. 27. Both these statements rested purely on the credibility or otherwise of the accused's statements: the fact that it was his share of the stolen property did not relate distinctly to the fact discovered which was merely that a certain article was buried under a certain tree: these facts could not be proved and would not be admissible or relevant against the accused. What could be rendered admissible under S. 27 would be that which the Court would find necessary in order that the statement may be intelligible and the fact that this was the accused's share of the stolen property or that he buried it, would not necessarily be proved by the admission of the statement. A. I. R. 1928 Lah. 308, *Expl.* and *Diss. from.* (*Harrison and Dalip Singh, JJ.*). KARAM DIN *v.* EMPEROR.

115 I.C. 1=30 Cr. L.J. 385=A.I.R. 1929 Lah. 338.

———The provisions of S. 27, Evidence Act are quite independent of those of S. 162, Cr. P. Code, and the amended S. 162 does not repeal or in any way affect S. 27. A.I.R. 1926 Rang. 116 (F.B.); A.I.R. 1926 Lah. 88; A.I.R. 1925 Mad. 574 and A. I. R. 1928 Nag. 108, *Appr.*; A. I. R. 1927 Cal. 17; A.I.R. 1926 Pat. 232; A.I.R. 1925 Rang. 101 and A.I.R. 1926 Rang. 116 (F.B.), *Ref.*; A.I.R. 1926 Nag. 368, *Diss. from.* (*Prideaux, Kinkhede and Kolhatkar, A. J. Cs.*). GOLA *v.* EMPEROR.

114 I.C. 273=24 N. L. R. 158=30 Cr. L.J. 258=12 A. I. Cr. R. 177=A. I. R. 1929 Nag. 17 (F.B.).

———S. 27 relates to statement of accused while in police custody and not prior to his arrest or detention. (*Prideaux, Kinkhede and Kolhatkar, A.J.Cs.*) GOLA *v.* EMPEROR. **114 I. C. 273=24 N. L. R. 158=30 Cr. L. J. 258=12 A.I. Cr. R. 177=A I.R. 1929 Nag. 17 (F. B.).**

———S. 27 is confined in its operation to an incriminating statement by an accused person while in police custody. (*Prideaux, Kinkhede and Kolhatkar, A. J. Cs.*). GOLA *v.* EMPEROR.

114 I. C. 273=24 N.L.R. 158=30 Cr. L.J. 258=12 A. I. Cr. R. 177=A.I.R. 1929 Nag. 17 (F. B.).

EVIDENCE ACT (1872), S. 27—Scope.

———*S.* 27 *qualifies S.* 24 *as well as Ss.* 25 *and* 26.

The broad ground for not admitting confessions made under inducement or to a police officer is the danger of admitting false confessions, but the necessity for the exclusion disappears in a case provided by S. 27 when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. (*Addison and Coldstream, JJ.*). BULAQI *v.* EMPEROR.

112 I.C. 347=9 Lah. 671=11 A. I. Cr. R. 284=29 Cr. L.J. 1019=A.I.R. 1928 Lah. 476.

———*S.* 27 *is not affected by S.* 162, *Cr. P. Code.*

S. 27, Evidence Act, is not affected by S. 162, Cr. P. Code, but S. 162 is affected by S. 27, Evidence Act. The result is that a special exception to S. 162, Cr. P. Code, exists in the circumstances mentioned in S. 27, Evidence Act. A.I.R. 1926 Rang. 116 (F.B.), *Rel. on.* (*Ramesam, Waller and Jackson, JJ.*). CHINNA THIMMAPPA *v.* TALUKUNTA THIMMAPPA. **112 I.C. 682=28 M.L.W. 314=1 M. Cr. C. 201=51 Mad. 967=29 Cr. L.J. 1098=A.I.R. 1928 Mad. 1028=55 M.L.J. 351 (F. B.).**

———S. 27 is not repealed by S. 162, Cr. P. Code—Cr. P. Code, S. 162: A.I.R. 1926 Rang. 116 (F. B.), *Foll.* (*Findlay, J. C. and Macnair, A.J.C.*). SHEOBALAK PRASAD *v.* EMPEROR.

108 I.C. 442=11 N.L.J. 7=9 A.I. Cr. R. 408=29 Cr. L.J. 400=A.I.R. 1928 Nag. 108.

———S. 162 of Cr. P. Code, overrides the provisions of S. 27, Evidence Act. (*Kotwal, A.J.C.*). BHOGIA *v.* KING-EMPEROR.

100 I.C. 820=28 Cr. L.J. 340=7 A.I. Cr. R. 575=A.I.R. 1927 Nag. 203.

———*S.* 162, *Cr. P. Code, does not override S.* 27.

S. 162 applies to the statements of persons examined as witnesses by the police in the course of investigation, and not to the statement of an accused person and it does not override or modify the provisions of S. 27 of the Evidence Act. (*Shadi Lal, C. J. and Addisson, J.*). RANUN *v.* KING EMPEROR. **94 I.C. 901=7 Lah. 84=27 Cr. L.J. 709=27 P.L.R. 583= A.I.R. 1926 Lah. 88.**

———The general provisions of the law with regard to the admissibility of statements made by accused persons like other admissions do not seem to be affected by S. 162, Cr. P. Code. (*Mullick, Ag. C.J. and Jwala Prasad, J.*). JAGWA DHANUK *v.* EMPEROR. **93 I.C. 884=5 Pat. 63=7 P.L.T. 396=27 Cr. L.J. 484=A.I.R. 1926 Pat. 232.**

———*Ss.* 160, 161 *and* 162, *Cr. P. Code—If overrides S.* 27—(Per *Curiam, Heald, J., Contra.*)

Ss. 160, 161 and 162 do not apply to an accused person and do not affect or override S. 27 of the Evidence Act, which applies only to information received from a person accused of any offence in the custody of a police officer: A.I.R. 1926 Pat. 232 and A. I. R. 1925 Mad. 574; *Appr.* (*Rutledge, C.J., Heald, Duckworth, Chari and Maung Ba, JJ.*). EMPEROR *v.* NGA THA DIN. **96 I.C 145=5 Bur. L.J. 30=4 Rang. 72=27 Cr. L.J. 881=A.I.R. 1926 Rang. 116 (F. B.).**

———*S.* 27 *is not affected by Cr. P. Code, S.* 162 (*as amended*).

S. 27 of the Evidence Act, which deals with information received from persons accused of an offence and in police custody is not affected by the aforesaid section of the Cr. P. Code, (*Rutledge, C.J., Heald, Duckworth, Chari and Maung Ba, JJ.*). EMPEROR. *v.* NGA THA DIN. **96 I.C. 145=5 Bur. L.J. 30=4 Rang. 72=27 Cr. L.J. 881=A.I.R. 1926 Rang. 116 (F. B.).**

EVIDENCE ACT (1872), S. 27—Scope.

———S. 27, Evidence Act is overridden by S. 162, Cr. P. Code. (*Doyle, J.*). EMPEROR *v.* NGA KYAIN. **94 I.C. 706=27 Cr. L.J. 658= A.I.R. 1926 Rang. 112.**

———*S. 24 will override S. 27 when they conflict.*

A statement though admissible under S. 27 should be excluded if under S. 24 the accused at the time of making the statement was under the influence of the village Magistrate's promise to save him from punishment. (*Spencer, Offg. C. J. and Reilly, J.*). SEMALAI GOUNDAN, *In re.* **86 I.C. 664=26 Cr.L. J. 840=21 M.L.W. 199= A. I. R. 1925 Mad. 574.**

———*Section is not repealed by the amended S. 162, Cr. P. Code.*

The amended S. 162 does not exclude from evidence the fact that the accused made a statement to the police that the weapon with which the crime had been committed was concealed in a prickly pear bush. The section both before and after amendment, is directed against the admission, at the instance of the prosecution of Police diaries and other records prepared or copied from the diaries of investigating officers. The provisions of the Evidence Act are quite independent of the sections in the Criminal Procedure Code and cannot be treated as impliedly repealed in consequence of the amendment of the Code of Criminal Procedure. (*Spencer, Offg. C. J. and Reilly, J.*). SEMALAI GOUNDAN, *In re.* **86 I.C. 664= 26 Cr. L. J. 840=21 M. L. W. 199= A.I.R. 1925 Mad. 574.**

———*Cr. P. Code* (1923), *S.* 162—*Overrides S.* 27 *of the Evidence Act.*

S. 162 of the Cr. P. Code in its present form, overrides, S. 27 of the Evidence Act. (*Baguley, J.*). BAWA ROWTHER *v.* EMPEROR. **84 I. C. 545= 3 Bur. L. J. 245=26 Cr. L. J. 321= A.I.R. 1925 Rang. 101.**

—S. 27—Several accused.

———Fact discovered in consequence of information by one accused, other giving same information—Fact cannot be said to be discovered from information given by both. 2 Bom. L. R. 1089; 24 W.R. (Cr.) 36; 11 B. H. C. R. 242, *Ref.* (*Mirza and Broomfield, JJ.*). EMPEROR *v.* SHIVPUTRAYA BASLINGAYA. **32 Bom.L.R.574= A.I.R. 1930 Bom. 244.**

———*Accused jointly pointing to place of dead body —Evidence is not admissible against any of them unless it can be shown who made discovery.*

Where all the accused persons jointly pointed out the place where blood stains were found and subsequently the place where the dead body of a person was discovered buried, such evidence is not admissible at all against any of the accused unless it can be shown who made the discovery first. (*Dalip Singh, J.*). FAQIRA *v.* EMPEROR. **116 I.C. 619= 30 P.L.R. 397=30 Cr. L.J. 639=1929 Cr. C. 214= 13 A.I. Cr. R. 60=A.I.R. 1929 Lah. 665.**

———*Fact discovered from information of several accused—Fact will be deemed to have been discovered from information of the first.*

Where a fact is discovered in consequence of information received from one of several persons charged with an offence and when others give like information the fact should not be treated as discovered from the information of them all, but from the information of the first: 24 W.R. 36, Cr. and 7 P. R. 1916, *Foll.* (*Shadi Lal, C.J. and Jai Lal, J.*). ADHAM KHAN *v.* EMPEROR. **101 I.C. 488= 28 P.L.R. 187=8 A.I. Cr. R. 94= 28 Cr.L.J. 456=A.I.R. 1927 Lah. 739.**

EVIDENCE ACT (1872), S. 27—What can be proved.

—S. 27—Statement.

———*Statement by accused that he buried body of person murdered at place pointed out by him is admissible only for S.* 201, *I. P. C.*

A statement made by the accused to the police that he had buried the body of the murdered person at the place pointed out by him is clearly admissible in evidence under S. 27 only for the purposes of S. 201, I P. C., but not for convicting him of murder. A. I. R. 1929 Lah. 344, *Expl.* (*Tapp, J.*). MAMUN *v.* EMPEROR. **121 I. C. 728= 31 Cr. L. J. 293=13 A. I. Cr. R. 382= A.I.R. 1930 Lah. 530.**

———*Statement of accused before police that he buried an article in a place—Police taken to that place and article delivered—Admissibility of statement.*

The accused person stated to the police that he had buried an article at a particular place, took the police to that place and delivered the article to them.

Held, that the statement of the accused to the police was admissible under S. 27 of the Evidence Act. (*Zafar Ali and Jai Lal, JJ.*). EMPEROR *v.* MELA. **112 I. C. 55=10 Lah. L. J. 531= 11 A.I.Cr.R. 292=29 Cr. L. J. 967.**

———*Statement by accused.*

A person was charged with an offence of being in possession of illicit liquor. When his house was searched he made a statement that he had buried a mat of lahan at a particular place and as a result of that information the mat containing lahan was discovered at the place by the police.

Held, that the statement was admissible in evidence against the accused to prove his guilt of being in possession of illicit liquor. A. I. R. 1928 Lah. 308 and A. I. R. 1926 Mad. 638 (F.B.), *Foll.* (*Zafar Ali and Jai Lal, JJ.*). EMPEROR *v.* MELA. **112 I. C. 55=10 L. L. J. 531=29 Cr. L. J. 967= 11 A. I. Cr. R. 292.**

———*Statements can be made by gesture.*

Statements can be made by other means than by words. They can be made by mere gesture. (*Doyle, J.*). EMPEROR *v.* NGA KYAING. **94 I. C. 706=27 Cr. L. J. 658= A. I. R. 1926 Rang. 112.**

———If the recoveries were made in consequence of the information supplied by the accused, the statements made by them are admissible under S. 27 of the Indian Evidence Act. (*Moti Sagar, J.*). ALI AHMED *v.* THE CROWN. **A. I.R. 1923 Lah. 434.**

—S. 27—What can be proved.

——Only so much of the information given by the accused as relates distinctly to the fact thereby discovered can be proved : A. I. R. 1929 Lah. 344, *Rel. on.* (*Wild, A. J. C. on difference between Percival, J. C. and Rupchand, A. J. C.*). MOHOMUD YUSUF *v.* EMPEROR. **1930 Cr. C. 865= A. I. R. 1930 Sind 225.**

———*Only that portion of information which is immediate and proximate cause of discovery of fact can be proved.*

The legislature has prescribed two limitations in order to define the scope of the information provable against the accused : (1) The information must be such as has caused the discovery of the fact, and (2) the information must "relate distinctly" to the fact discovered. The requirements of both the conditions specified above must be satisfied before an incriminating statement can be received in evidence. Thus, only that portion

EVIDENCE ACT (1872), S. 27—What can be proved.

of the information is provable which was the immediate or proximate cause of the discovery of the fact. Anything, which is not connected with the fact as its cause, or is connected with it, not as its immediate or direct cause, but as its remote cause, does not come within the ambit of the section and should be excluded.

A was being tried under S. 302, I. P. C., for having committed the murder of B who was proved to have suddenly disappeared from his house and whose dead body was recovered from a well two days later. At the time of his disappearance *B* was wearing certain ornaments, but these ornaments were not found on his body at the time of his recovery from the well. During the investigation *A* was alleged to have made a statement to the police in these terms: "I had removed the karas, had pushed the boy into the well, and had pledged the karas with Alla Din" and in consequence of the information so received the karas were recovered from Alla Din, which were identified as those worn by *B* at the time of his disappearance.

Held, (Per *Full Bench*) that the statement that the accused had pledged with Alla Din the karas subsequently recovered from the latter is admissible under S. 27 but that the rest of the incriminating statement cannot be received in evidence. (*Fforde and Jai Lal, JJ. dissenting.*) 9 Lah. 626; A. I. R. 1928 Lah. 308; 111 I. C. 561, *Overruled*; A. I. R. 1926 Mad. 638; A. I. R. 1928 Pat. 162, *Diss. from*; 12 Mad. 153, *Expl.*

(Per *Fforde, J.*)—The information "I had removed the karas and had pledged the karas with Alla Din" may be proved. (*Cases discussed.*)

(Per *Jai Lal, J.*)—The statement "had removed the karas and had pledged the karas with Alla Din" is admissible under S. 27 while the statement "had pushed the boy into the well" is not admissible. (*Cases discussed.*) (*Shadi Lal, C. J., Harrison, Fforde, Tek Chand, Jai Lal, Dalip Singh and Agha Haidar, JJ.*). SUKHAN *v.* EMPEROR. **115 I.C. 6= 10 Lah. 283=30 P. L. R. 197= 11 L. L. J. 159=30 Cr. L. J. 414= 12 A.I.Cr.R. 382=A.I.R. 1929 Lah. 344 (F.B.).**

———The words used by the legislature in S. 27 make it absolutely clear that only so much of such information whether it amounts to a confession or not, as relates distinctly to the fact which is deposed to as discovered in consequence of the information received, may be proved.

An accused gave information to the police in these words: "I shall produce the lathi with which I killed Ismail." It had been admitted as evidence under S. 27: The lathi which the accused handed over had no marks of blood whatsoever,

Held, that if the mere fact of the lathi having been handed to the police, might be relied upon, for the purpose of introducing an alleged confession made by the accused to the police, the provisions of S. 26 would become nugatory. (*Percival, J. C. and Rupchand, A.J.C.*). ILLAHIBUX *v.* EMPEROR. **1929 Cr.C. 453= A.I.R. 1929 Sind 175.**

———As S. 27 is intended to enable the prosecution to prove a confession made under certain circumstances, the whole of the information including the confessional portion thereof, given by the prisoner, which relates to the fact includes not only the concrete thing discovered by the investigating officer, but also its description as given by the accused including its connexion with the crime

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which is under investigation. While only so much of the information can be proved as has led to the discovery of the fact, there is no legal justification for splitting up or cutting down the statement of the prisoner so as to make it a vague and unintelligible statement and thus to defeat the very object with which S. 27 was enacted and, therefore, the information must be proved in the precise terms in which it was given. A. I. R. 1926 Mad. 638 (F.B.), *Rel. on*; 15 P.W.R. 1913 Cr.; 11 P. R. 1915 Cr.; 9 P.W.R. 1918 Cr., *Doubted*; A.I.R. 1926 Lah. 138. *Dist.*; A. I. R. 1926 Bom. 513 and A. I. R. 1928 Pat. 162, *Appr.*

Fforde, J.—The Evidence Act, in express terms, puts the law on the subject on a wider basis than does the common law in England. (*Fforde and Jai Lal, JJ.*). HARNAM SINGH *v.* EMPEROR. **111 I.C. 561=9 Lah 626= 29 P.L.R. 679= 29 Cr.L.J. 881=11 A.I.Cr.R. 106= A.I.R. 1928 Lah. 308.**

———*Confession leading to discovery of anything is admissible.*

The whole confession of a prisoner in police custody cannot be admissible, but where the confession includes a statement that a weapon was used for committing the offence charged, that part of the confession can certainly go in if it leads to the discovery of the weapon: A.I.R. 1926 Mad 638, *Foll.* (*Mullick, A.C.J. and Wort, J.*). LALJI DUSADH *v.* EMPEROR. **106 I.C. 698= 6 Pat. 747=29 Cr.L.J. 106= 9 A.I.Cr.R. 379=A.I.R. 1928 Pat. 162.**

———*Corpse—Discovery on information by accused —Statement of accused to police that he buried body is admissible.*

Where a person was murdered and his body was discovered in consequence of information received from the accused, the statement of accused to the police that he in company with his father and brother buried the body is admissible in evidence: 25 Cal. 413; 98 P.L.R. 1918 and 72 P.L.R. 1916, *Foll.* (*Zafar Ali, J.*). SAIFAL *v.* EMPEROR. **95 I.C. 603=8 L.L.J. 519=27 P.L.R. 580= 27 Cr.L.J. 827.**

———*Information by accused that he buried the dead body is not provable under the section.*

In a case under S. 302, I.P.C., the information given by the accused that he buried the body does not distinctly relate to the discovery of the body and is not provable under S. 27: 125 P.L.R. 1920, *Appl.* (*Scott Smith and Zafar Ali, JJ.*). SULAKDAN SINGH *v.* EMPEROR. **89 I.C. 901=26 Cr.L.J. 1429= A.I.R. 1926 Lah. 138.**

———*Statement leading to discovery of property should be admitted as a whole.*

If an accused makes a statement which is admissible under S. 27, the whole of the statement which leads to the discovery of the stolen property is admissible and sentences should not be cut up so as to reduce the statements only to the actual words which the accused may use to express the fact that he had hidden the properties. (*Spencer, Offg. C.J.*). SOGIAMUTHU PADAYACHI, *In re.* **93 I.C. 42=50 Mad. 274=27 Cr.L.J. 394= A.I.R. 1926 Mad. 638.**

———The information given by the accused which led to the recovery of certain jewels which had been stolen was held to be admissible in evidence under S. 27. (*Scott-Smith and Fforde., JJ.*). MANSHA SINGH *v.* CROWN. **86 I.C. 347=7 L.L.J. 51= 26 Cr.L.J. 763=A.I.R. 1925 Lah. 371.**

EVIDENCE ACT (1872), S. 30—Admissibility of confession.

—S. 30.

Admissibility of confession.
Approver's confession.
Confession, what is.
Corroboration.
Essentials for admissibility.
Evidentiary value.
Retracted confession.
Scope and interpretation.
Self-exculpatory confession.
Miscellaneous.

—S. 30—Admissibility of confession.

———Confession of co-accused during trial implicating the other accused in a warrant case is admissible. (*Johnstone, J.*). RAM KISHAN *v.* EMPEROR. **111 I.C. 387=29 Cr. L. J. 835=11 A. I. Cr. R. 185=A. I. R. 1928 Lah. 880.**

———Cr. P. Code, S. 162—Statement by a person, before he is charged for any offence by police is only an admission and is admissible in evidence against him but not against co-accused: A. I. R. 1927 Cal. 17, *Rel. on.* (*Courtney Terrell, C. J. and Adami, J.*). RAJ KUMAR SINGH *v.* EMPEROR. **111 I. C. 721=9 P. L. T. 449=29 Cr. L. J. 913=11 A. I. Cr. R. 143=A. I. R. 1928 Pat. 473.**

———*Obiter.*—The statement made by an accused in Court implicating himself as well as his co-accused can be taken into account in considering the guilt of the latter. (*Suhrawardy and Panton, JJ.*). NIRMAL CHANDRA *v.* EMPEROR. **100 I. C. 113=31 C. W. N. 239=28 Cr. L. J. 241=A. I. R. 1927 Cal. 265.**

———A confession of a co-accused implicating himself and others is admissiblein evidence against all the accused under S. 10 and can also be taken into consideration against them under the provisions of S. 30. (*Stuart, C. J. and Raza, J.*). RAM PRASAD *v.* EMPEROR. **106 I. C. 721=1 L. C. 339=2 Luck. 631=8 A. I Cr. R. 449=A.I.R. 1927 Oudh 369.**

———Confession of accused who is convicted on his plea of 'guilty' should not be admitted against others. (*Sulaiman, J.*). SHANKER *v.* EMPEROR. **93 I. C. 241=24 A.L.J. 318=27 Cr. L.J. 449=7 L. R. A. Cr. 55=A.I.R. 1926 All. 318.**

———Co-accused induced to make confession—Confession cannot be relied on. (*Zafar Ali, J.*). TEJU SINGH *v.* EMPEROR. **92 I. C. 461=7 L.L.J. 631=27 Cr. L.J. 285.**

———*Plea of guilty recorded after framing of charge by Magistrate—Confession is admissible against co-accused.*

Three men were sent up for trial before a Magistrate and proceedings taken against them all. When questioned, one of them said that he was guilty and subsequently pleaded guilty after the charge had been framed.

Held: that his confession could be taken into account against the other accused. The trial could not be said to have commenced only after the recording of the plea of guilty. 38 Mad. 302 and 43 Mad. 511 (F. B.), *Foll.* (*Harrison, J.*). FAKHRUDDIN *v.* CROWN. **95 I.C. 63=6 Lah. 176=27 Cr. L.J. 735=A. I. R. 1925 Lah. 435.**

———A statement by one co-accused that another was implicated in the offence is inadmissible in evidence against the other. (*Scott-Smith and Fforde, JJ.*). MAUSHA SINGH *v.* CROWN. **86 I.C. 347=7 L.L.J. 51=26 Cr. L.J. 763=A.I.R. 1925 Lah. 371.**

EVIDENCE ACT (1872), S. 30—Approver's confession.

———Statement of one accused is admissible against co-accused only if section applies. (*Ryves, J.*). RAMHIT *v.* EMPEROR. **65 I.C. 849=20 A.L.J. 178=23 Cr. L.J. 193=A.I.R. 1922 All. 24.**

———Statements of co-accused can be taken into consideration and used as evidence not only against the person making them but also against the person tried jointly with the confessing accused of the same offence. 39 All. 484, *Foll.* (*Prideaux, A.J.C.*). MT. RADHI *v.* EMPEROR. **75 I.C. 701=25 Cr.L.J. 13=A.I.R. 1924 Nag. 27.**

———A confession by each of co-accused implicating self and co-accused as regards robbery but throwing entire burden for murder on the other is admissible as regards former but inadmissible as regards the latter. (*Scott-Smith and Harrison, JJ.*). MIAN KHAN *v.* THE CROWN. **85 I. C. 836=26 Cr. L. J. 612=A. I. R. 1923 Lah. 293.**

———Case under Cr. P. Code, S. 110—Confession made by co-accused when he was co-accused in another case cannot be used. 22 C. W. N. 408, *Foll.* (*Sanderson, C.J. and Mookerjee, J.*). MAFIZUDDI KHAN *v.* EMPEROR. **61 I. C. 793=33 C.L.J. 70=25 C.W.N. 239=22 Cr. L. J. 441=A.I.R. 1921 Cal. 557.**

———*Accused charged with murder—Confession by one implicating him only under Penal Code, S. 328—Confession is admissible against co-accused.*

Where the accused are under trial for murder, a confession by one of them which implicates him only to the extent of an offence under Penal Code, S. 328, is admissible in evidence against the co-accused.

Per *Oldfield and Odgers, JJ.*—*Contra Ramesam, J.*—Persons under trial for a major offence should also be deemed to be charged with and tried for any minor offence or offences, constituted by the particular ingredients of the major offence which may be proved; and it can make no difference that the conviction of one accused of a minor offence takes place only in appeal, when the course of the proceedings has been the same against them both. (*Case-Law discussed.*) (*Oldfield, J.*). MANICKA PADAYACHI, *In re.* **72 I.C. 497=14 M.L.W. 474=A.I.R. 1921 Mad. 490.**

———*Confessions made outside British India.*

If confessions made before Magistrates outside British India are proved against the persons who made them they may be taken into consideration against others who are being tried jointly for the same offence. (*Hallifax and Macnair, A.J.Cs.*). GOVINDA *v.* EMPEROR. **69 I. C. 257=17 N.L.R. 113=A. I. R. 1921 Nag. 39.**

—S. 30—Approver's confession.

———*It is unsafe to base conviction on the uncorroborated statement of approver.*

It is not safe to base a conviction upon the evidence of such an approver who obviously is deeply interested in putting responsibility for the offence upon shoulders other than his own, unless there is some independent evidence to corroborate his story in material particulars. The mere fact that the approver produced a spear and a dang from a field and he stated that the spear was used by the accused is not corroboration of the approver's story; so also the fact that the accused was stained with human blood, does not corroborate the approver's story. (*Fforde, J.*). CHANAN SINGH *v.* KING EMPEROR. **99 I.C. 929=8 L.L.J. 610=28 P.L.R. 39=28 Cr.L.J. 193=7 A. I. Cr. R. 173=A.I.R. 1927 Lah. 78.**

EVIDENCE ACT (1872), S. 30—Approver's confession.

———A statement should not be accepted as that of an approver without any test as to his complicity in the crime. Such a statement does not amount to evidence against the accused. (*Dalal, A. J. C.*). SANT RAM *v.* EMPEROR. **74 I.C. 543= 24 Cr. L.J. 799=A.I.R. 1924 Oudh 188.**

———*It cannot be accepted unless he himself took part in the crime and unless the evidence is corroborated.*

Before the evidence of an accomplice can be accepted, it is necessary to be satisfied that the accomplice himself took part in the crime to the extent that he says and that he is in a position to give true evidence as to what occurred. It is also of course necessary that the accomplice's evidence should be corroborated to prove that it was the accused person and no one else who committed the crime. (*Batten, J. C. and Hallifax, A. J. C.*). KASHIRAM *v.* EMPEROR. **73 I.C. 262= 6 N.L.J. 144=24 Cr. L.J. 566= A.I.R. 1923 Nag. 248.**

———*Approver's confession cannot be used against accused.*

The confession of an approver cannot be used under S. 30 because he is not jointly tried along with the accused in the case. (*Jwala Prasad, J.*). SHIOBHAJAN AHIR *v.* EMPEROR. **2 P.L.T. 125= A. I. R. 1921 Pat. 499.**

—S. 30—Confession—What is.

———Where in a Dhatura poison case one of the co-accused stated that his co-accused brought milk and mixed some powder in it, but he did not know what that powder was and that his co-accused gave the milk to the deceased to drink,

Held, that the statement is not a confession. (*Fforde, J.*). ABDUL AZIZ *v.* EMPEROR. **99 I.C. 1009=27 P.L.R. 441=28 Cr. L.J. 209.**

———A statement by an accused that he and his co-accused struck the deceased in exercise of their right of private defence is in no sense a confession and cannot be taken into consideration against the co-accused. (*Scott-Smith and Zafar Ali, JJ.*). MAULU *v.* EMPEROR. **85 I.C. 371= 6 L.L.J. 434=26 Cr. L.J. 531=A.I.R.1925 Lah. 532.**

———Confession by a person under enquiry under S. 476, Cr. P. Code, is a confession. (*Macleod, C.J. and Fawcett, JJ.*). ANNAJI *v.* VYANKATESH. **87 I.C. 593=26 Bom. L.R. 614= 26 Cr. L. J. 993=A.I.R. 1924 Bom. 445.**

—S. 30—Corroboration.

———(Per *Subhedar, A. J. C.*)—Confession of co-accused cannot be used to corroborate evidence of approver—(*Staples, A. J. C., contra.*) A. I. R. 1921 Nag. 39, *Rel. on*, (*Jackson, A.J.C. on difference between Staples and Subhedar, A.J.Cs.*). DOULAT *v.* EMPEROR. **120 I.C. 721=31 Cr.L.J. 153= A.I.R. 1930 Nag. 97.**

———Confession of one co-accused is to be accepted against another with caution unless corroborated by independent evidence—Confession of one co-accused cannot be said to be corroborated by confession of another co-accused. A.I.R. 1921 Pat. 337; 43 Bom. 739, *Rel. on*. (*Mirza and Patkar, JJ.*). RAMA KARIYAPPA *v.* EMPEROR. **120 I.C. 350= 31 Bom. L.R. 565=A.I.R. 1929 Bom. 327.**

———To say that circumstances corroborative of co-accused's confession should be such as would themselves support conviction is to render S. 30 superfluous—What corroborative evidence is necessary to support conviction must depend on circumstances of each case. 4 Cal. 483; (Per *Jackson, J.*)

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Not appr. (Per *Garth, C. J.*), *Foll.*; A.I.R. 1924 Mad. 805, *Not appr.* (*Waller and Jackson, JJ.*). UGGAPPA PUJARI *v.* EMPEROR. **119 I.C. 474= 1929 M.W.N. 272=2 M.Cr.C. 96= 30 M.L.W. 403=1929 Cr.C. 9=30 Cr.L.J. 1071= A.I.R. 1929 Mad. 498.**

———The mere fact that the statement of the co-accused was used as corroboration of another part of the finding about guilt is not a ground for setting aside the conviction. (*Wort, J.*). SHEODATT ROY *v.* EMPEROR. **110 I.C. 803=29 Cr. L.J. 771= 11 A. I. Cr. R. 43=10 P.L.T. 429= A.I.R. 1929 Pat. 64.**

———*Existence of a motive for the offence is not sufficient—Person charged must be indubitably identified with the act committed.*

The existence of general hostility, general enmity and a desire, however strong, or a motive, however effective to procure the death of another person may be a piece of circumstantial evidence, but is not corroboration of a sworn statement of participation in a particular crime. Corroboration must point indubitably to the identification of the person charged with the particular act with which the direct evidence connects him. (*Walsh and Dalal, JJ.*). KALWA *v.* EMPEROR. **95 I.C. 74= 48 All. 499=24 A.L.J. 410=7 L.R. A.Cr. 105= 27 Cr, L.J. 746=A.I.R. 1926 All. 377.**

———*Corroboration should be inconsistent with honest dealings.*

Where there is no evidence at all against the alleged receiver of stolen property a statement made by the thief in his own defence at the close of the case for the prosecution cannot be taken into account against the receiver under S. 30. Judges should use some discrimination when they are dealing with ambiguous evidence which may have an honest or a dishonest interpretation. In such a case there is no corroboration unles the conduct of the accused, or the admission of the accused, goes to the full length of something inconsistent with honest dealing. (*Walsh, J.*). MAHADEO PRASAD *v.* KING EMPEROR. **76 I.C. 1025=25 Cr.L.J. 305= 21 A. L. J. 179=45 All. 323=4 L.R.A.Cr. 57= A.I.R. 1923 All. 322.**

———*Confession of accused can be considered against co-accused but cannot be taken as corroboration of accomplice witnesses.*

The confession made by a person can be taken into consideration as against persons who are being tried along with him, such a statement however is always regarded as tainted and cannot be used to corroborate the testimony of the accomplice witnesses. Where the accused made his statement at the end of the prosecution case when the whole of the evidence had been freshly detailed in his presence, it can be rightly used as evidence against himself.

The evidence of one approver cannot be said to corroborate another except where both have, at the earliest opportunity and before there has been any chance of collaboration, deposed to the same acts as having been committed by particular accused person. As a matter of prudence unanimity as to the incident deposed to or a sufficient number of them by two approvers should have been insisted on before their uncorroborated testimony was deemed sufficient to warrant a conviction thereon. It is doubtful if assessors, even the most intelligent, pay much attention to the aforesaid *maxim* and their opinion cannot be taken as a substitute for untainted evidence where a prudent person would

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require it. (*Scott-Smith and Broadway, JJ.*). MAHANT NARAIN DAS *v.* EMPEROR.

68 I. C. 113=3 Lah. 144=4 L. L.J. 91= 9 P.W.R. 1922 Cr. =23 Cr. L.J. 513= A.I.R. 1922 Lah. 1.

———Per *Kanhaiya Lal, J.C. and Lyle, A.J.C.*—Where there is a reasonable doubt whether the accused gave the information which led to a discovery, it would be unsafe to rely on his confession. If the dead body in a murder case was discovered in consequence of the confession, the corroboration would be material but if the evidence produced about the time when the dead body was discovered is discrepant it is difficult to say whether the discovery was made before the confession or afterwards.

Per *Ashworth, A.J.C.*—Where an accused person has pointed out the whereabouts of the body of a man who has undoubtedly been murdered and has made a confession which not only is uncontradicted by any of the facts proved in the case but indeed has received corroboration in respect of many points, then the confession should be held to be true as implicating the person making it unless he can make out a strong case to the contrary. It is not necessary that the confession of an accused should receive direct corroboration as to the fact that the accused was concerned in the offence. It is sufficient that there was such corroboration of the confession as to indicate that the accused had such knowledge of the circumstances of the offence as would suggest his taking part in it. (*Kanhaiya Lal, J.C., Lyle and Ashworth, A.J.Cs.*). HINGA *v.* EMPEROR. **68 I. C. 17= 9 O. L. J. 190=23 Cr.L.J. 481= A.I.R. 1922 Oudh 202.**

———The confession of a co-accused should be corroborated in material particulars. (*Oldfield, J.*). MANICKA PADAYACHI, *In re.* **72 I.C. 497= 14 M.L.W. 474=A. I. R. 1921 Mad. 490.**

———The confession of one co-accused cannot be said to be corroborated by the confession of another accused as against an accused person who has not confessed at all; but the confession of one co-accused may furnish the corroboration of the confession of another accused as against the latter and *vice versa*. 38 B. 156. (*Scott-Smith and Leslie Jones, JJ.*). GANGA RAM *v.* CROWN. **60 I. C. 786=22 Cr.L.J. 290.**

—S. 30—Essentials for admissibility.

———When the statement is self-incriminatory and also implicates a co-accused, the self-implication is the guarantee for the truth of the accusation against the co-accused and may be taken to be a substitute for the sanction of oath. (*Young and Sen, JJ.*). MT. KHUBAN *v.* EMPEROR. **120 I.C. 257=31 Cr.L.J. 26=1930 Cr.C. 45= A.I.R. 1930 All. 29.**

———Before S. 30 of the Evidence Act can be applied it must be proved that a confession has been made by one of the persons who are being tried jointly for the same offence and that the confession affects the person making it as well as some other persons so jointly being tried. The section is new to the Indian Evidence Act as contrasted with the English Law and must be construed strictly. When once there is no such confession as affects the person making it any statement made by one accused cannot be treated as evidence against the co-accused or be taken as affording corroboration of the evidence of the approver. (*Beaseley, C. J. and Ananthakrishna Iyer, J.*). ABBOI NAIDU *v.* EMPEROR. **1929 M.W.N. 698.**

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———Statement, for using it against the co-accused must be a confession in respect of an offence with which all are charged. 2 All. 444, *Rel. on.* (*Chotzner and Gregory, JJ.*). BHADRESWAR SARDAR *v.* EMPEROR. **109 I.C. 351=29 Cr.L.J. 527= 32 C.W.N. 731=47 C.L.J. 526= 10 A.I.Cr.R. 219=A.I.R. 1928 Cal. 416.**

———*Statement must not be self-exculpating.*

Section 30 contemplates a statement, which, taken by itself, is sufficient to justify the conviction of the person making it for the offence for which he is being jointly tried with the other person or persons against whom it is tendered. 2 All. 444, *Foll.* (*Wadegaonkar, A. J. C.*). RAGHUNATH *v.* EMPEROR. **89 I.C. 516=23 N.L.R. 62= 26 Cr.L.J. 1380=A. I. R. 1926 Nag. 119.**

———*Statement must inculpate the maker himself more than or at least equally with the co-accused.*

The test to determine whether any statement by a co-accused amounts to a confession under S. 30 is to see whether his statement proposed to be used in evidence against another is sufficient by itself to justify his conviction for the offence for which he is jointly tried with the other person against whom it is tendered. The statement of one prisoner cannot be taken as evidence against another prisoner under S. 30 unless the parties are admittedly in *pari delicto*, that is, unless a confessing prisoner implicates himself to the full as much as his co-prisoner whom he is criminating. The *ratio decidendi* of the cases bearing on this point is that statements which inculpate the maker more than, or equally with, others, alone can afford any satisfactory guarantee of their truth. This necessarily means less weight must be attached to statements which implicate the maker in a lesser degree than others. Where the principal blame is laid on others the statement is self-serving according to the ideas of the person making it and is entirely excluded from consideration. There is absolutely no guarantee whatever as to its truth where the statement entirely exonerates the maker. Such a statement cannot be held admissible as against the co-accused. (*Kinkhede, A.J.C.*). SHEOCHARAN *v.* EMPEROR. **90 I.C. 385=21 N.L.R. 88=26 Cr. L.J. 1537= A.I.R. 1926 Nag. 117.**

———Confession to be used against co-accused must be confession of guilt of maker. (*Ross and Kulwant Sahay, JJ.*). BIGNA KUMHAR *v.* EMPEROR. **94 I.C. 258=1926 P.H.C.C. 167= 27 Cr. L.J. 594=A.I.R. 1926 Pat. 440.**

———A confession should justify the conviction of the confessor and only then it is admissible against the confessor's co-accused. 22 Cr. L.J. 260, *Foll.* (*Harrison, J.*). FAKHR-UD-DIN *v.* CROWN. **95 I.C. 63=6 Lah. 176=26 Cr. L.J. 735= A.I.R. 1925 Lah. 435.**

———Confession to be admissible must equally incriminate the maker with the co-accused against whom it is to be used. (*Kotwal and Kinkhede, A.J.Cs.*). SHEROO *v.* EMPEROR. **81 I.C. 891= 25 Cr. L.J. 1067=A.I.R. 1925 Nag. 78.**

———*Confession of co-accused must implicate the maker to the same extent as the other accused.*

The statement of an accomplice is taken into consideration when he himself admits his own guilt to the same extent to which he implicates others. His confession may be taken into consideration against such other persons as well as against himself, because the admission of his own guilt operates as a sort of sanction which to some

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extent takes the place of the sanction of an oath and so affords some guarantee that the whole statement is a true one. The word 'confession' in S. 30 cannot be construed as including a mere inculpatory admission of guilt. A confession unsupported by other testimony is evidence of the weakest kind against a co-accused. 7 All. 646, *Foll.* (*Dalal and Cuming, A.J.Cs.*). SHEO AMBAR *v.* EMPEROR. **77 I.C. 439=25 Cr. L.J. 391=A. I.R. 1925 Oudh 295.**

———Only a confession implicating the maker and not exculpating him is admissible as against the other co-accused. (*Kennedy, J.C. and Raymond, A.J.C.*). TOPANDAS *v.* EMPEROR. **81 I.C. 249=25 Cr. L.J. 761=A.I.R. 1925 Sind 116.**

———Merely because a confession is not complete and detailed up to the hilt it does not become inadmissible against a co-accused. (*Walsh and Ryves, JJ.*). LAKHAN *v.* EMPEROR. **84 I.C. 548=5 L.R.A. Cr. 101=26 Cr. L.J. 324=A.I.R. 1924 All. 511.**

———*Confession of co-accused need not completely implicate himself—Substantial implication is sufficient.*

No general rule can be laid down as to the admissibility of confession against co-accused and each case must be decided on its own facts. All that is required is that the confession should substantially implicate its maker in regard to the crime with which he and his co-accused are charged. It is not necessary that there should be an admission of actual guilt. It is sufficient if the admission establishes constructive guilt. (*Mullick and Bucknill, JJ.*). SUKA RAUT *v.* EMPEROR. **75 I.C. 705=4 P.L.T. 505=25 Cr. L.J. 17=A. I. R. 1924 Pat. 347.**

—S. 30—Evidentiary value.

———Statement of accused taken after close of prosecution case under S. 342, Criminal P. C., implicating co-accused—It is admissible against co-accused—But no weight can be attached to it if co-accused implicated by it was not given opportunity to cross-examine accused nor was he asked any questions to explain allegations made against him and statement was not made on oath. 4 Cal. 483; A.I.R. 1923 All. 322; 38 Mad. 302; 17 All. 524 and 23 All. 53, *Cons.*, 6 Bom. 124, *Rel. on.* (*Mirza and Broomfield, JJ.*). WILLIAM COOPER *v.* EMPEROR. **32 Bom. L.R. 747=A.I.R. 1930 Bom. 354.**

———In the absence of any corroboration connecting an accused with the commission of offences the confession of a co-accused cannot be taken into consideration against him. (*Broadway and Agha Haidar, JJ.*). ARJAN SINGH *v.* EMPEROR. **119 I.C. 325=30 P.L.R. 646=30 Cr. L.J. 1046=11 Lah. 106=A.I.R. 1930 Lah. 257.**

———The self-inculpatory confession of an accused implicating his co-accused is fact upon which alone the conviction of his co-accused cannot be legally based. Nor can such a confession even if it be corroborated by other evidence which is insufficient by itself to sustain the conviction of the non-confessing co-accused form a legal basis for his conviction.

Per *Full Bench.*—But if there is any other relevant matter implicating the co-accused the Judge is permitted by S. 30 to consider confession along with the said matter and as a result of such consideration to convict the accused. (Per *Subhedar, A.J.C.*). Such confession can be legitimately used to corroborate other evidence and even

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to supplement the same in those exceptional cases in which without such aid the other evidence falls short by very narrow margin of that standard of proof which is requisite for a conviction.

Where the other evidence was to the effect that the accused were seen going on the night of the murder towards the place where the deceased lived and that there was general enmity between the accused and the deceased the evidence is insufficient to justify conviction of the non-confessing co-accused. 24 W.R. 42 Cr. and 9 C. P.L.R. 35 Cr., *Appr.*; A. I. R. 1926 All. 377, *Rel. on*; *other case law discussed.* (*Findlay, J.C., Macnair and Subhedar, A.J.Cs.*). GOBARYA *v.* EMPEROR. **A.I.R. 1930 Nag. 242 (F.B.).**

———The statement of a co-accused is admissible in evidence but according to the usual practice and as a rule of prudence it is unsafe to accept the tainted testimony of an accomplice so long as it is not corroborated in material particulars. The difficulty enhances where the said accomplice does not adhere to his statement. (*Sen, J.*). MAN SINGH *v.* EMPEROR. **121 I.C. 103=11 L. R. A. Cr. 1=13 A. I. Cr. R. 52=1929 Cr. C. 656=31 Cr. L.J. 206=A.I.R. 1929 All. 928.**

———Although a confession of one co-accused may be taken into consideration against another under the provisions of S. 30, it would be unsafe, if not illegal, to rely on it without further corroboration in material particulars. (*Harrison and Dalip Singh, JJ.*). KARAM DIN *v.* EMPEROR. **115 I.C. 1=30 Cr. L.J. 385=A.I.R. 1929 Lah. 338.**

———Where there is nothing against an accused person but a confession made by a co-accused from the dock at the trial, a conviction cannot be supported. (*Waller, J.*). GOVINDA NAIDU *v.* EMPEROR. **118 I. C. 512=1929 M. W. N. 391=2 M. Cr. C. 76=30 Cr. L.J. 932=A. I. R. 1929 Mad. 285.**

———An accused person cannot be convicted solely on such a confession made by a co-accused implicating him. 9 C. P. L. R. 35 Cr. and 37 Cr.; 24 W. R. (Cr.) 42; 38 Cal. 559, *Rel. on.* (*Kinkhede, A. J. C.*). NEEHA *v.* EMPEROR. **109 I.C. 801=11 N.L.J. 104=29 Cr. L. J. 609=10 A. I. Cr. R. 340=A.I.R. 1928 Nag. 213.**

———*Conviction based solely on confession of co-accused is bad.*

Under S. 30 the Court may take into consideration a confession made by an accused person as against the co-accused, but the Court can only treat a confession as lending assurance to other evidence against a co-accused and a conviction based on the confession of a co-accused alone would be bad in law. 38 Cal. 559, *Foll.* (*Das and Scroope, JJ.*). DEVENDRA BHATTACHANDRYA *v.* EMPEROR. **101 I. C. 881=28 Cr.L.J. 497=8 P.L.T. 566=8 A.I.Cr.R. 151=A.I.R. 1927 Pat. 257.**

———Confession by itself cannot be treated as sufficient evidence upon which a conviction can be based of the co-accused. (*Wazir Hasan, A.J.C.*). MANNA LAL *v.* KING EMPEROR. **75 I.C. 753=27 O.C. 40=25 Cr.L.J. 49=A.I.R. 1925 Oudh 1.**

———A confession is only evidence against the person who makes it. A conviction of an accused based solely on the confession of another accused cannot stand and there must be independent evidence entirely outside if the confession can be

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used. (*Coutts Trotter, C.J.*). LILARAM GANGANMULL, *In re.* **81 I.C. 817=20 M.L.W. 202=25 Cr. L.J. 1041=A.I.R. 1924 Mad. 805.**

———Confessing co-accused's evidence is practically that of an approver, and must be treated as such especially where the confession was not free from inducement. (*Wazir Hasan and Cuming, A.J.Cs.*). MAHADEO *v.* EMPEROR. **10 O. L. J. 280=A. I. R. 1924 Oudh 65.**

———*Conviction based on it alone, is invalid.*

Prideaux and Kotval, A.J.Cs.—(*Hallifax, A.J.C., Contra*)—A confession of an accused not being declared "relevant" by the Evidence Act as against a co-accused cannot be treated as "substantive" evidence and a judgment cannot be based upon it so far as he is concerned. A Court may under S. 30 of the Evidence Act "take it into consideration" with or supplementarily to relevant facts which may form the basis of a judgment (*case-law discussed*). A confession made by a co-accused must be regarded with suspicion. (*Hallifax, Prideaux and Kotval, A.J.Cs.*). SAPKU *v.* EMPEROR.

65 I. C. 561=23 Cr.L.J. 129=A.I.R. 1922 Nag. 146 (F.B.).

———Whether the confession of an accused can be used against his co-accused should be determined on seeing whether the accused can be convicted on that confession of the crime with which he and the co-accused were charged. (*Shadi Lal, C.J. and Wilberforce, J.*). CHUNNI LAL *v.* EMPEROR.

60 I.C. 660=22 Cr.L.J. 260 (Lah.).

———The confession of a co-accused cannot *per se* sustain a conviction and to do so, it must be corroborated *aliunde* by independent evidence in some material circumstance. (*Shadi Lal, C.J. and Leslie Jones, J.*). KEHR SINGH *v.* EMPEROR.

59 I.C. 913=22 Cr.L.J. 161=3 U.P.L.R. (Lah.). 24= 11 P.W.R. 1921 Cr.

———A confession of an accused is not made on oath and its evidentiary value is very low. The statement of even an accomplice has a higher and more probative value than the confession of a co-accused.

The Court can only treat a confession under S. 30 as lending assurance to the other evidence against the co-accused and a conviction on the confession of a co-accused alone would be bad in law. By S. 30 the Legislature has conferred upon the Court to take into consideration such confession. The corroborative evidence must be cogent and it must be corroborative of the *corpus delicti*. (*Raymond and Aston, A.J.Cs.*). PANI M. VAZ *v.* EMPEROR. **83 I.C. 889=26 Cr.L.J. 185=16 S. L.R. 197=A.I.R. 1921 Sind 57.**

—S. 30—Retracted confessions.

———In cases where the sole evidence against the accused is that of a retracted confession such confession if it is relied on must be relied on as a whole and not only in part. (*Young and Sen, JJ.*). DURJAN *v.* EMPEROR. **121 I.C. 550=1930 Cr. C. 84=31 Cr.L.J. 300=A I.R. 1930 All. 192.**

———*Value of.*

A retracted confession is sufficient evidence for convicting the person who made it if the Court believes it to be true. As regards the person making it such a confession may even without any corroborative evidence form the basis of conviction. As regards his co-accused corroborative evidence is necessary. 20 All. 133; 29 All. 494; A. I. R. 1925 All. 627 and A. I. R. 1927 Oudh 17, *Rel. on.* (*Raza and Nanavutty, JJ.*). WAJID *v.* EMPEROR. **7 O. W. N. 805=1930 Cr. C. 952=A.I.R. 1930 Oudh 412.**

EVIDENCE ACT (1872), S. 30—Retracted confessions.

———Retracted confession of accused standing unrebutted and corroborated sufficiently, by material evidence, is admissible and goes strongly against co-accused. A. I. R. 1929 Oudh 167, *Rel. on.* (*Raza and Nanavutty, JJ.*). WAJID *v.* EMPEROR. **A.I.R. 1930 Oudh 412.**

———*When material for conviction of co-accused*

The retracted confession alone of an accused is not sufficient to justify the conviction of a co-accused, but where such confession stands unrebutted, and there is nothing to show that the accused had any reason for naming other men falsely, and his story fits in exactly with the facts known or proved and is corroborated sufficiently by material evidence against the co-accused, the confession is admissible, and may be a strong piece of evidence against the co-accused. (*Raza and Nanavutty, JJ.*). HAZARI *v.* EMPEROR. **7 O. W. N. 527=A. I. R. 1930 Oudh 353.**

———*There is no distinction between retracted and unretracted confession.*

The Evidence Act makes no distinction whatever between a retracted or unretracted confession. Both are equally admissible and may be taken into consideration against the accused though it may be that less weight would be attached to a retracted confession. (*Cuming and Lort Williams, JJ.*). GOUR CHANDRA DAS *v.* EMPEROR. **115 I. C. 359=32 C. W. N. 1004=30 Cr. L. J. 475=A.I.R. 1929 Cal. 14.**

———Retracted confession must be corroborated by independent evidence in material details. (*Eforde and Jai Lal, JJ.*). MT. MIRAN *v.* EMPEROR. **116 I. C. 621=30 P. L. R. 377=30 Cr. L. J. 640=1929 Cr. C. 167=13 A. I. Cr. R. 49=A.I.R. 1929 Lah. 597.**

———Confession retracted though to be regarded with suspicion is admissible—If corroborated in material particulars or otherwise truthful it can be used even against co-accused. (*Courtney-Terrell, C. J. and Allenson, J.*). SHEONARAIN SINGH *v.* EMPEROR. **117 I. C. 43=8 Pat. 262=10 P. L. T. 228=30 Cr. L. J. 716=A.I.R. 1929 Pat. 212.**

———Retracted confession of co-accused is not sufficient for conviction. 30 P. R. 1914, Cr., *Ref.* (*Bhide, J.*). PALA SINGH *v.* EMPEROR. **107 I.C. 614=29 Cr. L. J. 267=9 A. I. Cr. R. 527=A.I.R. 1928 Lah. 329.**

———The rule is now firmly established that ordinarily, it is improper to use the retracted confession of an accused person against his co-accused, and that, generally speaking it is not safe to convict the maker of such a confession without corroboration in material particulars. (*Tek Chand and Coldstream, JJ.*). SHER MAHOMED *v.* EMPEROR. **104 I. C. 630=28 P.L.R. 583=9 A. I. Cr. R. 56=28 Cr. L. J. 854=A. I. R. 1927 Lah. 765.**

———Retracted confessions although they are nevertheless evidence against the person making them cannot be used as against the co-accused without substantial corroboration. (*Das and Scroope, JJ.*). DEVENDRA BHATTACHANDRYA *v.* EMPEROR. **101 I.C. 881=28 Cr. L.J. 497=8 P.L.T. 566=8 A. I. Cr. R. 151=A.I.R. 1927 Pat. 257.**

EVIDENCE ACT (1872), S. 30—Retracted confessions.

———As a matter of practice the Courts decline to convict accused persons on retracted confessions unless these confessions receive material corroboration, but this is a rule of prudence, not a rule of law. (*Das and Scroope, JJ.*). DENENDRA BHATTACHANDRYA *v.* EMPEROR. **101 I.C. 881=28 Cr. L.J. 497=8 P.L.T. 566=8 A. I. Cr. R. 151=A.I.R. 1927 Pat. 257.**

———It is not safe to base conviction on the retracted uncorroborated confession of a co-accused and mere identification of an accused person by a confessing accused, who admittedly knew him, is absolutely no corroboration of the statement of the confessing accused. Also the mere fact that the accused were not found at their house and that they were absconding is no corroboration of such a confession. (*Banerji, J.*). DUNGAR *v.* EMPEROR. **95 I.C. 938=7 L. R. A. Cr. 143=27 Cr. L.J. 858=A.I.R. 1926 All. 603.**

———The confession of an accused person, whether retracted or not, can be taken into consideration as against his co-accused. But an accused person cannot be convicted solely on the confession or confessions of his co-accused unsupported by other evidence: 3 U. B. R. 3, *Foll.* (*Carr, J.*). NGA PO KANK *v.* EMPEROR. **95 I.C. 71=4 Rang. 45=27 Cr. L.J. 743=A.I.R. 1926 Rang. 127.**

———Accused made a confession which he subsequently retracted. In the confession he carefully avoided saying that he took any actual hand in the murder. He stated however that he was one of the original conspirators and that he was present and saw the murder being committed without attempting to interfere,

Held, this confession cannot be taken into account against the co-accused as the person making confession did not intend to implicate himself though he actually did so. (*Shadi Lal, C. J. and Harrison, J.*). HAYAT *v.* EMPEROR. **68 I.C. 401=4 Lah. L.J. 41=23 Cr. L.J. 561=A.I.R. 1922 Lah. 119.**

———A retracted confession is not inadmissible in evidence and a Judge does right in letting it in and leaving it to the jury to decide the value to be attached to it as against the maker. (*Newbould and Suhrawardy, JJ.*). ABDUL SALIM *v.* EMPEROR. **69 I.C. 145=49 Cal. 573=35 C.L.J. 279=23 Cr.L.J.657=26 C.W.N. 680=A.I.R. 1922 Cal. 107.**

—S. 30—Scope and interpretation.

———Per *Macnair, A.J.C.*—When S. 30 lays down that the Judge may consider a fact in certain circumstances it plainly declares that fact to be relevant in those circumstances. (*Findlay, J.C., Macnair and Subhedar, A.J. Cs.*). GOBARYA *v.* EMPEROR. **A.I.R. 1930 Nag. 242 (F.B.).**

———Per *Full Bench.*—Court has discretion to exclude a confession by an accused altogether from consideration against the co-accused if it is so disposed, Per *Macnair, A.J.C.*—The use of the word "may" does not show that every confession is of very small-value against a co-accused. It cannot be said that the word "may" gives the Court right to exclude the confession from consideration if it is so disposed. The Judge is given a discretion but the discretion must be exercised in a judicial manner; if the confession would help in arriving at a decision that the accused is guilty he must do so. (*Findlay, J.C., Macnair and Subhedar, A.J.Cs.*). GOBARYA *v.* EMPEROR. **A.I.R. 1930 Nag. 242 (F.B.).**

EVIDENCE ACT (1872), S. 30—Self-exculpatory confessions.

———"*Same offence*"—*Meaning.*

The expression "same offence" in S. 30 means the identical offence and does not mean an offence of the same kind. The legislature did not intend the section to cover different offences in the same transaction by different persons. The illustration to S. 30 makes the meaning of the section quite clear. (*Cuming and Lort-Williams, JJ.*). GOUR CHANDRA DAS *v.* EMPEROR. **115 I.C. 359=32 C.W.N. 1004=30 Cr.L.J. 475=A. I. R. 1929 Cal. 14.**

———Section 30 does not refer to statements made at the trial but the statements made before and proved at the trial: 33 Mad. 302, *Diss. from*; 45 All. 323 and 4 Cal. 483, *Appr.* (*Waller, J.*). GOVINDA NAIDU *v.* EMPEROR. **118 I.C. 512=2 M.Cr.C. 76=30 Cr.L.J. 932=A.I.R. 1929 Mad. 285.**

———"*May take into consideration.*"

The expression 'may take into consideration' points to the necessity of there being other evidence on record to which this statement can lend assurance. (*Kinkhede, A. J. C.*). NEEHA *v.* EMPEROR. **109 I.C. 801=11 N L J. 104=29 Cr.L.J. 609=10 A.I.Cr.R. 340=A. I. R. 1928 Nag. 213.**

———'*Affect*'—*Meaning.*

The word "affect" is a very wide one and S. 30 is not limited to a case where the confessing accused directly implicates another accused as well as himself but also covers a case where the confession indirectly affects a co-accused. (*Fawcett and Madgavkar, JJ.*). EMPEROR *v.* SHIVABHAI BECHARBHAI. **97 I.C. 660=50 Bom. 683=28 Bom.L.R. 1013=27 Cr.L.J. 1140=A.I.R. 1926 Bom. 513.**

———To use therefore a statement made in the dock by one accused against the other in a joint trial, offends against at least two of the fundamental principles of criminal law. What is contemplated by Section 30 is formal proof by the prosecution of a confession previously made. When you prove a confession made by a person, you tender evidence at the trial that on some previous occasion he did in fact make a confession, and that is the only thing which was ever contemplated by the section. (*Walsh, J.*). MAHADEO PRASAD *v.* KING EMPEROR. **76 I.C. 1025=25 Cr.L.J. 305=21 A.L.J. 179=45 All. 323=A.I.R. 1923 All. 322.**

—S. 30—Self-exculpatory confessions.

———The statement of the accused in her confession admitting her guilt on implicating the co-accused is a self-exculpatory statement and is inadmissible in evidence against the co-accused. (*Raza and Pullan, JJ.*). EMPEROR *v.* CHATTARPAL SINGH. **7 O.W.N. 980.**

———Confession exculpating author from alleged offence is not confession and should not be relied upon for convicting co-accused. (*Boys and Young, JJ.*). ABDUL JALIL KHAN *v.* EMPEROR. **A.I.R. 1930 All. 746.**

———Self-exculpatory statement of accused should not be taken into consideration against his co-accused. (*Mirza and Murphy, JJ.*). EMPEROR *v.* C. E. RING. **120 I.C. 340=53 Bom. 479=31 Bom. L.R. 545=1929 Cr. C. 114=31 Cr. L. J. 65=A.I.R. 1929 Bom. 296.**

———Where a self-exculpatory statement is volunteered by a co-accused it is inadmissible in evidence. (*Subhedar, A.J.C.*). SHAMLAL *v.* EMPEROR. **120 I.C. 210=31 Cr. L.J. 15=13 A.I. Cr. R. 157=1929 Cr. C. 673=A.I.R. 1929 Nag. 350.**

EVIDENCE ACT (1872), S. 30—Self-exculpatory confessions.

———A confession made by one of the co-accused who does not implicate himself to the same extent as he implicates the other co-accused is of very little value at least as against the other co-accused. (*Courtney-Terrell, C. J. and Fazl Ali, J.*). KUNJA SUBUDHI *v.* EMPEROR. **116 I.C. 770= 8 Pat. 289=10 P.L.T. 549=30 Cr. L.J. 675= 1929 Cr. C. 62=13 A.I. Cr. R. 143= A.I.R. 1929 Pat. 275.**

———Statements implicating co-accused but not incriminating maker are not admissible in evidence. (*Aston, A.J.C.*). WAHID BUX *v.* EMPEROR. **120 I. C. 81=1929 Cr.C. 678=30 Cr.L.J. 1121. A.I.R. 1929 Sind 250.**

———A confession, intended to be exculpatory as regards the person confessing, is inadmissible against a co-accused though it is admissible against the confessor. *Case-law considered.* (*Findlay, Offg. J. C. and Prideaux, A. J. C.*). DIWAN DHIMAR *v.* EMPEROR. **91 I.C. 1002= 9 N.L.J. 80=27 Cr.L.J. 186=A.I.R. 1926 Nag. 229.**

—S. 30—Miscellaneous.

———Identification by co-accused while on trial is not admissible. (*Walsh, J.*). KHETAL *v.* EMPEROR. **73 I.C. 62=45 All. 300= 21 A.L.J. 143=4 L.R.A.Cr. 13=24 Cr.L.J. 526= A.I.R. 1923 All. 352.**

—S. 31—Admission by co-defendant.

———Suit for possession—Admission by co-defendant of plaintiff's title—No evidence by plaintiff—Admission is not sufficient proof of plaintiff's title. (*Jai Lal, J.*) SAIDU *v.* MEHR DAD. **101 I.C. 589=A.I.R. 1927 Lah. 356.**

—S. 31—Conclusive admission.

———Admissions under Civil P. C., O. 10, R. 1 are conclusive. (*Sulaiman and Banerji, JJ.*). ABDUL AZIZ *v.* MT. MARIYAM BIBI. **97 I. C. 176= 49 All. 219=25 A.L.J. 48= A.I.R. 1926 All. 710.**

—S. 31—Divorce proceedings.

———Divorce Act, S. 13—Husband admitting adultery alleged by wife—Admission is sufficient proof even in absence of other evidence. *Robinson* v. *Robinson*, 29 L. J. N. S. 178, *Foll.* (*Shadi Lal, C. J. and Zafar Ali, J.*). MRS. M. V. O'DONELL *v.* C. E. O'DONELL. **9 L.L.J. 315= A.I.R. 1927 Lah. 491.**

—S. 31—Effect of admission against third person.

———An admission cannot have binding effect on a third person claiming under an independent title. Where a Hindu father made an admission as regards the law applicable.

Held, that it was not binding on the son because he did not claim through the father. (*Graham and Mitter, JJ.*). GOPAL JANA *v.* BROJA MOHAN SWAMI. **34 C.W.N. 944.**

—S. 31—Execution proceedings.

———Admissions made in execution proceedings must be held to be binding when the unsuccessful party proceeds to a suit. (*Dalal, J.*). GORDHAN DAS *v.* HUSAINFA. **103 I.C.34=A.I.R. 1927 All. 659.**

—S. 31—Explained admissions.

———Admissions are on a somewhat similar footing to a retracted confession, and it is difficult to base a conviction on such an admission. (*Addison and Kemp, JJ.*). EMPEROR *v.* BAKHWAR LAL. **102 I.C. 492=8 A.I. Cr. R. 196=28 P.L.R. 313= 28 Cr. L.J 556=A.I.R. 1927 Lah. 549.**

—S. 32.

Assertion of right.
Bhat's register.
Boundaries.
Cross-examination.
Date of birth.
Date of death.
Death of executant.
Dying declarations.
Guardianship certificate.
Horoscope.
Interested statement.
Ordinary course of business.
Panda's register.
Pedigree.
Previous statement.
Public interest.
Recitals.
Relationship.
Revenue papers.
Scope.
Special means of knowledge.
Statement after dispute.
Statement against interest.
Unreasonable delay or expense.
Verbal statements.
Miscellaneous.

EVIDENCE ACT (1872), S. 32—Bhat's register.

—S. 32—Assertion of right.

———Settlement deed under which pro-note is transferred, if admissible as secondary evidence, may be employed to prove pro-note under S. 32 (7) read with Evidence Act, S. 13 (*a*). (*Obiter*). 26 I.C. 747, *Rel. on.* (*Curgenven, J.*). SUBBARAYALU NAIDU *v.* VENGAMA NAIDU. **A.I.R. 1930 Mad. 742.**

———S. 32, clause 7 of the Evidence Act, makes the statements made by a deceased person in respect of relevant facts themselves relevant if those statements are contained in a document which relates to any transaction mentioned in S. 13, that is, a transaction in which an assertion is made of a right or title which is relevant question in the suit, those statements being relevant in proof of the facts contained in the statements. So assertion of title as owner in a deed of mortgage is relevant on the question of the mortgagor's ownership under S. 13 and after his death, under S. 32, Cl. 7. (*Sadasiva Iyer and Spencer, JJ.*). NALLASIVA MUDALIAR *v.* RAVAN BIBI. **70 I.C. 389= 14 M.L.W. 327=1921 M.W.N. 560= A.I.R. 1921 Mad. 383.**

—S. 32—Bhat's register.

———*Pedigree—Proof of.*

Entries made by successive generations of bards supply a running account of the different branches of the families of their customers and they afford, if otherwise reliable, evidence of as great value as any family pedigree kept by the family members themselves.

A pedigree may be kept by a member of the family or by another person on his behalf and can be admitted in evidence if it is written by a family Bard for the purpose of keeping a record of the family events for his use and for the use of the family. At any rate such a record is a record of the statements as are usually made to and noted by the Bard; it can be admitted in evidence, though the person who made the entries is unknown. The Bahis of Gangabasi priests which contain the relationships of their clients and their ancestors are the records of statements made by persons having special means of knowledge and are admissible in evidence. 46 B. 753; 30 A. 510, *Dist.* (*Kanhaiya Lal and Mukerjee, JJ.*). MT. ANANDI *v.* NAND LAL. **83 I.C. 618=22 A. L. J. 657=5 L.R.A. Civ. 435= 46 All. 665=A. I. R. 1924 All. 575.**

EVIDENCE ACT (1872), S. 32—Bhat's register.

———*Family pedigree—Proof by the books kept by the family chronicler.*

If the book by a professional person or a person whose business was to keep a book for the advantage of the family, is shown to have been kept in the ordinary course of business. it should be admitted as evidence under sub-S. 2, S. 32. Even if that were incorrect, still sub-S. 6 of S. 32 enables a family pedigree to be admitted in evidence so long as the members of the family depend upon a particular person to keep a record of the family events. (*Macleod, C.J. and Shah, J.*). MOHAN SINGH UMED RAMOL *v.* DALPAT SINGH HANBAJI.
67 I.C. 235=24 Bom.L.R. 289=46 Bom. 753= A.I.R. 1922 Bom. 51.

———Family records kept by *Bhats* are evidence on question of relationship. (*Richardson and Shamsul Huda, JJ.*). KARTICK CHANDRA *v.* GOSSAIN RUDRANANDA GIR. **66 I. C. 894= 25 C.W.N. 908=A.I.R. 1921 Cal. 482.**

—S. 32—Boundaries.

———The recital in a document between third parties to the effect that the land which formed the boundary of the property dealt with by the document belonged to a particular third person is not admissible against persons not parties to the transaction evidenced by that document to prove the ownership of such neighbouring land. ALAGIRI NAYAKAR *v.* PERUMAL NAYAKAR. **30 L.W. 422.**

———Recitals in documents regarding boundaries executed by third parties in favour of the plaintiffs are not admissible in evidence if the executant is not dead and does not come to corroborate them. A.I.R. 1927 Lah. 448, *Foll.*; A.I.R. 1927 Cal. 230; A.I.R. 1916 P.C. 5, *Dist.* (*Harrison, J.*). GHULAM MUHAMMAD *v.* KALIMULLAH. **109 I. C. 728= 10 L.L.J. 370=A.I.R. 1928 Lah. 428.**

———Documents not *inter partes*—Statements as to boundary description—Executant dead—Documents are admissible: 16 C.W.N. 252; 23 Bom. 63; 11 Bom. L.R. 409; 11 A.L.J. 139; 17 C.W.N. 108; 45 Cal. 159 and 22 W.R. 231, *Foll.*; A.I.R. 1924 Cal. 1067, *Diss. from.* PRAMATHA NATH ROY *v.* BEJOY SINGH. **99 I.C. 910=44 C.L.J. 587= A. I. R. 1927 Cal. 234.**

———Executant of a document containing recital of boundaries of land in dispute dead—Document is admissible. 23 Bom. 63; 16 C.W.N. 252; 11 A.L.J. 139 and 45 Cal. 159, *Foll.* (*B. B. Ghose and Panton, JJ.*). KETABUDDIN *v.* NAFARCHANDA. **99 I. C. 907=44 C. L. J. 582= A. I. R. 1927 Cal. 230.**

———A document between strangers to the suit in which mention is made of one of the parties or their predecessors as holding the land lying on the boundaries of the lands belonging to the executants of the document is not admissible in evidence. CHOONI LAL KHEMANI *v.* NILMADHAB BARIK. **86 I.C. 734=41 C L. J. 374= A.I.R. 1925 Cal. 1034.**

———A mere description of boundaries in a document between third parties cannot be said to be a statement against the proprietary interest of the person making it. PRAMATHA NATH CHOUDHURI *v.* KRISHNA CHANDRA BHATTACHARJEE. **84 I. C. 420=28 C. W. N. 1092= A.I.R. 1924 Cal. 1067.**

—S. 32—Cross-examination.

———The affidavit of a person who is dead and who is not subjected to cross-examination is not evidence admissible either under S. 32 or S. 33,

EVIDENCE ACT (1872), S. 32—Dying declarations—Admissibility.

Evidence Act. (*Wallace, J.*). DORAISWAMI AYYAR *v.* BALASUNDARAM AYYAR. **102 I. C. 243= 38 M. L. T. 275=A.I. R. 1927 Mad. 507. 52 M. L. J. 477.**

—S. 32—Date of birth.

———Entry as to date of birth in a school register based upon statement of deceased father is admissible to prove age. (*Gokaran Nath Misra and Pullan, JJ.*). MUNNA LAL *v.* KAMESHARI DAT. **114 I. C. 801=5 O.W.N. 1111= A.I.R. 1929 Oudh 113.**

—S. 32—Date of death.

———The question was as to the date of *A's* death. A mortgage deed executed by *A's* son soon after *A's* death in which *A* was described as dead is admissible. (*Mookerjee, C.J. and Rankin, J.*). SAYERUDDIN AKONDA *v.* SAMIRUDDIN AKONDA. **72 I. C. 985= A.I.R. 1923 Cal. 378.**

—S. 32—Death of executant.

———Where papers about 45 years old proved to have come into the respondent's hands as purchaser are produced in evidence, and where the papers cannot be shown to be in the hand of any one alive.

A Court of fact may in the circumstances of the case presume that the writer was dead at the time they were produced: 16 C.L.J. 24, *Rel. on.* (*Suhrawardy and Graham, JJ.*). JUBBAR ALI *v.* MONMOHAN PANDEY. **114 I.C. 485=55 Cal. 1216= 49 C.L.J. 70=A. I. R. 1929 Cal. 110.**

—S. 32—Dying declarations—Admissibility.

———The statement of a woman, who was alleged to have been raped and who committed suicide three days later, made immediately, after the incident is inadmissible in evidence as it was not the cause of her death. (*Wallace and Jackson, JJ.*). KAPPINAIAH *v.* EMPEROR. **1930 M.W.N. 702.**

———Statement by deceased before Third Class Magistrate not competent to record statement under Criminal P.C., S. 164—Statement is yet relevant under S. 32 (1). (*Zafar Ali and Addison, JJ.*). CHADJI *v.* EMPEROR. **120 I.C. 274= 1930 Cr. C. 28=31 Cr.L.J. 79= A. I. R. 1930 Lah. 60.**

———Where a person dies in a hospital after being assaulted and hurt, not of the injuries but of a malady independent of such injuries such for example as pneumonia, the dying statement of such person is not admissible in evidence in a trial of his assaulters under S. 324. (*Pullan, J.*). WALI MOHAMMAD *v.* EMPEROR. **7 O.W.N. 466=A.I.R. 1930 Oudh 249.**

———Declaration made by a dying person, though he lingered on for some days, is a dying declaration. (*Fforde and Bhide, JJ.*). THAKUR SINGH *v.* EMPEROR. **113 I.C. 177=10 L.L.J. 463= 30 Cr.L.J. 65=11 A.I.Cr.R. 543= A. I. R. 1929 Lah. 64.**

———A dying declaration which contradicts itself in its various parts is inadmissible in evidence. INAYAT ALI *v.* EMPEROR. **108 I.C. 526= 10 A.I.Cr.R. 68=29 Cr.L.J. 418.**

———A dying declaration as to the cause of death is admissible even when the charge is not one of homicide. 6 W. R. (Cr.) 75, *Foll.* (*Mullick, Ag. C. J. and Wort, J.*). LALJI DUSADH *v.* EMPEROR. **106 I.C. 698=6 Pat. 747=9 A.I. Cr. R. 379= 29 Cr. L.J. 106=A. I. R. 1928 Pat. 162.**

———Dying declaration certified by its recorder in Court to be correct is admissible in proof of its contents. A.I.R. 1922 Cal. 382, *Foll.* (*Harrison and Jai Lal, JJ.*). PARTAB SINGH *v.* EMPEROR. **92 I.C. 167= 7 Lah. 91=27 Cr. L.J. 215= 28 P.L.R. 222=A.I.R. 1926 Lah. 310.**

EVIDENCE ACT (1872), S. 32—Dying declarations—Cause of death.

———Dying declaration of one of the dacoits as to the circumstances of dacoity before a Magistrate is admissible against him, so far his implication in the crime is concerned but is not admissible against other dacoits. (*Daniels, J.*). DANNU SINGH *v.* EMPEROR. **85 I.C. 643=26 Cr. L.J. 547= 5 L.R. A. Cr. 201=A.I.R. 1925 All. 227.**

—S. 32—Dying declarations—Cause of death.

———First information Report is admissible under S. 32 (1), Evidence Act, as the statement of a person (since deceased) relating to the circumstances of the transaction which resulted in his death. (*Tek Chand and Johnstone, JJ.*). KAPUR SINGH *v.* EMPEROR. **123 I.C 120=31 P.L. R. 83= 31 Cr. L.J. 475=A.I.R. 1930 Lah. 450.**

———The first information report could also be tendered in a proper case under S. 32 (1) as a declaration as to the cause of the informant's death. (*Rankin and Duval, JJ.*). AZIMADDY *v.* EMPEROR. **99 I.C. 227=44 C.L.J. 253= 28 Cr. L.J. 99=54 Cal. 237= A.I.R. 1927 Cal. 17.**

———Statement by a person as to circumstances of transactions resulting in her death are admissible when cause of her death is in question. (*Aston, A.J.C.*) WAHID BUX *v.* EMPEROR. **120 I.C. 81= 1929 Cr. C. 678=30 Cr. L.J. 1121= A.I.R. 1929 Sind 250.**

———Statement, as to circumstances of transaction resulting in death made before injury was inflicted is admissible. A.I.R. 1924 Lah. 253; 4 Lah. 451, *Diss.*; A.I.R. 1924 Nag. 115 and 20 P.R. 1916 Cr., *Rel. on.* (*Fawcett and Madgavkar, JJ.*). EMPEROR *v.* SHIVABHAI BECHARBHAI. **97 I.C. 660= 50 Bom. 683=28 Bom.L .R. 1013= 27 Cr. L.J. 1140=A.I.R. 1926 Bom. 513.**

———*Report to police showing motive for murder is admissible.*

B made a report to the police that he was slapped by a 'pahelwan' of Nagpur because he had refused to deliver the keys of a house. Next day, *B* was murdered by *C*, who was identified as the assailant of *B* on the previous day,

Held, that the report discloses the motive for the murder and is admissible in evidence. (*Baker, J.C. and Kotwal, A.J.C.*). CHUNNILAL *v.* KING EMPEROR. **88 I.C. 353=7 N.L.J. 144=26 Cr. L.J. 1121= A I.R. 1924 Nag. 115.**

—S. 32—Dying declarations—Evidentiary value.

———It is unsafe to convict a person merely on the dying statement when such statement is not recorded in the deceased's own words and contains a note of the substance of what deceased told the police. (*Boys and Young, JJ.*). EMPEROR *v.* SIKANDAR. **1930 Cr. C. 757=A.I.R. 1930 All. 532.**

———Although a dying declaration, if properly recorded is a valuable piece of evidence, but if while the statement is being recorded a third person is present and prompts the deceased to give out names of certain accused, it would be exceedingly unsafe to attach any weight to such a dying statement. (*Broadway and Zafar Ali, JJ.*). BISHEN SINGH *v.* THE CROWN. **96 I.C. 215= 8 L.L.J. 296=27 P.L.R. 484=27 Cr.L.J. 903= A.I.R 1926 Lah. 496.**

———No reliance would be placed on the dying declaration when it is made at a time when the deceased must have been well aware of the fact that the accused has been named as his assailant. (*Broadway and Zafar Ali, JJ.*). MUZAFFAR *v.* EMPEROR. **99 I.C. 322=8 L.L.J. 410= 27 P.L.R. 632=28 Cr.L.J. 114.**

EVIDENCE ACT (1872), S. 32—Dying declarations—Procedure of taking.

———*Reliability depends upon circumstances in which declaration was made and nature of its record.*

A dying declaration under the Indian Law assumes a character very widely different from what it is under the English Law. A dying declaration is relevant under the Indian Evidence Act, whether the person who made it was or was not at the time when it was made, under expectation of death, and the weight to be attached to it depends not upon the expectation of death which is a guarantee of its truth, but upon the circumstances and surroundings under which it was made and very much also upon the nature of the record that has been made of it. Hence it becomes almost always a question of fact as to whether it should be relied upon or not. (*Greaves and Mukerjee, JJ.*). EMPEROR *v.* PREMANANDA DUTT. **88 I.C. 1000=29 C.W.N. 738=42 C.L.J. 247= 52 Cal. 987=26 Cr.L.J. 1256= A.I.R. 1925 Cal. 876.**

———Dying declaration of inhabitants of a Punjab is unsafe as basis of conviction. (*Scott-Smith and Martineau, JJ.*). BAKHSHISH SINGH *v.* EMPEROR. **86 I.C. 826=26 Cr.L.J. 890= A.I.R. 1925 Lah. 549.**

———Dying declaration though conflicting with initial report is not wholly unreliable. (*Broadway, J.*). MULA SINGH *v.* EMPEROR. **71 I.C 593= 24 Cr.L.J. 177=A.I.R. 1924 Lah. 413.**

—S. 32—Dying declarations—Partial acceptance.

———*Acceptance of dying declaration in part and rejection of the rest is not permissible.*

A dying declaration stands upon a widely different footing from the testimony of a witness given in Court. In the case of the latter it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable and reject that which is obviously untrue, though, to found a criminal conviction on such appraisement of evidence will be very often unsafe. As regards a dying declaration, to accept a portion and reject the rest is entirely out of the question; there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it can be acted upon. (*Greaves and Mukerji, JJ.*). EMPEROR *v.* PREMANANDA DUTT. **88 I.C. 1000=29 C.W.N. 738= 42 C.L.J. 247=52 Cal. 987=26 Cr. L. J. 1256= A.I.R. 1925 Cal. 876.**

—S. 32 — Dying declarations — Procedure of taking.

———*Form of dying declaration should show distinctly the questions put to the declarant and his answers to them.*

Where a statement is not the *ipsissima verba* of the person making it but is composed of a mixture of questions and answers there are several objections open to its reception in evidence, which it is desirable should not be open in cases in which the person has no opportunity of cross-examination. In the first place the questions may be leading questions and in the condition of a person making a dying declaration there is always a very great danger of leading questions being answered without their force and effect being freely comprehended. In such circumstances the form of the declaration should be such that it would be possible to see what was the question and what was the answer, so as to discover how much was suggested by the examining Magistrate, and how much was the production of the person making the state

EVIDENCE ACT (1872), S. 32—Dying declarations—Proof.

ments. *R.* v. *Mitchell*, 17 Cox. C. C. 503 (1892), *Foll.* (*Greaves and Mukerji, JJ.*). EMPEROR *v.* PREMANANDA DUTT. **88 I.C. 1000=29 C.W.N. 738=42 C.L.J. 247=52 Cal. 987=26 Cr.L.J. 1256=A.I.R. 1925 Cal. 876.**

—S. 32—Dying declarations—Proof.

———Dying declaration can be proved by examining person recording it or person who heard its being made—It must be taken as a whole and portion only cannot be allowed. (*Graham and Lort Williams, JJ.*). TAFIZ PRAMANIK *v.* EMPEROR. **50 C. L. J. 584=1930 Cr. C. 196=A. I. R. 1930 Cal. 228.**

———Deceased's statement to doctor made just before death, though admissible, must have independent corroboration to prove murder. (*Jwala Prasad and James, JJ.*). BULLU SINGH *v.* EMPEROR. **120 I.C. 474=A.I.R. 1929 Pat. 249.**

———Dying declaration should be proved in manner prescribed by 8 Cal. 211. (*Suhrawardy and Mukerji, JJ.*). SARAT CHANDRA KAR *v.* EMPEROR. **88 I.C. 860=52 Cal. 446=26 Cr. L.J. 1244=A.I.R. 1925 Cal. 821.**

———Witnesses should not be allowed to prove a dying declaration as if it is a substantial piece of evidence in the case. The relevant fact to be proved is the statement made by a deceased person admissible under S. 32 of the Evidence Act and that statement is not a document made by the Magistrate but the verbal statement made by the deceased person. The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over to him at or about the time the statement is made. (*Abdul Qadir, J.*). KUNJ LAL *v.* EMPEROR. **67 I.C. 577=23 Cr. L.J. 417=6 L. L.J. 115=A.I.R. 1924 Lah. 12.**

———*Proof by a witness present is sufficient proof.*

Where the dying declaration was recorded in the presence of a witness, was read over to the deceased in the presence of the witness and was admitted by the deceased to be correct.

Held, if the witness, who heard that statement made, swears that the written statement correctly reproduces the words used by the deceased, this is sufficient to prove that the deceased did use the words contained in that statement. (*Newbould and Suhrawardy, JJ.*). EMPEROR *v.* BALARAM DAS. **71 I.C. 685=49 Cal. 358=24 Cr. L.J. 221=A.I.R. 1922 Cal. 382.**

—S. 32—Guardianship certificate.

———Where the person who had filed the application and affidavit in the Guardianship proceedings was alive during the pendency of the suit in the Trial Court, and might have been called as a witness, but was not called, the defendant-minor was held not be entitled to the benefit of S. 32 (5), Evidence Act. (*Mookerjee and Chotzner, JJ.*). HARA KUMAR DEY *v.* JOGENDRA KRISHNA RAY. **71 I.C. 336=33 C.L.J. 186=A.I.R. 1924 Cal. 526.**

———The recital in a guardianship certificate as to age of a person is admissible under Section 32 (5). (*Mookerjee and Panton, JJ.*). SARUT CHANDRA *v.* BIBHABATI DEBI. **34 C.L.J. 302=66 I. C. 433=A.I.R. 1921 Cal. 584.**

—S. 32—Horoscopes.

———Horoscopes containing date of birth and prepared by a person having special means of knowledge and who is dead, are admissible to prove date of birth. (*Das and Adami, JJ.*). GANGANAND SINGH *v.* RAMESHWAR SINGH BAHADUR. **102 I.C. 449=6 Pat. 388=8 P.L.T. 730=A.I.R. 1927 Pat. 271.**

EVIDENCE ACT (1872), S. 32—Ordinary course of business.

———Horoscope brought into the Court by the family Pandit was held as evidence of the proof of age. (*Dalal and Simpson, A. J. Cs.*). AMBIKA PRASAD *v.* LAL BAHADUR. **83 I.C. 840=11 O.L.J. 164=A.I.R. 1924 Oudh 353.**

———A horoscope is often accepted as substantive evidence of the date of the birth of the person mentioned in it, perhaps with a vague idea of reference to Section 32. No part of that section can make any statement of a date in such a document a relevant fact. (*Hallifax, A.J.C.*). SHANKARGIR *v* CHINNUJI. **71 I. C. 140=6 N.L.J. 1=A.I.R. 1923 Nag. 164.**

—S. 32—Interested statement.

———*Statements in a will.*

Statements in a will of an interested party in the disputes who was then taking a position adverse to another cannot be regarded as evidence against the other and are inadmissible even though the testator is dead. (*Sir John Edge*). HARI BAKHSH *v.* BABU LAL. **83 I.C. 418=22 A.L.J. 254=34 M.L.T. 70=5 Lah. 92=5 L.R.P.C. 113=51 I. A. 163=28 C.W.N. 953=1924 M.W.N. 650=20 M.L.W. 406=26 Bom. L.R. 1108=A.I.R. 1924 P.C. 126=47 M.L.J. 938 (P.C.).**

—S. 32—Ordinary course of business.

———Rent suit by landlord—Account books from the landlord's *sherista* tendered in evidence and admitted under S. 32 (2)—The fact that they were made in the absence of and without the assent of the tenants and were uncorroborated is not sufficient ground to consider them as of no value. 28 Bom. 294; 16 C. L. J. 24; 16 C. L. J. 328 and 47 Cal. 266, *Ref.* (*Page and Graham, JJ.*). MAN MOHAN PANDEY *v.* HARI NATH. **110 I.C. 338=47 C.L.J. 457=A.I.R. 1928 Cal. 408.**

———A receipt, stating the disputed property as one of the boundaries to an adjacent plot, executed by a deceased person in the ordinary course of business and consisting of an acknowledgment written or signed by him of the receipt of money, is admissible in evidence under S. 32, and not under S. 13: 19 C.W.N. 468 and A.I.R. 1922 Cal. 251, *Dist.* (*Pullan, J.*). AHMAD SHAJI *v.* JAMAL AHMAD. **113 I.C. 414=5 O.W.N. 174=A.I.R. 1928 Oudh 248.**

———Post mortem *report.*

Where the Civil surgeon who conducted the *post mortem* examination had since died.

Held, that the *post mortem* report would be admissible under S. 32 (2) of the Evidence Act as being a statement made by a dead person in the ordinary course of business and in the discharge of his professional duty. (*Sulaiman and Mukerji, JJ.*). MOHAN SINGH *v.* EMPEROR. **85 I.C. 647=26 Cr.L. J. 551=6 L.R.A.Cr. 49=A.I.R. 1925 All. 413.**

———*Account books—Entries in relevancy.*

But where the persons making the entries are dead these entries are relevant under S. 32, sub-Section (2) of the Indian Evidence Act and the entries which are relevant also under S. 32, sub-Section (2) are in law sufficient evidence in themselves, and do not as in the case of entries admissible only under S. 34, require corroboration. (*Shadi Lal, C.J.*). Mt. RANI *v.* FIRM BAHADUR MAL FAKIR CHAND. **63 I .C. 946=4 Lah. L. J. 36=A.I.R.1922 Lah. 119.**

EVIDENCE ACT (1872), S. 32—Ordinary course of business.

———An endorsement of the deceased scribe of a document after the mark of the executant, that it was his mark, is admissible. (*Mitra, Offg. A. J. C.*). MT. LAHANI *v.* BALA. **77 I. C. 798= 18 N. L. R. 85=A. I. R. 1922 Nag. 227.**

———Entries made in the diary of a deceased illiterate *chaukidar* not by the *chaukidar* himself but by other persons at his instance are not admissible under S. 32 (2) of the Evidence Act. 2 P.L.J. 42, *Foll.* (*Das and Adami, JJ.*). CHANCHAMA KUAR *v.* RAM GAYAN. **67 I.C. 57= A. I. R. 1922 Pat. 111.**

—S. 32—Panda's register.

———Entries in the books of priests at places of pilgrimage visited by Hindus are admissible for proving relationship under S. 32. (*Addison and Bhide, JJ.*). BALAK RAM, HIGH SCHOOL, PANIPAT *v.* NANU MAL. **31 P.L.R. 509= A.I.R. 1930 Lah. 579.**

———The statement contained in a deceased priest's bahi regarding the relationship by blood between persons deceased, before the question in dispute arose, is admissible in evidence under Cl. (6). 15 I. C. 625, *Rel. on*; 30 All. 510 (P.C.), *Dist.* (*Campbell, J.*). AMRITSARIA *v.* PRABH DIAL. **89 I. C. 989=A.I.R. 1926 Lah. 157.**

———The papers, books and statement of a *panda* are admissible under S. 32 to prove relationship. (*Harrison and Zafar Ali, JJ.*). BURA *v.* NANAK. **84 I.C. 912=6 L.L.J. 550=A.I.R. 1925 Lah. 281.**

———Entries in the Purohit book are admissible to prove the relationship between parties. (*Broadway and Moti Sagar, JJ.*). KARTAR SINGH *v.* KIRPA SINGH. **30 P. L. R. 1922=3 P.W.R. 1922= A.I.R. 1921 Lah. 380.**

—S. 32—Pedigree.

———*Settlement pedigree.*

A settlement pedigree is admissible in evidence under S. 32, Cl. (5) if it be shown that it amounts to the statements of deceased persons, who were the members of the family and as such had special means of knowledge and further that these statements were made before there was any controversy as to the point, which is sought to be established by the said pedigree. 3 O. L. J. 327; 1 O.L.J. 447; 19 O. C. 321 and A.I.R. 1926 Oudh 101, *Appl.* (*Misra and Nanavutty, JJ.*). SARFARAZ KHAN *v.* MT. RAJANA. **112 I. C. 834= 4 Luck. 39=6 O. W. N. 1285= A.I.R. 1929 Oudh 129.**

———Pedigree satisfying conditions of Ss. 32 (6) and 90—Relationship as given corroborated—Presumption as to its genuineness ought to be made. 37 All. 600; A. I. R. 1921 Nag. 49 and A.I.R. 1925 Nag. 271, *Rel. on.* (*Kinkhede, A.J.C.*). JAGDEO *v.* VITHOBA. **105 I, C. 31= A.I. R. 1928 Nag. 20.**

———"*Family pedigree*"—*Construction.*

The word " family pedigree " in Cl. 6 should not be construed according to the standard adopted by Courts of England in regard to pedigrees of English families. Peoples of India and peoples of England widely differ in their habits of thought, modes of expression and indeed in their entire system of family life.

Where a pedigree brings one down from the remotest ancestor to the generations living contemporaneously with a person in whose time it is prepared, the document is a record of family traditions as to pedigree and of the existence of persons contemporaneously alive. The authenticity of that part

EVIDENCE ACT (1872), S. 32—Previous statement.

of the record which embraces the names of persons who existed before the living memory rests on the absence of anything showing directly or inferentially that the pedigree was prepared with any motive other than the natural motive of preparing and preserving a record of family traditions relating to the family pedigree. Such a pedigree is admissible in evidence. 30 All. 510 (P. C.), *Dist.*; 14 Cal. 296, *Ref.* (*Stuart, C. J. and Wazir Hasan, J.*). JANG BAHADUR *v.* AGAN SINGH. **110 I. C. 466=3 Luck. 256=1 L. C. 700= A.I.R. 1928 Oudh 125.**

———Pedigree Tables are inadmissible unless the persons who made them are proved to be dead or incapable of giving evidence. (*Campbell, J.*). MEHR DAD *v.* MUHAMMAD ALI SHAH. **84 I.C. 927= 6 L.L.J. 299=A.I.R. 1925 Lah. 63.**

———"*Family pedigree*" *need not necessarily be ancient family record handed down from generation to generation.*

The ruling of the Privy Council in 30 All. 510 does not compel the conclusion that "family pedigree" as used in S. 32 (6) is confined to a document coming strictly within the description contained in that ruling, *viz*,, "an ancient family record handed down from generation to generation and added to as a member of the family dies or is born."

A genealogical tree was received by the witness, a member of the family from his deceased father with whom he had seen it 20 years ago. The witness did not know who wrote it and when.

Held, that the document would be admissible under S. 32 (6) or at least, as the declaration of the witness's deceased father who must be taken to have adopted it. (*Kotval, A.J. C.*). NAMDEO *v.* GANOBA. **86 I. C. 847=8 N.L.J. 29= A.I.R. 1925 Nag. 271.**

———Genealogical tree merely copied by the dead person from an old one is inadmissible. (*Das and Macpherson, JJ.*). JHOBALI RAI *v.* SAKHI RAI. **79 I. C. 335=1923 P.H.C.C. 266= A.I.R. 1923 Pat. 585.**

———Family pedigree writer need not have special means of knowledge. (*Drake-Brockman, A.J.C.*). LAHANU *v.* MOTIRAM. **63 I.C. 968= 4 N.L.J. 33=A.I.R. 1921 Nag. 49.**

———The words "family pedigree" in Cl. (6) do not necessarily include only such a pedigree as is in the possession of a member of the family concerned. (*Drake-Brockman, A.J.C.*). LAHANU *v.* MOTIRAM. **63 I.C. 968=4 N.L.J. 33= A.I.R. 1921 Nag. 49.**

—S. 32—Pedigree table.

———Entries made in the pedigree table prepared at the time of the Settlement under instructions legally issued under the Land Revenue Act giving the history of the Land in respect of which a suit is brought is not inadmissible in evidence. A. I. R. 1928 Lah. 214, *Foll.* (*Jai Lal, J.*). SADAR ALI *v.* ALI MOHAMMAD. **110 I.C. 710= 10 L.L.J. 237=29 P.L.R. 678.**

—S. 32—Previous statement.

———Evidence recorded for the purposes of proceedings under the Fugitive Offenders Act can be admissible under Ss. 32 and 33 of Evidence Act in proceedings under Penal Code against the same accused. (*Wild, J. C. and Aston, A. J. C.*). E. C. D. WHEELER *v.* EMPEROR. **112 I.C. 673= 29 Cr.L.J. 1089=A.I.R. 1928 Sind 161.**

———Statements that the testator had no power to make a will, contained in an objection filed in a

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Probate case are not admissible in another proceeding to show that one of the members of the family had admitted the existence in the family of prohibition on testamentary disposition. (*N. R. Chatterjee and Chotzner, JJ.*). PROTAP CHANDRA DEO DHANBAL DEB *v.* SRI RAJA JAGADISH CHANDRA DEO DHANBAL DEB. **82 I. C. 886=40 C. L. J. 331=A.I.R. 1925 Cal. 116.**

———When the conditions prescribed by S. 32 do not exist, a plaint filed in a rent suit is not admissible to prove a statement made by the superior landlord. (*Mookerjee and Suhrawardy, JJ.*). LAKSHAN CHANDRA MANDAL *v.* TAKIM DHALI. **80 I. C. 357=39 C. L. J. 90=28 C.W.N. 1033=A.I.R. 1924 Cal. 558.**

———Statements made by insolvents under S. 27, sub-S. (1) of the Presidency Towns Insolvency Act cannot be received in evidence in a subsequent suit brought by their creditors against them. Sections 32 and 33 of the Evidence Act are of no avail. The omission to object through mistake to the acceptance of such evidence does not make it legally admissible. *In re Brunner*, (1887) 19 Q. B.D. 572; 19 All. 76; 23 I.A. 106 (P.C.), *Ref. to.* (*Mookerjee and Buckland, JJ.*). LUCHIRAM MOTIRAM BOID *v.* RADHA CHARAN PODDAR. **66 I. C. 15=49 Cal. 93=34 C. L. J. 107=A.I.R. 1922 Cal. 267.**

—S. 32—Public interest.

———Declarations made *ante litem motam* by persons who are now dead in respect of a question relating to a matter of general or public interest, even if they be no more than evidence of reputation or hearsay evidence, are admissible. (*Rankin, C. J. and Mukerji, J.*). BUSOID *v.* NEWAJ AHMED KHAN. **119 I.C. 116=33 C.W.N. 439=A.I.R. 1929 Cal. 533.**

—S. 32—Recitals.

———*Recitals in compromise not stating the previous rights are not admissible.*

Where there were no recitals in the consent decree as to the previous rights of the respective parties in the subject-matter of the litigation but it was stated at the outset that, regardless of the rights of the parties, they had come to an arrangement that in future their rights would be regulated in the manner specified in the decree,

Held, that such recitals in the decree cannot be used as evidence under S. 32. (*Mukerjee and Rankin, JJ.*). JAGADISH CHANDRA DE *v.* HARIHAR DE. **78 I.C. 219=40 C L.J. 39=A. I. R. 1924 Cal. 1042.**

—S. 32—Relationship.

———Statements made by a person who is dead as to the name of her mother and other relations (except her husband) are admissible under S. 32 (5) in a charge under S. 368, I. P. C. (*Aston, A. J. C.*). WAHID BUX *v.* EMPEROR. **120 I C. 81=1929 Cr. C. 678=30 Cr. L. J. 1121=A.I.R. 1929 Sind 250.**

———*Mere hearsay evidence about relationship of parties is not admissible.*

Where the witnesses gave no pedigree table but stated vaguely that they were related to the parties and, therefore, knew that the parties were related in the fifth degree, and as regards their personal knowledge they referred to their previous conduct in attending certain ceremonies described as *oos* in attending certain ceremonies described as *moos* where the attendance of persons other than relatives is possible, and further stated that they heard there the bhats reciting the pedigree table,

Held, that the statements were not admissible for proving agnate relationship. 32 Cal. 84 (P.C.); A.I.R. 1922 P.C. 139; 39 Cal. 492 (P.C.); 26 I.C. 110 and 26 All. 581, *Ref. to.* (*Dalip Singh, J.*). MOHAN LAL *v.* MT. TULSAN. **109 I.C. 774=A.I.R. 1928 Lah. 824.**

EVIDENCE ACT (1872), S. 32—Revenue papers.

———A statement by a deceased person as to the existence of relationship, the person having special means of knowledge, and the statement being made before the legitimacy of a certain person was called in question, is admissible in evidence. (*Stuart, C.J. and Raza, J.*). RAJ FATEH SINGH *v.* BALDEO SINGH. **109 I. C. 310=3 Luck. 416=5 O.W.N. 143=A. I. R. 1928 Oudh 233.**

———Statement in a previous suit admitting relationship by a person who is dead is admissible in a subsequent suit, not under S. 33 but under S. 32 (5). (*Ross and Wort, JJ.*). GOKHUL PANDE *v.* BALDEO SUKUL. **105 I.C.26=7 Pat. 90=9 P. L. T. 180=A.I.R. 1928 Pat. 113.**

———*Obiter.*—Very liberal interpretation should be given to the words "when the statement relates to the existence of any relationship by blood-relations."

Statements made by deceased members of the family about certain facts of family history and statements regarding the seniority of members of the family are admissible in evidence under S. 32, Cl. (5) of the Evidence Act, (*King, J.*). KRISHNOPAL SINGH *v.* SRI RAJ KAUR. **104 I. C. 299=1 L. C. 97=A.I.R. 1927 Oudh 278.**

———Statement by testator that beneficiary is his adopted son—Suit for declaration of adoption—Statement can be used. A. I. R. 1922 P. C. 102 (P. C.); 26 C. W. N. 772 and 22 Cal. 843 (P. C.), *Dist.*; 40 Cal. 555, *Ref.* (*Das and Foster, JJ.*). CHANDRESHWAR PRASAD NARAIN SINGH *v.* BISHESHWAR PRATAB NARAIN SINGH. **101 I. C. 289=5 Pat. 777=8 P. L. T. 510=A.I.R. 1927 Pat. 61.**

———Illustration (*k*) to S. 32 does not indicate that a declaration by a son as to his parentage would not be admissible in evidence. (*Dalal, J. C.*). SANTU *v.* TARA. **85 I.C. 407=A.I.R. 1925 Oudh 537.**

———The dispute between the parties was whether the defendant *S* was or was not the mother of one *K*, deceased. At the trial a document executed by one *M* was put in evidence by the defendant. This document was a deed of gift in which the donor had described *K* as her grandson, and if he were her grandson the presumption was that he was the son of *S* as she was the daughter of *M*.

Held, that the document was not admissible under S. 32 because *M* was still alive and there was no other section of the Evidence Act which would make a statement by a person not a party to the suit admissible in evidence in the circumstances of the case. (*Dawson-Miller, C. J. and Mullick, J.*). SUMITRA KUER *v.* RAM KHAIR CHOWBEY. **1921 P. H. C. C. 17=A. I. R. 1921 Pat. 61.**

—S. 32—Revenue papers.

———The hudabandi papers are admissible under S. 32. 16 C.L.J. 328, *Expl.*; A.I.R. 1927 Cal. 855, *Rel. on.* (*Cuming and Mukerji, JJ.*). GOPESWER SEN *v.* BIJOYCHAND MAHATAB. **108 I.C. 883=55 Cal. 1167=32 C.W.N. 580=A.I.R 1928 Cal. 854.**

———*Jamawasilbaki and jamabandi papers are admissible.*

Jamawasilbaki and jamabandi papers can be admitted in evidence under S. 32 (2), but it must be clear that the persons who made them are dead and that the papers were made in the ordinary

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course of business. The entry as to the rate of rent cannot be distinguished from other entries in the jamawasilbaki papers as being entries not made in the ordinary course of business. 25 C.W.N. 204 and 47 Cal. 266, *Appl.* (*Suhrawardy and Duval, JJ.*). DUKHU MIA *v.* JAGDISH NATH.
90 I.C. 564=A.I.R. 1926 Cal. 359.

———A statement that certain land is in the *khas* possession of the landlord is of doubtful accuracy and ought not to be used in his favour when made in a Return by invoking the aid of S. 32 of the Evidence Act or some other adjective law. (*Suhrawardy and Chotzner, JJ.*). CHANDRA MOHAN MAITI *v.* KINARAM MAITI.
79 I.C. 412=A.I.R. 1925 Cal. 408.

—S. 32—Scope.

———Section 32 of the Indian Evidence Act is much wider than the Common Law-Rule in England. (*Ross and Wort, JJ.*). GOKUL PANDE *v.* BALDEO SUKUL. **105 I.C. 26=7 Pat. 90=9 P.L.T. 180=A.I.R. 1928 Pat. 113.**

———*Statement must relate to the injuries by which death was caused.*

The sub-section applies to the class of statements made by a dying person as to the injuries which have brought him or her to that condition, or her circumstances under which those injuries came to be inflicted. The rule as to the admissibility of evidence under S. 32 (1) has worked ill in India. (*Broadway and Fforde, JJ.*). AUTAR SINGH *v.* THE CROWN. **81 I.C. 964=4 Lah. 451=25 Cr. L.J. 1140=A.I.R. 1924 Lah. 253.**

———Per *Mukerji, J.*—The only material difference as between an entry relevant under S. 34, and one relevant under S. 32, Cl. (2), is that in the former case the person who made the entry may be available as a witness, while in the latter case he is not. Such entries, no matter whether they are relevant under one or the other section are not to be considered as alone sufficient to charge any person with liability. 28 Bom. 294; 10 Bom. L.R. 811; 16 C.L.J. 24 and 16 C.L.J. 328, *Doubted.* (*Cuming and Mukherji, JJ.*). GOPESWAR SEN *v.* BIJOYCHAND. **108 I.C. 883=55 Cal. 1167=32 C. W.N. 580=A.I.R. 1928 Cal. 854.**

———Section 32, Cl. (3) does not make the statement in a document between third parties admissible against a party in suit. 41 Bom. 300 (P.C.), *Rel. on. Case-law discussed.* (*Suhrawardy and Graham, JJ.*). BROJO MOHAN DAS *v.* GAYA PROSAD. **97 I.C. 265=45 C.L.J. 55=30 C.W.N. 761=A.I.R. 1926 Cal. 948.**

—S. 32—Special means of knowledge.

———*Evidence—Admissibility.*

Where evidence to support immigration of a Hindu family from one province into another is of witnesses who have heard about it from deceased members of the family, it is inadmissible. Clauses (5) and (6) of S. 32, Evidence Act, do not apply to it. (*Jackson and Mohiuddin, A.J.Cs.*). RAMCHANDRA *v.* RAMABAI. **123 I.C. 907=A.I.R. 1930 Nag. 267.**

———*Statement of a* qanungo *about relationship between a taluqdar's branch and another taluqdar's branch is admissible.*

A *qanungo* of the taluqdar must be presumed to have special means of knowledge as to the relationship between the different branches of the taluqdar. In the character of a *qanungo*, it is his duty to furnish information to the Settlement Court on questions relating to title and his statement is recorded by the Settlement Officer in the discharge of the official duty. (*Stuart, C.J. and Wazir Hasan, J.*). HARIHAR PRATAB BAKHSH SINGH *v.* BISHESHWAR BAKHSH SINGH. **109 I. C. 422=3 Luck. 326=5 O. W. N. 299=A.I.R. 1928 Oudh 307.**

EVIDENCE ACT (1872), S. 32 — Statements against interest.

———Pedigree—Proof of special means of knowledge necessary before admission of pedigree—Relationship far removed in degree—Presumption of special means of knowledge does not exist. (*Lyle, A.J.C.*). BHIMA SINGH *v.* MT. SUNDAR.
69 I. C. 421=9 O. L. J. 186=26 O.C. 109=A. I. R. 1922 Oudh 218.

———A person's statement about his being the adopted son of a particular person—Adoption taken place when he was very young—He should still be regarded as having "special means of knowledge." 32 Cal. 84 (P.C.), *Rel. on.* (*Drake-Brockman, J.C.*). GULAB THAKUR *v.* FADALI.
68 I.C. 566=A. I. R. 1921 Nag. 153.

—S. 32—Statement after dispute.

———Statement made after a dispute has arisen is not admissible. (*Sulaiman and Banerji, JJ.*). RUP KISHORE *v.* PATRANI. **25 A.L.J. 861=A.I.R. 1927 All. 818.**

—S. 32—Statements against interest.

———*Application of S.* 32 (3) *to detrimental statement of Hindu widow desiring to adopt.*

The principle upon which statements coming under S. 32 (3) are regarded as admissible in evidence is that in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true. But this sanction is of no use in the case of a Hindu widow who, after a lifelong enjoyment of her husband's property, desires at the end to pass it on to her relations, and for this purpose goes through the form of adopting her brother's grandson, to effectuate which she is bound to allege authority from her husband. (*Lord Buckmaster.*) DAL BAHADUR SINGH *v.* BIJAI BAHADUR SINGH. **122 I.C. 8=1930 A. L. J. 122=7 O. W. N. 295=34 C.W.N. 369=32 Bom. L.R. 487=51 C.L.J. 230=57 I.A. 14=52 All. 1=A.I.R. 1930 P.C. 79=58 M.L.J. 446 (P.C.).**

———Dispute regarding nature of land—Recitals in sale-deeds in favour of one party to suit showing nature of same land are admissible under S. 32. 11 A.L.J. 139, *Rel. on*; 23 Bom. 63; 16 C.W.N. 252; 17 C.W.N. 108; A.I.R. 1924 Cal. 1067; 45 Cal. 159 and A.I.R. 1922 Cal. 251, *Ref.* (*Sulaiman and Kendall, JJ.*). TIKA RAM *v.* MOTI LAL.
1930 A.L.J. 564=A.I.R. 1930 All. 299.

———Where a person sentenced to death for murder makes a statement to a Magistrate about the time of his being hanged that the approver appointed to give evidence in the case, who had previously retracted his confessions, was not involved in the crime, the statement may be admissible under S. 32 (3). A. I. R. 1925 P. C. 52, *Rel. on.* (*Findlay, J. C. and Subhedar, A.J.C.*). SHEIKH SHAFI *v.* EMPEROR. **124 I.C. 459=A.I.R. 1930 Nag. 259.**

———(*Obiter.*)—Where the question, whether there was partition between the ancestors of the parties or not, is in issue, the statements made by the deceased ancestors of the parties to the effect that there was partition are admissible in evidence as they are statements against the proprietary interest of the persons making them. (*Mohiuddin and Jackson, A. J. Cs.*). JAITARAM *v.* NAROTTAM.
A.I.R. 1929 Nag. 131.

———Under S. 32 (3) it is the statement and not the document containing the statement which

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must be against the proprietary interest of the person making it. 1910 M. W. N. 668 and 1914 M.W.N. 779, *Foll.*; 22 W. R. 231, *Diss. from.*

Parties making statements which are not material to their interests have no occasion to be accurate. It is for this reason that a statement to be admissible must be against the interest of the person making the same. (*Jackson, J.*). KARUPPANNA KONAR *v.* RANGASWAMI KONAR. **107 I.C. 293= A.I.R. 1928 Mad. 105.**

———The statement by a person since dead that certain lands lie on the boundary of the land forming the subject-matter of the document cannot be regarded as having been made against the pecuniary interest of the person making it under S. 32 (3). A.I.R. 1926 Cal. 948, *Foll.* (*Duval and Mitter, JJ.*). KUMUDA KUMARI *v.* DILSOOK ROY. **101 I.C. 542=45 C.L.J. 138= A. I. R. 1927 Cal. 918.**

———*Evidentiary value of.*

So far as a statement against the pecuniary or proprietary or other interest of the person making it is concerned, such statement may be given in evidence against third persons, provided that the reference to such third persons is not foreign to that portion of the statement which is against the interest of the declarant. But although the whole statement of a deceased person is admissible in evidence, the value which the Court will attach to such evidence will depend in each case upon a variety of circumstances. If the statement happens to be recorded in a document it must naturally possess greater value than when it depends upon the evidence of a witness who purports to have heard it. The Court in each case will also have to consider whether or not the statement in question bears on its face the appearances of truth, also the circumstances under which it came to be made, and whether or not the deceased person had a motive in making it or an object in naming the particular person whom he charges with complicity in the crime in question. These are all matters which affect the weight of the evidence and not its admissibility. (*Shadi Lal, C. J. and Fforde, J.*). MOHAMMAD *v.* EMPEROR. **89 I.C. 252=26 Cr. L.J. 1308= A. I. R. 1926 Lah. 54.**

———An admission against interest by a Hindu widow that she borrowed a loan for a particular purpose cannot be split up into two parts making one part admissible and the other inadmissible, but must be admitted as a whole for the purpose of ascertaining the purpose and nature of the loan under S. 32. (*Dawson Miller, C. J. and Macpherson, J.*). SITA RAM SINGH *v.* KHUBLAL SINGH. **94 I. C. 13=5 Pat. 168=7 P. L. T. 573= A.I.R. 1926 Pat. 255.**

———Statement in sale-deed that a certain sum is due from the executant thereof on account of a promissory note executed by him is admissible for controverting the presumption that a promissory note is executed for consideration and showing that only a part of the consideration really passed. (*Stuart and Mukherji, JJ.*). KALYAN RAI *v.* JAGANNATH. **78 I. C. 1033= A. I. R. 1925 All. 130.**

———Attesting with knowledge a document showing that the attestors have no interest in the land passed by the documents, amounts to a statement against interest and is admissible under S. 32.

EVIDENCE ACT (1872), S. 32—Miscellaneous.

(*Odgers and Hughes, JJ.*). GNANAMUTHU NADAN *v.* VEILUKANDA NADATHI. **79 I. C. 2= 19 M.L.W. 494=1924 M. W. N. 451= A.I.R. 1924 Mad. 542.**

———*Statement by members of a community regarding rule of succession is admissible.*

A statement by some members of the Rajgond community that amongst Rajgonds a son takes interest by birth is a statement against the proprietary interest of the declarant and therefore is clearly admissible in evidence under S. 32 (3). (*Kinkhede, A. J. C.*). RAMNATH *v.* SUKALSI. **78 I. C. 185=A. I. R. 1924 Nag. 330.**

———Declarations made by persons in disparagement of title to land, if made whilst in actual possession, are admissible in evidence under S. 32 (3) of the Evidence Act. (*Fawcett and Raymond, J. Cs.*). RAMDAS *v.* AJUDHIADAS. **63 I. C. 685= 14 S. L. R. 137.**

—S. 32—Unreasonable delay or expense.

———In a case in Madras, the mere fact that a witness happens to live at Rangoon is not a ground for holding that his evidence cannot be procured without unreasonable delay or expense. (*Venkatasubba Rao and Srinivasa Ayyangar, JJ.*). KANDAPPA CHETTI *v.* TIRUPATHI CHETTY. **86 I.C. 576=21 M.L.W. 210=A.I.R. 1925 Mad. 444.**

—S. 32—Verbal statements.

———*Questions with answers by signs owing to throat being cut are admissible under Cl.* (5).

Where the man's throat had been cut and he could not speak but he was said to have replied to the questions put to him by means of signs,

Held, that the questions put to the deceased and the signs made by him taken together might properly be regarded as "verbal statements" made by a person as to the cause of his death within the meaning of S. 32. 7 All. 385 (F.B.); 1922 Cal. 402, *Foll.* (*Scott-Smith and Fforde, JJ.*). RANGA *v.* THE CROWN. **84 I.C. 552=5 Lah. 305= 26 Cr. L. J. 328=A.I.R. 1924 Lah. 581.**

———Signs made by the deceased in answer to questions amount to 'a verbal statement.' (*Newbould and Ghose, JJ.*). EMPEROR *v.* SADHU CHARAN DAS. **77 I.C. 993=49 Cal. 600=26 C.W.N. 414= 25 Cr. L.J. 529=A.I.R. 1922 Cal. 409.**

———Gestures by the person murdered are relevant but not their interpretation by witnesses present. (*Coutts and Ross, JJ.*). CHANDRIKA RAM KAHAR *v.* EMPEROR. **71 I.C. 353=1 Pat. L.R.Cr. 77= 24 Cr.L.J. 129=1 Pat. 401= 3 P.L.T. 779=1923 P.H.C.C. 26= A.I.R. 1922 Pat. 535.**

—S. 32—Miscellaneous.

———The statement that a document is a copy of the original is admissible where made by a deceased person in a document relating to a relevant fact and also as an admission under S. 21. (*Lord Atkin.*) V. SEETHAYYA *v.* P. SUBRAMANYA. **117 I.C. 507=33 C.W.N. 578= 52 Mad. 453=29 M.L.W. 804= 31 Bom. L.R. 756=49 C.L.J. 566= 56 I.A. 146=1929 M.W.N. 553= A.I.R. 1929 P.C. 115=56 M.L.J. 730 (P. C.).**

———Statements of living persons not examined as witnesses are inadmissible in evidence to prove the allegation that the executant was a major at the time when he executed the document. (*Gokaran Nath Misra and Pullan, JJ.*). MUNNALAL *v.* KAMESHARI DAT. **114 I.C. 801= 5 O.W.N. 1111=A.I.R. 1929 Oudh 113.**

———In the absence of proof of some fact within S. 32, what the appellate Court has to do is to find

EVIDENCE ACT (1872), S. 32—Miscellaneous.

whether or not there was any real contention that the writer was still alive and if so grant a remand. (*Rankin, C.J. and Mitter, J.*). JONAB BISWAS *v.* SEVA KUMARI DEBI. **104 I.C. 733= 46 C.L.J. 253=A.I.R. 1927 Cal. 855.**

———A statement made by deceased as to who will be his successor in case of his failure to have a son is inadmissible in evidence under S. 32. (*N.R. Chatterjee and Panton, JJ.*). PRYAG KUMARI DEBI *v.* SIVA PRASAD SINGH. **93 I.C. 385= 42 C.L.J. 280=A. I. R. 1926 Cal. 1.**

———Statements of deceased persons are admissible under S. 32 if certain conditions are fulfilled. The statements in a deceased person's will as to the time when a certain member of the family left the house or as to the restriction imposed upon him by a will of a pre-deceased person do not fall within any of the clauses of S. 32. 44 Bom. 192, *Ref.* (*Kincaid, J.C. and Raymond, A.J.C.*). MT. BHAGHARI *v.* MT. KHATUND. **80 I.C. 118= 16 S.L.R. 25=A.I.R. 1921 Sind 177.**

—S. 33—Admissibility of depositions.

———It is necessary that under S. 33 of the Evidence Act the Judge must be satisfied that the evidence is admissible on the materials before him, namely, on the ground that the witness whose deposition is attempted to be put in was not or could not be found or had been won over by the adverse party or otherwise incapable of giving evidence.

A verbal application made by the Public Prosecutor for admission of evidence of a particular witness under S. 33, Evidence Act, is not by itself a sufficient ground for admitting that evidence. 20 W.R. 69 (Cr.) and 41 Cal. 601, *Ref.*

The fact that no objection was taken to the reception of evidence of a particular witness on the mere verbal application by the Public Prosecutor or by the defence, does not dispense with the requirements of S. 33, Evidence Act. 39 Mad. 449 and 10 Lah. 837, *Ref.* (*Suhrawardy and Patterson, JJ.*). MOKSHAD SHEIKH *v.* EMPEROR. **1930 Cr. Cases.**

———A previous deposition is admissible against the witness on his subsequent trial, unless he has brought himself within the protection of the proviso to S. 132. 39 Cal. 164 and 45 Cal. 720, *Rel. on.* (*Percival, A.J.C.*). EMPEROR *v.* E.C.D. WHEELER. **112 I.C. 50=22 S.L.R. 458= 29 Cr.L.J. 962=A.I.R. 1929 Sind 15.**

———Ejectment proceedings in revenue Court—Suit or possession in civil Court—Evidence in former is not admissible in latter. (*Tek Chand and Agha Haidar, JJ.*). SARU KHAN *v.* JAN MUHAMMAD. **106 I.C. 313=A.I.R. 1928 Lah. 43.**

———Evidence in previous proceedings admitted with pleader's consent—One accused no party to previous proceedings—Admission of evidence is bad. (*Darwood, J.*). ABDUL GAFFOOR *v.* GOVIND PRASAD. **117 I. C. 241=30 Cr. L. J. 736= A. I. R. 1928 Rang. 284.**

———Evidence under Fugitive Offenders Act may be admissible in proceedings under Penal Code. (*Wild, J. C. and Aston, A. J. C.*). E. C. D. WHEELER *v.* EMPEROR. **112 I. C. 673= 29 Cr. L. J. 1089=A. I. R. 1928 Sind 161.**

———C. P. Code, O. 41, R. 27—Statements of witness in proceedings under Lunacy Act, commenced after dismissal of suit between same parties, were admitted at appellate stage. (*Sir John Wallis.*) MAHANT RAI *v.* MT. LACHMINA KUNWAR. **101 I. C. 363=1927 M. W. N. 456= 26 M. L. W. 94=31 C. W. N. 1087=39 M.L.T. 155= A. I. R. 1927 P. C. 123 (P.C.).**

EVIDENCE ACT (1872), S. 33—Condition precedent.

———Where a witness for the prosecution is examined and cross-examined before charge and leaves for England, and after charge the accused requires him to be cross-examined under S. 257, Cr. P. Code, the Magistrate may act under the provisions of S. 33, Evidence Act. (*Maung Ba, J.*). NGA BA ON *v.* EMPEROR. **104 I. C. 637= 6 Bur. L. J. 114=9 A. I. Cr. R. 33= 28 Cr. L. J. 861=A. I. R. 1927 Rang. 248.**

———The fact that a witness did not appear when cited or that he was not examined when present is no ground to make his deposition in previous suit admissible. (*Suhrawardy and Mukherji, JJ.*). BRAJABALLAV *v.* AKHOY BAGDI. **93 I. C. 115= 30 C. W. N. 254=A. I. R. 1926 Cal. 705.**

———Where the formalities prescribed in Ch. 25 of Cr. P. Code are not observed in recording evidence, the accused cannot be said to have had opportunity to cross-examine within S. 33. (*Foster, J.*). EMPEROR *v.* PHAGUNIA BHUIAN. **89 I.C. 1043=26 Cr. L.J. 1475= A. I. R. 1926 Pat. 58.**

———Where evidence was given before a committing Magistrate, but in the Sessions Court the witness proves shy and speechless, S. 33 does not apply to the case and the evidence cannot *ipso facto* be treated as evidence at the Sessions. The proper procedure would be to give the prosecution the right to put leading questions under S. 154 and obtain the admission or denial of the truth of the evidence. (*Pipon, J.C.*). MOTI RAM *v.* EMPEROR. **75 I. C. 152=24 Cr. L. J. 904.**

—S. 33—Compliance with section.

———*Strict proof of compliance with the provision is necessary specially in a murder trial—Reasons should be recorded before admission of evidence.*

Per *May Oung, J.*—The power given by S. 33 requires to be exercised with great caution and the Court must insist on strict proof before holding that the requisite conditions have been satisfied. More especially is this necessary where a man is being tried for his life and the evidence sought to be put in is of signal importance. Moreover, it is essential that a Judge or Magistrate admitting such evidence should either in his judgment or preferably in a separate order record his reasons for doing so.

Per *Lentaigne, J.*—The section pre-supposes a consideration of the grounds for admission of the deposition prior to the admission of the evidence and if the grounds and reasons are recorded prior to the admission of the deposition as evidence, the order constitutes a more convincing proof of the considered adequacy of the grounds than a passage in a judgment subsequently written which in a case near the border line might easily assume the appearance of a subsequent statement of excuses for a previous ill-considered action. (*May Oung and Lentaigne, JJ.*). NGA NYO *v.* EMPEROR. **76 I. C. 817=1 Rang. 512=2 Bur. L.J. 205= 25 Cr. L.J.257=A.I.R. 1924 Rang. 209.**

—S. 33—Condition precedent.

———*Strict compliance with requirements essential.*

A previous deposition can be admitted in evidence only under the provisions of S. 33, Evidence Act, but before it can be placed on the record of a criminal trial the Court must decide judicially that a proper effort had been made on behalf of the prosecution to secure the presence of the witness, that in spite of that effort he had not been traced and could not be found out, or that he was incapable of giving evidence, or was kept out of the way by

EVIDENCE ACT (1872), S. 33—Condition precedent.

the adverse party, or his presence could not be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable. 39 Mad. 449; 41 Cal. 601; A.I.R. 1925 Lah. 418, *Foll.*

The fact that the counsel for the accused gave his consent does not make any difference. A.I.R. 1923 Mad. 32, *Rel. on.* (*Tek Chand and Agha Haidar, JJ.*). GHULAM HAIDAR *v.* EMPEROR.
116 I.C. 329=10 Lah. 837=30 P.L.R. 192=30 Cr. L. J. 623=1929 Cr. C. 85=13 A.I. Cr. R. 34=A.I.R. 1929 Lah. 542.

———Evidence taken in another case is inadmissible unless requirements of S. 33 are satisfied. (*Kanhaiya Lal, J.C.*). DWARKA SINGH *v.* EMPEROR. **74 I. C. 860=25 O C. 142=24 Cr. L.J. 828=A. I. R. 1922 Oudh 254.**

—S. 33—Consent of parties.

———Evidence in a previous proceeding between the same parties can be made admissible in a subsequent proceeding by consent of parties. A.I.R. 1924 All. 845, *Foll.* (*Madhavan Nair, J.*). LAKSHMIDEVAMMA *v.* P. KRISHTIAH. **104 I.C. 518=39 M.L.T. 198=A.I.R. 1927 Mad. 1107.**

———Evidence recorded in a previous judicial proceeding between the same parties can be made admissible in a subsequent proceeding by the consent of both parties. 43 Mad. 699, *Foll.* (*Odgers, J.*). VARADARAJULU CHETTY *v.* VELAYUDA UDAYAN. **90 I.C. 743=22 M.L.W. 230=A. I. R. 1925 Mad. 1160.**

———Conditions imposed by S. 33 may be dispensed with by consent of parties. 24 Bom. 591 and 43 Mad. 609, *Foll.* (*Neave and Daniels, JJ.*). RADHA KISHAN *v.* KEDAR NATH.
80 I. C. 874=46 All. 815=22 A.L.J. 761=5 L.R.A. Civ. 536=A.I.R. 1924 All. 845.

———Strict requirements can be dispensed with by consent of parties. 43 Mad. 609, *Foll.* (*Phillips and Venkatasubba Rao, JJ.*). B. BHAVAMMA *v.* B. RAMAMMA. **78 I. C. 176=19 M. L. W. 205=1924 M. W. N. 270=34 M.L.T. 355=A.I.R. 1924 Mad. 537.**

—S. 33—Death of witness.

———Evidence of a witness, who dies before his cross-examination, is inadmissible. 5 C.W.N. 230, *Foll.* (*Mears, C. J. and Lindsay, J.*). NARSINGH DAS *v.* GOKUL PRASAD.
107 I. C. 243=50 All. 113=25 A.L.J. 775=A. I. R. 1928 All. 140.

———Witness examined in committal proceedings but not cross-examined immediately—Witness dying before Sessions trial—His deposition in committing Court can be admitted in Sessions trial. (*Rankin, C.J. and C.C. Ghose, J.*). AZIMUDDY *v.* EMPEROR. **101 I.C. 661=31 C.W.N. 410=28 Cr. L.J. 485=8 A. I. Cr. R. 134=A.I.R. 1927 Cal. 398.**

—S. 33—Deposition of party.

———Evidence given by defendant as witness in previous suit is admissible as admission—Section 33 does not apply to such case. 14 B.L.R. (App.) 3, *Foll.* (*Chatterjee and Pearson, JJ.*). ALI MAHOMED *v.* MAHARAJ BEPARI. **64 I.C. 266=36 C.L.J. 186= A.I.R. 1921 Cal. 781.**

—S. 33—Different parties.

———A deposition of a witness made in a previous suit cannot be accepted as evidence in any subsequent suit when the witness is still living and more so when the parties to the previous suit are different from the parties to the subsequent suit.

EVIDENCE ACT (1872), S. 33—Parties.

(*Mears, C.J. and Lindsay, J.*). NARSINGH DAS *v.* GOKUL PRASAD. **107 I.C. 243=50 All. 113=25 A.L.J. 775=A.I.R. 1928 All. 140.**

———Statement in a previous suit cannot be used against person who was not a party to previous suit. (*Sulaiman and Banerji, JJ.*). RUP KISHORE *v.* PATRANI. **25 A. L. J. 861=A.I.R. 1927 All. 818.**

———A statement of a witness examined in a case in which only one of the plaintiffs in the subsequent suit was a party, and in which the other plaintiffs were not parties at all, cannot be admitted in evidence against them all. (*Misra, J.*). HARI KISHEN *v.* RAGHUBAR DAYAL. **97 I.C. 853=1 Luck. 489=3 O.W.N. 645=13 O.L.J. 696=A.I.R. 1926 Oudh 578.**

—S. 33—Discretion of Court.

———Application is essentially matter of discretion of Court. (*Rankin, C.J. and C.C. Ghose, J.*). JATI MALI *v.* EMPEROR. **33 C.W.N. 918=1929 Cr.C. 477=A.I.R. 1929 Cal. 765.**

—S. 33—Dying declaration.

———Dying declaration made to Sub-Inspector—Sub-Inspector examined under S. 208, Cr. P. Code but not cross-examined—Sub-Inspector dying before Sessions Trial—Deposition can be admitted in evidence. (*Graham and Lort-Williams, JJ.*). TAFIR PRAMANIK *v.* EMPEROR. **50 C.L.J. 584=1930 Cr.C. 196=A.I.R. 1930 Cal. 228.**

—S. 33—Evidence before Committing Magistrate.

———Where a witness who gives evidence before the Committing Magistrate, leaves the district, the Sessions Judge cannot, without taking evidence to see whether S. 33 of the Evidence Act has been satisfied, admit the evidence given before the Committing Magistrate. (*Scott-Smith and Fforde, JJ.*). KHEM SINGH *v.* EMPEROR. **88 I.C. 30=7 L.L.J. 105=26 Cr.L.J. 1086=26 P.L.R. 458=A.I.R. 1925 Lah. 319.**

—S. 33—Identity of witness.

———To admit certified copy of the deposition of a witness his identity must be proved. (*Suhrawardy and Mukerjee, JJ.*). BRAJABALLAV *v.* AKHOY BAGDI. **93 I.C. 115=30 C.W.N. 254=A.I.R. 1926 Cal. 705.**

—S. 33—Jurisdiction.

———A proceeding before a Judge or Magistrate who has no jurisdiction is *coram non judice* and the evidence of witnesses given in such a proceeding cannot be used under S. 33 on a retrial before a competent Court. (*Campbell and Addison, JJ.*). BUTA SINGH *v.* EMPEROR. **97 I.C. 752=7 Lah. 396=27 Cr.L.J. 1168=27 P.L.R. 447=A.I.R. 1926 Lah. 582.**

—S. 33—Medical practitioner.

——— *Examining the doctor is not an essential condition when a witness is ill.*

Facilities for obtaining qualified doctors in England are very different from those in India, and thus it cannot be accepted as a proposition of law that it is absolutely necessary to examine a qualified medical practitioner before evidence can be accepted under S. 33 of the Evidence Act when the witness is ill and thus unable to attend. (*Suhrawardy and Duval, JJ.*). SHEIKH ALIJAN *v.* EMPEROR. **103 I.C. 846=31 C.W.N. 908=28 Cr.L.J. 766=A.I.R. 1927 Cal. 679.**

—S. 33—"Parties."

———"Parties" in the proviso include parties wrongly impleaded. (*Kotval and Prideaux, A.J.Cs.*). GANGARAM *v.* EMPEROR. **82 I. C. 715=25 Cr.L.J. 1355=A.I.R. 1925 Nag. 172.**

EVIDENCE ACT (1872), S. 33—Representatives-in-interest.

—S. 33—Representatives-in-interest.

———In seeing whether a person is the legal representative of another or not for the purpose of rendering evidence admissible under S. 33, regard must be had to the state of affairs when the evidence is sought to be admitted.

Where the defendant in a subsequent suit was the natural son of the plaintiff in previous suit and claimed in the subsequent suit not as the natural son of the plaintiff but as adopted son of a third person,

Held, that the depositions in the previous suit were not admissible. A.I.R. 1927 Mad. 733, *Appr.* (*Kumaraswami Sastri, Odgers and Jackson, JJ.*). KRISHNAYYA RAO *v.* RAJAH OF PITTAPUR.

116 I.C. 673=51 Mad. 893=28 M.L.W. 422=A.I.R.1928 Mad. 994=55 M. L. J. 894 (F.B.).

———*Meaning of.*

The words "representatives-in-interest" mean that the parties in the second proceedings in which evidence is tendered must be the representatives-in-interest of the parties in the first proceeding, or in other words should be persons who derive their title through or claim under them, or, shortly, are their privies.

Section 33 cannot be applied without any reference to the subject-matter of the two suits. The interests involved in each case must be the same, or similar. *English and Indian case-law ref. to.* (*Krishnan and Venkatasubba Rao, JJ.*). KRISHNA RAO *v.* RAJA OF PITTAPUR. **102 I.C. 713=A. I. R. 1927 Mad. 733.**

———*Partners and joint contractors.*

The expression "representatives-in-interest" in proviso to S. 33 must at least include privies in estate. Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts and must be regarded as privies in estate and are included in the expression "representatives-in-interest" in proviso to S. 33. (*Das and Foster, JJ.*). CHANDRESHWAR PRASAD NARAYAN SINGH *v.* BISHESHWAR PRATAB NARAIN SINGH. **101 I. C. 289=5 Pat. 777=8 P. L. T. 510=A. I. R. 1927 Pat. 61.**

—S. 33—Right and opportunity.

———The true reading of S. 33 is that the party had both the right and the opportunity of cross-examining. Mere opportunity to cross-examine is not sufficient. There must also be the right to do so. (*Lord Buckmaster.*) DAL BAHADUR SINGH *v.* BIJAI BAHADUR SINGH. **122 I. C. 8=1930 A. L. J. 122=7 O. W. N. 295=34 C. W. N. 369=32 Bom. L. R. 487=51 C. L. J. 230=57 I. A. 14=52 All. 1=A. I. R. 1930 P. C. 79=58 M. L. J. 446 (P.C.).**

—S. 33—Scope.

———The general provisions of S. 33 of the Evidence Act are in no way affected by S. 350 of the Cr. P. Code. (*Fforde and Addison, JJ.*). LEKAL *v.* EMPEROR. **101 I. C. 483=8 Lah. 570=28 P. L. R. 199=28 Cr. L. J. 451=8 A. I. Cr. R. 83=A. I. R. 1927 Lah. 332.**

—S. 33—Thanedar's statement.

———Copy of statement of *thanedar* in one case is inadmissible to prove loss of property in another case. (*Martineau, J.*). JIWAN SINGH *v.* EMPEROR. **4 L. L. J. 418=A. I. R. 1921 Lah. 332.**

—S. 33—Trial de novo.

———Criminal Trial—Evidence—Trial *de novo*—Witnesses not examined *de novo*—Depositions at the previous trial filed—Procedure is illegal—Consent of accused will not cure irregularity. (*Oldfield and Ramesam, JJ.*). K. K. UMMAR HAJI, *In re.* **69 I.C. 636=16 M.L.W. 697=1922 M.W.N. 644=23 Cr. L. J. 748=46 Mad. 117=A. I. R. 1923 Mad. 32=43 M. L. J. 659.**

EVIDENCE ACT (1872), S. 34—Accounts.

—S. 33—Witness not cross-examined.

———The true reading of S. 33 is that the adverse party in the first proceeding had both the right and the opportunity of cross-examining and not "the right *or* opportunity to cross-examine." Where a Hindu widow made an adoption about fifty years after the alleged power to adopt was given by the husband and it appeared that in certain prior proceeding regarding mutation of names the widow had referred to the power but there was no issue on the point and the Court had disallowed cross-examination regarding the same,

Held, that the previous statement was not admissible in a later suit in which the validity of the adoption was questioned. (*Lord Buckmaster.*) DAL BAHADUR SINGH *v.* BIJAI BAHADUR SINGH. **122 I.C. 8=1930 A.L.J 122=7 O.W.N. 295=51 C.L.J. 230=52 All. 1=67 I.A. 14=32 Bom.L.R. 487=34 C.W.N. 369.=A.I.R. 1930 P.C. 79=58 M.L.J. 446 (P.C.).**

———If the cross-examination of a witness is reserved by a Magistrate during committal proceedings of his own accord, that deposition is not complete and should not be admitted in evidence at the trial in the Court of Session. (*Percival, J. C. and Barley, A. J. C.*). EMPEROR *v.* MAHRAL. **120 I. C. 524=1930 Cr. C. 70=31 Cr.L.J. 121=A.I.R. 1930 Sind 54.**

———In a warrant case until the stage provided for in S. 256 is reached the accused has no right to cross-examine and consequently the evidence of a witness given before framing of the charge is not admissible under S. 33. 8 C. W. N. 388, *Ref.* (*Cuming and Lort-Williams, JJ.*). EMPEROR *v.* C. A. MATHEWS. **1929 Cr.C. 669=A. I. R. 1929 Cal. 822.**

———A witness was examined by prosecution but no cross-examination was put to him and after the charge it was discovered that he was too ill to attend the Court and was unable to answer the interrogatories. The result was that he was never subjected to cross-examination. It was contended that the statement being incomplete his evidence could not be considered.

Held, that such evidence was admissible but the weight to be attached to it depended upon the circumstances of each case. A.I.R. 1925 Mad. 497, *Rel. on.* (*Johnstone, J.*). MANGAL SEN *v.* EMPEROR. **118 I. C. 647=1929 Cr.C. 568=11 L.L.J. 384=30 Cr.L.J. 951=A. I. R. 1929 Lah. 840.**

—S. 34—Absence of entry.

———Evidence that there is no entry in the account books is not admissible under S. 34. (*Mookerjee and Chotzner, JJ.*). TARA KUMAR GHOSE *v.* KUMAR ARUN CHANDRA SINGH. **74 I.C. 383=36 C.L.J. 389=A.I.R. 1923 Cal. 261.**

—S. 34— "Account book."

———Where the entries are made from day to day but the totalling does not take place every day, this would not make the book any the less an account-book within the meaning of S. 34. (*Mittra, A.J.C.*). NARAYAN *v.* WAMAN. **59 I.C. 121=A.I.R. 1921 Nag. 133.**

—S. 34—Accounts.

———*Evidentiary value of.*

Where defendant agreed with plaintiff: "You will receive a sum equivalent to 5 per cent. of the net profits (as shown in the books) of the Bombay

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branch of the Bombay Company Limited as accruing from the sales of all goods for which you were salesman, whether on purchase or joint account,"

Held, a plaintiff, who accepts the defendants' books as deciding his rights to some extent, accepts them to that extent (unless he guards himself by apt words) as statements of the right mode of distributing the results of the recorded transactions, and not as a mere repository of figures like a calendar or price list. On the terms of this agreement the books cannot be divorced from the system of book-keeping of which they are the expression. The thing on which the percentage is to be reckoned is the profit of the branch as shown, and in showing a profit the mode of getting at it is as relevant as the final figure. The profit is the profit of the Bombay branch, not of some selected department of that branch, and it is the company's profit. Profits "shown" can only mean profits, which from time to time are, or in the ordinary course of business will be, shown. (*Viscount Sumner.*) KAIKHUSHROO RUSTOMJI WALLACE *v.* THE BOMBAY CO. LTD. **104 I.C. 139=46 C.L.J. 214=1927 M.W.N. 600=29 Bom. L.R. 1367=32 C.W.N. 145=39 M.L.T. 294=A.I.R. 1927 P.C. 210=53 M.L.J. 278 (P.C.).**

—S. 34—Bogus entries.

———Account books are sufficiently discredited if a certain number of entries therein are proved to be bogus by independent evidence which precludes the possibility of error or accident. (*Lord Sinha.*) SETH MAGANMAL *v.* DARBARILAL CHOWDHURY. **107 I.C. 113=24 N.L.R. 40=30 Bom. L.R. 296=47 C.L.J. 222=5 O.W.N. 226=27 M.L.W. 523=A.I.R. 1928 P.C. 39=54 M.L.J. 208 (P.C.).**

—S. 34—Corroboration.

———Under S. 34 of the Evidence Act, relevant entries in account books unless corroborated are not sufficient to fasten liability on a person. (*Sen and Niamatullah, JJ.*). KHUNNI MAL *v.* DWARAKA DAS. **1930 A.L.J. 987=A.I.R. 1930 All. 710.**

———*Statement in books of account may be corroborated by any evidence.*

Section 34 does not limit in any way at all the nature of the material upon which a Court may rely to support the statements in a book of account. Such material may take the shape of contemporary vouchers, receipts or other documentary evidence or of sworn oral testimony. (*Stuart and Boys, JJ.*). KALLU MAL *v.* BHAWANI DAS. **88 I.C. 383=6 L.R. A. Civ. 375=A.I.R. 1925 All. 742.**

———Plaintiff's own statement on oath in support of entries can be sufficient to support the entries in plaintiff's account books to fix the defendant with liability. (*Abdul Raoof, J.*). FIRM GODHA MAL BUDHU MAL *v.* DITTA. **84 I.C. 909=6 L.L.J. 504=A.I.R. 1925 Lah. 242.**

—S. 33—Essentials.

———It is only the account books that are properly kept that are admissible in evidence as relevant. (*Mears, C.J. and Mukerji, J.*). BANKEY BEHARI LAL *v.* BRIJ BEHARI LAL. **116 I.C. 285=51 All. 519=1929 A.L.J. 115=A.I.R. 1929 All. 170.**

—S. 34—Evidentiary value.

———Relevant entries in account books unless corroborated are not sufficient to fasten liability upon a person. (*Sen and Niamatullah, JJ.*). KHUNNI MAL NARAIN DAS *v.* DWARKA DAS BAJI NATH. **1930 A.L.J. 987=A.I.R. 1930 All. 710.**

———Where the plaintiff's account books are the only evidence of the defendant's liability to pay any of the particular sums entered against them the evidence is not conclusive under S. 34, and

EVIDENCE ACT (1872), S. 34—Proof.

plaintiff's suit must fail. (*Campbell, J.*). GANESHI LAL *v.* FIRM MANGAT RAM ATMA RAM. **76 I.C. 157=A.I.R. 1924 Lah. 540.**

———*Entries—Evidence of past transaction is relevant.*

In a suit for the recovery of Rs. 53-12 on the allegations that the defendants had irrigated their fields from the plaintiffs' well and were liable to pay at the rate of Rs. 4 per *bigha* according to an agreement arrived at between the parties,

Held, that the *bahi* entries in plaintiffs' *bahi* showing that the defendants had been paying the water-rate in previous years at the rate demanded by the plaintiffs taken along with the oral evidence produced sufficiently prove the plaintiffs' claim. (*Moti Sagar, J.*). PRABHU DIYAL *v.* RAM CHANDER. **A.I.R. 1923 Lah. 595.**

—S. 34—Hudabandi papers.

———S. 34 does not apply. 16 C. L. J. 328, *Expl.*; A.I.R. 1927 Cal. 855, *Rel. on.* (*Cuming and Mukerji, JJ.*). GOPESWAR SEN *v.* BIJOY CHAND. **108 I.C. 883=55 Cal. 1167=32 C. W. N. 580=A.I.R. 1928 Cal. 854.**

—S. 34—Irregular accounts.

———Accounts prepared at considerable intervals from memory or possibly inadequate materials cannot be treated as proof of the actual income and expenditure of the estate to which they relate although they may be useful in cases where they corroborate other evidence. (*Phillips, Offg. C. J. and Srinivasa Aiyangar, J.*). RAJAGOPALA NAIDU *v.* SUBBAMMAL. **109 I. C. 153=51 Mad. 291=28 M. L. W. 158=A.I.R. 1928 Mad. 180=54 M.L.J. 703.**

—S. 34—Jama wasil baki papers.

———Jama wasil baki papers, in the absence of proof that the writer or the maker of the entries therein at the date of the trial was dead or could not be procured without unreasonable expense or was otherwise such a person as is contemplated by S. 32, merely amount to evidence under S. 34 which in the presence of other substantive evidence may be used as corroborative but which cannot be regarded as proving any fact by itself. (*Rankin, C.J. and Mitter, J.*). JONAB BISWAS *v.* SIVA KUMARI DEBI. **104 I. C. 733=46 C. L. J. 253=A. I. R. 1927 Cal. 855.**

—S. 34—Proof.

———*Necessity of formal proof that books are kept in course of business has been dispensed with.*

Under the old Evidence Act II of 1855, books to be admissible had to be proved to have been regularly kept in course of business. In the later Act I of 1872 the words "proved to have been" have dropped. This amounts to material alteration in the law. The legislature has dispensed with the necessity of any formal proof that the books were kept up in the regular course of business. It is a matter of intrinsic evidence as to whether the books in question were books of account and regularly kept in the regular course of business. The only limitation imposed by the statute is that the statement contained in the account books "shall not alone be sufficient to charge any one with liability." The value of the entries is corroborative and cannot be used as independent evidence to charge any person with liability. 18 All. 92; *Rel. on*; 27 Cal. 118, *Ref.*; 4 Bom. 576, *Dist.* (*Young and Sen, JJ.*). EMPEROR *v.* NARBADA PRASAD. **121 I. C. 819=1930 Cr. C. 54=51 All. 864=31 Cr.L.J. 356=A.I.R. 1930 All. 38.**

EVIDENCE ACT (1872), S. 34—Proof.

———Where there were only the account books and the general statement of the plaintiff that there were dealings between him and defendant.

Held, that the dealings were not proved under S.34, Evidence Act, in absence of evidence of specific sums having been paid. A. I. R. 1924 Lah. 540; A.I.R. 1922 Lah. 338; A. I. R. 1923 Lah. 431 and 82 P.R. 1914, *Foll.* (*Addison, J.*). BUTA *v.* TIRLOKCHAND. **100 I.C. 862= A.I.R. 1927 Lah. 903.**

———*Party producing accounts should prove reliability of each item.*

It is for the party who puts forward the accounts to explain them and support them in such a way as to convince the Judge there is such a probability of their accuracy as to make it reasonable for a prudent man to accept them. 26 Bom. 363, *Foll.*

A mere account book without more does not prove anything. 52 I.C. 704, *Foll.*

The law requires proof not only of account books generally but of each item, that is, in the interest of the person producing the books but with regard to admissions, *i.e.*, entries against the producer's own pecuniary interest, the law dispenses with all proof save that the book has been kept by or under the authority of the producer. (*Odgers and Madhavan Nair, JJ.*). MATHILDA SICE *v.* FRITZ GAEBELE. **96 I.C. 429=23 M.L.W. 272= A.I.R. 1926 Mad. 955.**

———*Entries in account books must be proved by independent evidence.*

Mere entries in books of account are not by themselves sufficient to charge any person with liability. The reason is that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of third parties. There must be independent evidence of the transaction to which the entries relate. (*Wadegaonkar, A.J.C.*). BENI *v.* BISAN DAYAL. **89 I.C. 371=A.I.R. 1925 Nag. 445.**

———Mere production of books of accounts without proof is not sufficient to charge a defendant with liability although it may have been shown that they had been regularly kept in the course of business. 15 C.L.J. 621 and 47 P.L.R. 1914, *Foll.* (*Abdul Raoof and Harrison, JJ.*). ABDUL HAQ *v.* FIRM SHIVJI RAM. **71 I. C. 259= A. I. R. 1922 Lah. 338.**

—S. 34—'Regularly kept.'

———A book of account may be said to be regularly kept, although the book is not entered up from day to day or from hour to hour as the transactions take place. (*Das and Foster, JJ.*). CHANDRESHWAR PRASAD NARAIN SINGH *v.* BISHESHWAR PRATAB NARAIN SINGH. **101 I.C. 289= 5 Pat. 777=8 P.L.T. 510=A.I.R 1927 Pat. 61.**

———*Irregularities in keeping account books affect its weight, but not admissibility—Regularly means according to certain rules or system.*

The fact that the entries in an account book are not in chronological order, and that the roznama was written up once a week from memoranda on loose papers, which were destroyed, and that the khataoni was written up once a month, affect the weight of the evidence but not its admissibility.

According to S. 34, regularly or systematically means that the accounts are kept according to a set of rules or a system, whether the accountant has followed the rules or system closely or not. Nor is there anything in the section that says the system must be an elaborate or reliable one. Both those matters, the degree of excellence of the system, and the closeness with which it has been followed, affect the weight of the evidence of an entry, not its admissibility. The roughest memoranda of accounts kept generally according to the most elementary system, though often departing from it, are admissible in evidence, but would of course have no weight. (*Hallifax, A.J.C.*). KESHORAO *v.* GANESH. **95 I.C. 128= A. I. R. 1926 Nag. 407.**

EVIDENCE ACT (1872), S. 35—Birth and death-registers.

—S. 34—Unstamped receipt.

———Where, in an account book kept in the regular course of business copies of all receipts given by plaintiffs are entered, in the usual course, and one of such entries was that of an unstamped receipt, *held*, that nevertheless the entry was admissible under S. 34 of the Act. (*Hallifax, A.J.C.*). CHOUDHURI RAMPRASAD *v.* NATHU RAM. **68 I.C. 494= A.I.R. 1923 Nag. 32.**

—S. 35.

Basis and scope.
Birth and death registers.
Civil Court records.
Guardianship certificate.
Judgments.
Municipal records.
Police records.
Records of custom.
Reports of officers.
Revenue records.
School certificate and registers.
Miscellaneous.

—S. 35—Basis and scope.

———S. 35 covers public documents of Native States or foreign countries. (*Fawcett and Madgavkar, JJ.*). BHANUDAS NARAYANBOA *v.* KRISHNABAI CHINTAMANI. **99 I.C. 307=50 Bom. 716= 28 Bom.L.R. 1225=A.I.R. 1927 Bom. 11.**

———The section is based upon the circumstance that in the case of official documents entries are made in the discharge of public duty by an officer who is authorised and accredited agent appointed for the purpose. The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity. (*Walmsley and Mukerjee, JJ.*). TARAK CHANDRA CHUCKERBUTTY *v.* PARASANNA KUMAR SAHA. **78 I. C. 719=39 C.L.J. 389= 28 C.W.N. 679=A.I.R. 1924 Cal. 654.**

—S. 35—Birth and death registers.

———Entry in death register may be rejected when used to prove or disprove death on particular day, if register is prepared in casual way. (*Cuming, J.*). KALIPADA DAS KARMAKAR *v.* SASHI BHUSAN MAJHI. **A.I.R. 1930 Cal. 636.**

———*Date of death—Inference of.*

Where the date of death of a person was in question, and a report of death in the kotwal's diary, dated 6th January, 1913, was produced but it did not mention the date of death but the lower Court inferred that the death was within a week of the date of the report,

Held, that the inference drawn by the lower Court was not altogether erroneous or one which could not have been reasonably drawn from facts proved. (*Kinkhede, A. J. C.*). MT. BANI *v.* GANAJI. **103 I.C. 883=A.I.R. 1927 Nag. 326.**

———*Copy of birth register is admissible to prove age.*

Where the original birth register of a particular year was found to have been lost, but a copy thereof, prepared by the public servant whose duty it was to maintain such a register, was found and it was relied upon to show that certain *A* was born in that year and it was also found that the public

EVIDENCE ACT (1872), S. 35—Birth and death-registers.

servant who prepared that copy had died shortly after,

Held, that the copy was admissible. (*Venkatasubba Rao, J.*). CHAKRAVARTHI *v.* PUSHPAVATHI. **95 I.C. 1005=23 M.L.W. 688= A.I.R. 1926 Mad. 985.**

———*Death Register kept in police station is official book.*

The Death Register kept at the police station is an official book and the entries in it are legally admissible. Such a register is an official book, register or record made by a public servant in the discharge of his official duty within the meaning of S. 35 of the Evidence Act, and an entry made therein would, therefore, be itself a relevant fact. 14 O. C. 68, 15 O. C. 321; 19 O. C. 221; 54 I.C. 166, *Dist.*; 46 Cal. 152 and 22 O.C. 124, *Foll.*; 41 Mad. 26, *Ref. to.* (*Sulaiman and Kanhaiya Lal, JJ.*). SHIB DEO MISRA *v.* RAM PRASAD. **87 I.C. 938= 46 All. 637=22 A.L.J. 690=A.I.R. 1925 All. 79.**

———Death register is public document and is ordinarily conclusive of dates of deaths recorded. (*Spencer, Offg. C. J. and Srinivasa Aiyangar, J.*). RANGAPPA NAYAKAR *v.* RANGASAMI NAYAKAR. **88 I.C. 249=1925 M.W.N. 232= A.I.R. 1925 Mad. 1005.**

———Death Register—Entries during Epidemic Season appearing to have been made at one time and not from day to day—Informant not examined—Register is not of much value. (*Shah, Ag. C. J. and Crump, J.*). SHIVA BASAPPABIN LAGMAPPA MANOLI *v.* NILAWA KOM SATAPA MANOLI. **82 I. C .618=24 Bom. L.R.1162= 47 Bom. 110=A.I.R. 1923 Bom. 17.**

———Register of births and deaths—Entry not proved to be in handwriting of choukidar is inadmissible. (*Lindsay and Gokul Prasad, JJ.*). SHEO BALAK *v.* GAYA PRASAD. **77 I.C. 52= 20 A.L.J. 601=A.I.R. 1922 All. 510.**

———Death Register—Prepared during times of Epidemic—Not of much value to prove order of death. (*Macleod, C. J. and Shah, J.*). Y. N. KULKARNI *v.* LAXMIBAI KESHEO GOPAL. **77 I. C. 117=24 Bom. L.R. 836= 47 Bom. 37=A.I.R. 1922 Bom. 347.**

—S. 35—Civil Court records.

———Where a paper book of Calcutta High Court relating to another case was tried to put in evidence in a case in a Patna Court,

Held, in the absence of proof that the papers printed in that book were the true copies of the original documents it could not be admitted. (*Das and Wort, JJ.*). SANTOKHI MANDAR *v.* RAMESHWAR SINGH. **114 I.C. 469=7 Pat. 187= 11 P.L.T.12=A.I.R. 1929 Pat.41.**

———A sale certificate is not a public or other official book, register or record: A.I.R. 1924 Cal. 526; 17 Cal. 849 and 188 All. 478, *Rel. on.* (*Cuming and Mukherji, JJ.*). AMBICA CHARAN *v.* KUMUD MOHUN. **110 I.C. 521= A. I. R. 1928 Cal. 893.**

———Description of property given in a sale proclamation or a sale-certificate does not amount to a statement within the meaning of Ss. 32 and 35. A.I.R. 1922 Mad. 71 (F. B.), *Foll.* (*Cuming and Mukerji, JJ.*). AMBICA CHARAN *v.* KUMUD MOHUN. **110 I.C. 521=A.I.R. 1928 Cal. 893.**

———Process-server's report is inadmissible if he is not examined. (*Jai Lal, J.*). FATEH MUHAMMAD *v.* HAKIM KHAN. **96 I.C. 825= A.I.R. 1926 Lah. 629.**

EVIDENCE ACT (1872), S. 35—Judgments.

———Register of Civil suits—Entry as to disposal of suit is relevant. (*Richardson and Suhrawardy, JJ.*). SARAT CHANDRA DAS *alias* SACHIDANANDA DAS *v.* SM. SAROJINI RUDRAJA. **79 I.C. 257=27 C.W.N. 897= A.I.R. 1924 Cal. 135.**

———An extract from Register of Applications in respect of Minors and Lunatics is inadmissible in evidence on the question of age. (*Das and Ross, JJ.*). GOKHULA NAND *v.* B. BALDEO NARAYAN SINGH. **86 I.C. 681=5 P.L.T. 403= A.I.R. 1924 Pat. 796.**

—S. 35—Guardianship certificate.

———Entry in guardianship certificate is sufficient to prove age of persons. A.I.R. 1926 Oudh 88 and A.I.R. 1929 Oudh 134, *Foll.* (*Stuart, C.J. and Srivastava, J.*). MEHDI ALI *v.* WALAYAT HUSAIN KHAN. **121 I.C. 277=7 O.W.N. 25= A.I.R. 1930 Oudh 97.**

———In the province of Oudh a certificate of guardianship issued by a District Judge to a guardian appointed by him of a particular minor is a record made by a public servant in the discharge of his official duties and an entry in such record is therefore admissible under S. 35: A.I.R. 1926 Oudh 88, *Foll.*; 17 Cal. 849; 18 All. 478 and 5 P.L.J. 460, *Expl.* and *Not foll.* (*Misra and Srivastava, JJ.*). AMEER HASAN *v.* MD. EJAZ HUSAIN. **117 I.C 456=6 O.W.N. 51= A.I.R. 1929 Oudh 134.**

———In the Province of Oudh a District Judge is bound by law to prepare a certificate of guardianship.

Where the guardianship certificate was prepared in the office of the District Judge and signed by the incumbent of the office as required by the rules framed by the Oudh J. C.'s Court under S. 50 (j) of the Guardians and Wards Act:

Held, that it was a public document made by a public servant in the discharge of his official duty and was therefore a record such as is mentioned under S. 35 of the Evidence Act and an entry therein as to the birth of a minor was relevant fact. 17 Cal. 849, *Diss.*(*Dalal and Wazir Hasan, A.J.Cs.*). MOHAN LAL *v.* MOHAMMAD ADIL. **89 I.C.69= 12 O.L.I. 453=2 O.W.N. 601=A.I.R. 1926 Oudh 88.**

———The certificate of guardianship cannot be regarded as evidence of minority under S. 35. (*Mookerjee and Chotzner, JJ.*). HARA KUMAR DAY *v.* JOGENDRA KRISHNA RAY. **71 I.C. 336= 38 C.L.J. 186=A. I. R. 1924 Cal. 526.**

—S. 35—Judgments.

———Recitals in judgment not *inter partes* of relevant fact are not admissible in evidence. A.I.R. 1929 P.C. 99; 20 C.W.N. 643 and A.I.R. 1922 Mad. 71, *Rel. on.* (*Addison, J.*). ASA SINGH *v.* MANOHA RAM. **121 I.C. 509=11 L.L.J. 526= A.I.R. 1930 Lah. 237.**

———Judgments *inter partes* are admissible under S. 35 inasmuch as they form a record of facts in issue made by public servant in the discharge of his official duty. 18 Mad. 73, *Rel. on.* (*Kinkhede, A.J.C.*). GOPAL RAO *v.* SITARAM. **97 I.C. 694= 9 N.L.J. 215=A.I.R. 1927 Nag. 19.**

———Section 35 has no application to judgments. It would be straining the language of S. 35 to hold that a Judge, when he writes a judgment, is making entries in a public or official book, register or record and that every statement made in a judgment is an entry in such book, register or record. 9 Cal. 586, *Dist.* (*Schwabe, C. J., Coutts Trotter and*

EVIDENCE ACT (1872), S. 35—Municipal records.

Kumaraswami Sastri, JJ.). TRIPURANA SEETHAPATHI RAO DORA *v.* ROKKAIN VENKANNA DORA.
66 I.C. 280=45 Mad. 332=15 M.L.W. 316=1922 M.W.N. 147=30 M.L.T. 160=A.I.R. 1922 Mad. 71=42 M.L.J. 324 (F.B.).

—S. 35—Municipal records.

———*Assessment list prepared by Municipality.*

Although an assessment list prepared by a Municipality is not the final or sole test of the liability of the assessee to pay the particular taxes, there is a presumption that the assessment list was duly published at the time the assessment was made and that after due publication it became final, and if an assesee alleges in the fact of an entry in such a list that an alleged tax was never paid by him or his predecessor-in-interest but by third persons, the burden is on him to prove that it was so realized. (*Scroope, J.*). BHAGALPUR MUNICIPALITY *v.* MAULAVI FAIK. **A.I.R. 1930 Pat. 370.**

———Entry in Register that a well is public is no evidence against owner when owner had no notice of the entry. (*Abdul Raoof and Lumsden, JJ.*). NUR AHMAD KHAN *v.* THE MUNICIPAL COMMITTEE, AMRITSAR. **75 I.C. 896=A.I.R. 1924 Lah. 511.**

—S. 35—Police records.

———Record of First information report is corroborative and not substantive evidence. (*Sulaiman and Mukerjee, JJ.*). MOHAN SINGH *v.* EMPEROR.
85 I.C. 647=26 Cr. L.J. 551=6 L.R.A. Cr. 49=A.I.R. 1925 All. 413.

———*List of suspects drawn up by Police is not admissible.*

Where the question is whether the accused were present at an unlawful meeting, a list of suspects drawn up by the Police at the time is not admissible in evidence and if admissible it proves nothing beyond the fact that the Police expected to find the accused amongst those present. (*Fforde and Scott-Smith, JJ.*). BAWA SARUP SINGH *v.* THE CROWN. **88 I.C. 22=7 L.L.J. 264=26 P.L.R. 566=26 Cr. L.J. 1078=A.I.R. 1925 Lah. 299.**

———Police report is admissible under S. 35. (*Banerji and Kendall, JJ.*). MUHAMMAD SALIUM *v.* RAM KUMAR SINGH. **110 I.C. 657=26 A.L.J. 1001=A.I.R. 1928 All. 710.**

—S. 35—Records of custom.

———Entry in the *wajib-ul-arz* is admissible in proof of the custom under S. 35 and its validity does not depend upon the question whether the *wajib-ul-arz* has been verified by the proprietors of the village or not. (*Wazr Hasan, J.*). MEHDI HASAN *v.* ABDUL WAHID. **101 I. C. 820=1 L.C. 73=A.I.R. 1927 Oudh 608.**

———Officer specially deputed to record customs prevailing in a locality—Record by such officer is evidence and is admissible without further proof. (*Mukerji and Daniels, JJ.*). SHYAM LAL SHAH *In re.* **86 I. C. 729=49 All. 848.**
6 L.R. A. Civ. 186=A.I.R. 1925 All. 648.

—S. 35—Reports of officers.

———Official reports regarding the nature of any estate are valuable and in many cases the best evidence of facts stated therein, but opinions therein expressed should not be treated as conclusive in respect of matters requiring judicial determination, however eminent the authors of such reports may be. (*Lord Sinha*). MARTAND RAO *v.* MALHAR RAO. **107 I.C. 7=55 Cal. 403=24 N.L.R. 25=55 I.A. 45=47 C.L.J. 150=30 Bom. L.R. 251=27 M.L.W. 350=32 C.W.N. 621=11 N.L.J. 26=1928 M.W.N. 942=A. I. R. 1928 P.C. 10=54 M.L.J. 397 (P.C.).**

EVIDENCE ACT (1872), S. 35—Revenue records—Batwara papers.

———Correctness of entry on a copy indicating the date on which it was completely challenged—Report of the copyist in an inquiry about its correctness made departmentally is not relevant without the copyist being cited as a witness. 31 All. 457 (P.C.); 24 Mad. 427 and A.I.R. 1923 Mad. 322, *Dist.* (*Tek Chand, J.*). NIZAM DIN *v.* MOHAMMAD IQBAL.
108 I. C. 619=A.I.R. 1928 Lah. 643.

———The result of an inquiry by a kanungo under S. 202, C. P. Code, embodied in the report, is an entry in a public record stating a fact in issue and made by a public servant in the discharge of his official duty and the report is, as such, admissible in evidence under S. 35, Evidence Act. (*Wazir Hasan, J.*). JAGDAT *v.* SHEO PAL.
104 I.C. 287=1 L.C. 259=A.I.R. 1927 Oudh 323.

———Mr. Taylor's report about the resumability of mokhasas in the Madras Presidency and the Government order thereon are entitled to great weight. A. I. R. 1924 Mad. 589, *Rel. on.* (*Spencer and Odgers, JJ.*). VEERASWAMI *v.* SEETHARAMA.
98 I.C. 65=A.I.R. 1926 Mad. 1089=51 M.L.J. 394.

———The crop cutting report of the Deputy Collector made under S. 40, Bengal Tenancy Act, should be considered a public document and is evidence of the amount of crops produced by the land. 4 Cal. 79, *Rel. on.* (*Adam, J.*). HARGOBIND SINGH *v.* KISHUNDEYAL GOPE. **95 I. C. 966=7 P.L.T 671=A.I.R. 1926 Pat. 436.**

———Government reports have no judicial authority where they express opinions on private rights of parties but they are entitled to great weight so far as they supply information of official proceedings and historical facts. (*Jwala Prasad and Ross, JJ.*). H. MATHEWSON *v.* SECRETARY OF STATE.
84 I.C. 405=3 Pat. 673=A.I.R. 1924 Pat. 616.

———*Reports made in obedience to order of superior officer come within S.* 35.

The Tahsildar made reports in obedience to an order passed by his superior officer and in discharge of his official duty; whether it is a duty enjoined on him by the law of the country to send up these reports or not, he was bound as an officer subordinate to the Deputy Collector to make the report when he was called upon to do so and the report was made as an official report after such enquiries as the Tahsildar could make, and his report was kept on the record of the land acquisition case in the Collector's office.

Held, it comes expressly within the words of S. 35. (*Krishnan and Ramesam, JJ.*). RATHNAMASARI *v.* SECRETARY OF STATE.
72 I.C. 214=17 M.L.W. 415=32 M.L.T. 279=A.I R. 1923 Mad. 332=44 M.L.J. 132.

———Though reports and books are not strictly speaking evidence or do not at all come within the scope of S. 35 of the Evidence Act, there may be no objection to their being read for what they may be worth. (*Richardson and Shamsul Huda, JJ.*). JOGESH CHANDRA *v.* MOKBUL ALI.
60 I. C. 984=25 C. W. N. 857=A. I. R. 1921 Cal. 474.

—S. 35—Revenue records—Batwara papers.

———A Batwara signed by the partition Deputy Collector and containing entries required by the provisions of Ch. 7, is a record made in the course of official duty within the purview of S. 35, Evidence Act. 38 I. C. 205. *Ref.* (*Mullick, Ag. C. J. and Jwala Prasad, J.*). RAMSARUP RAUT *v.* RAMNARAIN TEWARY. **114 I. C. 479=7 Pat. 85=10 P. L. T. 399=A. I. R. 1929 Pat. 32.**

EVIDENCE ACT (1872), S. 35—Revenue records —Batwara papers.

———Batwara papers relating to partition proceedings between landlords can be used as evidence to show that certain lands were rent free. (*Suhrawardy and Chotzner, JJ.*). CHATTRA NATH CHOWDHURY *v.* BABAR ALI. **86 I. C. 835= 29 C. W. N. 333=A. I. R. 1925 Cal. 635.**

———A *Batwara Khasra* is not a "record" within the meaning of S. 35 of the Evidence Act, 1872, and an entry made therein of the name of a tenant in possession is not admissible in evidence. 25 C. 90, *Ref.* (*Adami, J.*). SADHU SARAN *v.* H. AMBICA LAL. **68 I. C. 676= A. I. R. 1923 Pat. 163.**

———A *Batwara Khasra* is admissible in evidence. 38 I.C. 491, *Foll.* (*Coutts and Das, JJ.*). TRILOKE PRASAD SINGH *v.* UMANAND LAL. **72 I.C. 634= A.I.R. 1922 Pat. 447.**

—S. 35—Revenue records—Chittas.

———Chittas are admissible in evidence, though what their value should be is a matter to be determined by the Court in the particular circumstances of the case. 9 Cal. 741, *Dist.* (*Cuming and Roy, JJ.*). SARAT CHANDRA *v.* SARALA BALA GHOSH. **105 I.C. 61= A.I. R. 1928 Cal. 63.**

—S. 35—Revenue records—Entries about rent.

———It seems clear from Bengal Regulation (7 of 1822) that the recording of the rate of rent which appear in the *rubkars* of the Collectors is a duty imposed upon them by the regulation itself and the matters so recorded are evidence which the Court is entitled to take into consideration in settling the question of enhancement of rent. (*Dawson Miller, C. J. and Mullick, J.*). DEO NARAYAN SINGH *v.* DWARKA PRASAD SINGH. **109 I.C. 136= P.L.T. 679=A. I. R. 1928 Pat. 429.**

———Certified copy of a paper in Collectorate not strictly fulfilling the test of S. 35, Evidence Act is not sufficient to rebut presumption under S. 50 (2), B. T. Act. (*Walmsley and Mukerji, JJ.*). TARAK CHANDRA CHUKERBUTTY *v.* PRASUNNA KUMAR SAHA. **78 I.C. 719=28 C.W.N. 679= 39 C.L.J. 389=A.I.R. 1924 Cal. 654.**

———The collection papers which have not been proved by persons who make the collections should not be treated as independent evidence of the amount of rent realised. (*Suhrawardy, J.*). FAIJADDIN *v.* AGNI KUMAR SARMA. **71 I.C. 300= A.I.R. 1924 Cal. 370.**

—S. 35—Revenue records—Entries in.

———Bombay Land Revenue (Amendment) Act (1913), S. 7—Entries under are not conclusive but are evidence of fact—Evidence Act, S. 35. A.I.R. 1920 P.C. 46 and 18 All. 176 (P.C.), *Dist.* (*Sir Binod Mitter*). GANGABAI *v.* FAKIRGOWDA SOMAYPAGOWDA DESAI. **123 I.C. 166= 32 Bom. L.R. 368=57 I.A. 61=51 C.L.J. 592= 32 M.L.W. 34=A.I.R. 1930 P.C. 93= 58 M.L.J. 322 (P.C.).**

———Extracts from supplementary revenue records are not sufficient to prove mortgage. (2 U.B.R. (1907-1909) Evidence 19, *Foll.*). (*May Oung and Duckworth, JJ.*). KO PO MAUNG *v.* MA KEIN GALE. **1 Rang. 562=77 I.C. 380= A.I.R. 1924 Rang. 135.**

———Under S. 35 of the Evidence Act, the entry in Revenue Register No. VII is a relevant fact. (*Pratt, J.*). MAUNG HLAING *v.* MAUNG CHIT SU. **76 I.C. 449=1 Rang. 135=A.I.R. 1923 Rang. 196.**

———Revenue records as made in Burma are relevant evidence under S. 35. (*Duckworth and Pratt, JJ.*). MG. PO LUN *v.* MA E MAI. **74 I.C. 47= 1 Bur. L. J. 111=A.I.R. 1923 Rang. 57.**

EVIDENCE ACT (1872), S. 35—Revenue records —Khewat.

———*Entry, in road cess return.*

The fact that certain lands were entered in a road-cess return filed by a person in respect of lands held by him under the zamindar is *prima facie* evidence that they were not held adversely to the zemindar, and the presumption cannot be got over unless it is established that the lands were erroneously included. (*Chatterjea and Greaves, JJ.*). MONMOTHA NATH *v.* ANATH BUNDHU. **61 I.C. 469=25 C.W.N. 106=A.I.R. 1921 Cal. 754.**

———In the absence of any evidence to the contrary entries in the revenue papers must be deemed to be correct. 8 O.C. 145, *Foll.* (*Wazir Hasan, A.J.C.*). DURGA *v.* RAM PADARATH. **65 I.C. 749= 8 O.L.J. 495.**

—S. 35—Revenue records—Hissawari.

———A *hissawari* prepared in consequence of a demand by the Collector under S. 30, Bengal Land Registration Act, is not admissible under S. 35 of the Evidence Act as it is not a public or other official book, register or record. (*Chamier, C.J. and Sharjuddin, J.*). TANHA SINGH *v.* BANDHU SINGH. **59 I.C. 8=1919 P.H.C.C. 323.**

—S. 35—Revenue records—Inam register.

———The inam Register is a great act of state and is entitled to very great weight. In particular cases some reasons may be given why the inam register might be discounted. But the absence of any proof that the inam commissioner made some actual enquiry is no such reason as could depreciate the authenticity of the Inam Register. (*Ramesam, J.*). KRISHNAMACHARLU *v.* S. VIJAYASARTHY. **88 I. C. 646=22 M. L. W. 73= 1925 M. W. N. 117=A.I.R. 1925 Mad. 823= 48 M. L. J. 467.**

—S. 35—Revenue records—Jamabandi papers.

———Where the question is as to whether a certain land is or is not parjaut land, an entry in the jamabandi is admissible and is of great value. (*Sulaiman and Mukerjee, JJ.*). SRILAL GOAIKA *v.* KESHODAS. **87 I.C. 368=A. I. R. 1926 All. 83.**

———Jamabandi prepared by landlord is admissible to show basis of assessment. 25 C.W.N. 204, *Foll.* (*Mullick, A.C.J. and Kulwant Sahay, J.*). SIB SAHAI LAL *v.* BIJAI CHAND. **90 I.C. 862= 5 Pat. 157=7 P.L.T. 375= 1926 P.H.C.C. 19=A.I.R. 1926 Pat. 197.**

———Jamabandi is not a record of customary cess. (*Stuart, J.*). (KHAN BAHADUR) MUHAMMAD ASHGHAR ALI KHAN *v.* RAMMON. **71 I. C. 432= A.I.R. 1923 All. 378.**

—S. 35—Revenue records—Katardhar papers.

———The katardhar papers drawn up under the Punjab Land Reservation Act are public documents provable by certified copies thereof : 63 P.R. 1913, *Foll.* (*Dalip Singh, J.*). SHAMAS-UD-DIN *v.* GANESH GIR. **117 I.C. 80=11 L.L.J. 138= A.I.R. 1929 Lah. 328.**

—S. 35—Revenue records—Khewat.

———Khewat entry—Origin of entry known—Entry alone should not be relied upon. 44 Mad. 421 (P.C.), *Rel. on.* (*Stuart, C. J. and Misra, J.*). PIRTHA SINGH *v.* MOHAM-MAD ALI. **94 I.C. 188= 13 O.L.J. 126=A.I.R. 1926 Oudh 427.**

———Even if the entries do not come under the Local Tenancy Act, they are relevant under S. 35 of the Evidence Act, being made by a public officer in the discharge of his duties. 5 Cal. 744, *Foll.* (*N. R. Chatterjee and Chotzner, JJ.*). PROTAP CHANDRA *v.* JAGADISH CHANDRA. **82 I. C. 886=40 C. L. J. 331= A. I. R. 1925 Cal. 116.**

EVIDENCE ACT (1872), S. 35—Revenue records —Maps.

—S. 35—Revenue records—Maps.

———No inference can be drawn from thak map whether a particular river was included in the grant of permanent settlement. Thak authorities having nothing to do with title or possession : 30 Cal. 291 and 22 Cal. 252, *Rel. on.* (*Greaves and Mukerjee, JJ.*). DEBENDRA LAL *v.* SECRETARY OF STATE. **103 I.C. 13=31 C.W.N. 473= 46 C.L.J. 322=A.I.R. 1927 Cal. 403.**

———*Settlement map is more reliable than khasra.*

Inasmuch as the Settlement map forms the original record of area of a field and the entry in the *khasra* is no more than its copy, the former is more reliable in case of conflict between the two in respect of the area. (*Hallifax, A.J.C.*). LAHARAM *v.* GURUMUKHRAO. **99 I. C. 628= A. I. R. 1927 Nag. 204.**

———*Record-of-rights, cadastral map and revenue survey map are* prima facie *correct.*

Revenue Survey map should be properly judicially received in evidence as correct when made. 30 Cal. 291 (P. C.). A Cadastral Survey Map is a map of very great importance. The entry in the Record-of-rights operates in the same way between landlord and tenant, as between landlords of the same or of the neighbouring estates, or between tenant and tenant. The entry must be presumed to be correct until it is shown by evidence to be incorrect. (*Das and Ross, JJ.*). MAZHARUL EKBAL *v.* RAJAGOPAL LAL RAY BAHADUR AND M. MARIAM-UN-NISA. **84 I.C. 488=1924 P.H.C.C. 213= A.I.R. 1924 Pat. 719.**

———*Thak and survey maps are not conclusive proof.*

It cannot be maintained as a matter of law that thak and survey maps constitute sufficient proof that what was part of the bed of the river at that time was included in the Permanent Settlement of 1793 ; and, no Court can properly act, on the assumption that in 1793 a state of things existed different from what appears from any evidence before the Court. (*Mookerjee and Cuming, JJ.*). SECRETARY OF STATE *v.* UPENDRA NARAIN ROY. **71 I. C. 849=36 C.L.J. 336= A. I. R. 1923 Cal. 247.**

———Agreement to be bound by survey map—Is binding on parties. (*Das and Adami, JJ.*). BABU RAGHUNATH PRASAD SINGH *v.* RAMESHWAR SINGH BAHADUR. **A.I.R. 1922 Pat. 87.**

—S. 35—Revenue records—Pedigree.

———Settlement pedigree amounting to statement of deceased with special knowledge before controversy or prepared in discharge of public duty is admissible under Evidence Act, S. 35. 3 O.L.J. 327; 1 O.L.J. 447; 19 O.C. 321 and A.I.R. 1926 Oudh 101, *Appl.* (*Misra and Nanavutty, JJ.*). SARFARAZ KHAN *v.* MT. RAJANA. **112 I.C. 834= 4 Luck. 39=6 O.W.N. 1285= A. I. R. 1929 Oudh 129.**

———*Old public records—Statements in, should be presumed as true.*

Evidence regarding the tribe of a person taken from public records for a series of years (here since 1852) and recorded in accordance with the requirements of the law, cannot in a pedigree case be disregarded for the reason that a particular link in the chain is not found, especially when there is no suggestion that entries in the records were false or that there was an existing reason why deliberately false entries should have been made. Statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorised agents of the public in the

EVIDENCE ACT (1872), S. 35—Revenue records —Record-of-Rights.

course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community. In many cases, indeed, in nearly all cases, after a lapse of years it would be impossible to give evidence that the statements contained in such documents were in fact true, and it is for this reason that such an exception is made to the rule of hearsay evidence. (*Lord Carson*). GHULAM RASUL *v.* SECY. OF STATE. **86 I.C. 654=23 A.L.J. 639=52 I.A. 201= 2 O.W.N. 646=22 M.L.W. 299= 30 C.W.N. 101=26 P.L.R. 390= 6 Lah. 269=A.I.R. 1925 P.C. 170= 50 M.L.J. 120 (P.C.).**

—S. 35—Revenue records—Perepatraks.

———*Perepatraks* are admissible in evidence to show actual area under crop. (*Kinkhede, A.J.C.*). SITARAM *v.* HIMATRAO. **90 I.C. 38= A.I.R. 1926 Nag. 161.**

—S. 35—Revenue records—Pyatpaing.

———A *pyatpaing* (foil of Register VII) is admissible in evidence, though it has not been signed by the transferor and transferees, where it was proved by the Surveyor who recorded it. (*Duckworth, J.*). KO MAUNG *v.* MAUNG BA HLAINE **98 I.C. 166= 5 Bur. L.J. 116=A.I.R. 1926 Rang. 204.**

—S. 35—Revenue records—Quinquennial papers.

———The Quinquennial Register of 1795 kept under the Bengal Regulation 48 of 1793 is admissible in evidence to rebut the presumption under the B. T. Act, S. 50 (2). (*Suhrawardy and Duval, JJ.*). HEM CHANDRA ROY CHOUDHURY *v.* BENAYAKDAS ACHARJI CHOUDHURY. **86 I.C. 538= A.I.R. 1925 Cal. 1037.**

———The registers prepared under Regulation 48 of 1793 (Bengal) and now maintained under Act VII of 1876, *e.g.*, Mutation, Quinquennial and Settlement Registers, are public documents.

The entries in these registers are receivable in evidence *quantum valeat* for what they are worth. They are, however, not conclusive and may be shown to be inaccurate. (*Jwala Prasad and Ross, JJ.*) RAMANANDHAN SAHAY *v.* JAIGOVIND PANDEY. **75 I.C. 955=2 Pat. 839= A.I.R. 1924 Pat. 213.**

———Quinquennial papers prepared by the Revenue authorities from 1795 to 1799 under the provisions of Regulation 48 of 1793 containing information as to the lands comprised in revenue-paying estates in the district of Mymensingh are admissible in evidence. 20 Cal. 940, *Foll.* (*Mookerjee and Buckland, JJ.*). SECY. OF STATE *v.* WAZED ALI. **65 I.C. 866=34 C.L.J. 141= A.I.R. 1921 Cal. 687.**

—S. 35—Revenue records—Rasadbandi.

———The rasadbandi or the chowkidara papers are not admissible in evidence as public documents. (*Zafar Ali, J.*). THAKUR SINGH *v.* GHANAYA SINGH. **94 I.C. 125=27 P.L.R. 198= A.I.R. 1926 Lah. 452.**

—S. 35—Revenue records—Record-of Rights.

———Record-of-Rights—The draft record is admissible only for the purpose of showing what was the entry made in the earlier proceedings before the final publication. 1 P. L. T. 224, *Dist.* (*Kulwant Sahay and Macpherson, JJ.*). HARDEO NARAYAN SINGH *v.* KAPIL SINGH. **108 I.C. 417= A.I.R. 1928 Pat. 353.**

———The Record-of-Rights is a public record prepared by public officers appointed under the statutory authority of the Local Government and, therefore, is admissible under S. 35. (*B. B. Ghose*

EVIDENCE ACT (1872), S. 35—Revenue records —Settlement register.

and Graham, JJ.). FAZLAR RAHMAN BISWAS *v.* GOLAM KADAR MIA. **96 I.C. 959=30 C.W.N. 689= A.I.R. 1926 Cal. 862.**

—S. 35—Revenue records—Settlement register.

———Where Settlement Register of 1876 was signed by Acting Director of Revenue Settlement and was dated from the Revenue Settlement office,

Held, it cannot be too clearly premised, that any such record would not be held to be conclusive evidence of ownership; but upon the other hand one cannot be blind to the importance of such a document which appears, *de facto*, to have settled the bounds of the possession of certain plots for a period of thirty-five years (that is to say, from 1876 to 1910). *(Lord Shaw)*. T. P. SRINIVAS CHARIAR *v.* C. N. EVALAPPA MUDALIAR. **68 I.C. 1= 45 Mad. 565=16 M. L.W. 247= 31 M. L.T. 1=49 I.A. 237=24 Bom.L.R. 1214= 21 A.L.J. 250=27 C.W.N. 317=36 C.L.J. 524= A.I.R. 1922 P.C. 325=43 M.L.J. 536 (P.C.).**

—S. 35—Revenue records—Village notes.

———*Stuart, C.J.*—Where a Settlement Officer inspected a village and recorded in respect of it certain remarks. they are admissible in evidence under S. 35, being entries in a public record made by a public servant in discharge of his official duty. *(Stuart, C. J. and Wazir Hasan, J.)*. SHEO BAHADUR SINGH *v.* BISHUNATH. **99 I.C. 876=2 Luck. 4= 4 O.W.N. 15=8 L.R.A. Rev. 48= A. I. R. 1927 Oudh 74.**

———A village note prepared by a Settlement Officer is only a piece of evidence and no presumption of correctness is attached to it. *(Kulwant Sahay, J.)*. BHAGWAN SINGH *v.* LACHUMAN PRASAD. **90 I. C. 579=3 Pat. L. R. 225= A. I. R. 1925 Pat. 754.**

—S. 35—Revenue records—Village papers.

———A definition of "shares," in revenue and village papers affords by itself but a very slight indication of an actual separation. A. I. R. 1920 P. C. 46, *Foll.* *(Addison, J.)*. KARTAR SINGH *v.* LONA. **113 I.C. 773= A.I.R. 1929 Lah. 74.**

—S. 35—Revenue records—Writs of attachment.

———Where writs of attachment issued in 1792 and 1797 must have been prepared when the Collector took possession of the Zemindari upon default in payment of revenue by the proprietor and the documents might be relevant in connection with the history of the estate and might be used to show that the proprietor defaulted and the Collector went into possession, but there was nothing to indicate that the duty was cast upon the Collector to prepare a complete record of all the tenures then in existence.

Held, that in view of the scope of the two attachment writs no inference favourable to the landlord can be drawn therefrom, and they cannot be treated as relevant under S. 11. *(Mookerjee and Chotzner, JJ.)*. TARAKUMAR GHOSE *v.* KUMAR ARUN CHANDRA SINGH. **74 I.C. 383= 36 C. L. J. 389=A.I.R. 1923 Cal. 261.**

—S. 35—School certificate and registers.

———Where the question is as to the age of a person, the entry of his date of birth in the school register based upon the statements of his deceased father is admissible under S. 35, the entry being in a public register stating a fact in issue and made by a public servant in discharge of his official duty. *(Gokaran Nath Misra and Pullan, JJ.)*. MUNNA LAL *v.* KAMESHARI DAT. **114 I.C. 801= 5 O.W.N. 1111=A.I.R. 1929 Oudh 113.**

EVIDENCE ACT (1872), S. 36—Burden of proof.

———Copy of a school leaving certificate given by a school master in a Native State wherein the age of the pupil is recorded and certified, as required by S. 78, Cl. (6), by the Political Agent assigned to that State by the Government of India, is admissible in evidence under S. 35. *(Fawcett and Madgavkar, JJ.)*. BHANUDAS NARAYAN BOA *v.* KRISHNABAI CHINTAMAN. **99 I.C. 307=50 Bom. 716= 28 Bom. L.R. 1225=A.I.R. 1927 Bom. 11.**

———Entries in School Register as to age are relevant. *(Dalal and Simpson, A. J. Cs.)*. AMBIKA PRASAD *v.* LAL BAHADUR. **83 I.C. 840= 11 O.L.J. 164=A.I.R. 1924 Oudh 353.**

———Certain entries from a School Register at Bikaner, which were not proved, are not sufficient to show that the defendant was actually at Bikaner at the time of the entries. *(Moti Sagar J.)*. MT. CHANDO *v.* SIRI RAM. **80 I.C. 177= A.I.R. 1923 Lah. 607.**

—S. 35—Miscellaneous.

———Document neither shown to be prepared by public servant nor shown as forming the act or record of public officer is inadmissible. *(Sen, J.)*. GAURI SHANKAR *v.* EMPEROR. **120 I. C. 547= 1930 A. L. J. 244=1930 Cr. C. 42= 31 Cr. L. J. 133=A.I.R. 1930 All. 26.**

———Entry in vaccination register regarding father's name of illegitimate child made three years after child's birth is inadmissible in evidence. *(Curgenven, J.)*. M. KANNIAPPAN *v.* KULLAMMAL. **1930 Cr. C. 88=1929 M. W. N. 696= 2 M. Cr. C. 275=A.I.R. 1930 Mad. 194.**

———*House registers.*

House registers not prepared by any Government Officer, or by any public servant whose duty it was to prepare them, though kept in the record room of the Deputy Commissioner, are inadmissible in evidence. The mere fact that they are kept in a public office does not lead to the inference that they are public documents: 7 Cal. 76, *Rel. on.* *(Zafar Ali, J.)*. MAHTAB DIN *v.* KASAR SINGH. **107 I. C. 618=A.I.R. 1928 Lah. 640.**

———Prescription register in Government dispensary is admissible though handwriting is not proved. *(King, J.)*. D. CRUZ *v.* D. CRUZ, MRS. W.E. **103 I. C. 512= 1 L. C. 203= A.I.R. 1927 Oudh 310.**

———A certificate of the Manchester Chamber of Commerce stating that there was a national strike in England resulting in the shortage of coal supplies and in difficulty of manufacture by the mills of the contracted goods is not a public record within S. 35. *(Fawcett, J.)*. GIRDHARDAS *v.* KERAWALA & Co. **93 I.C. 622=28 Bom.L.R. 232= A.I.R. 1926 Bom. 253.**

———Attendance register of association—Oral testimony to prove its being such is necessary. *(Fforde and Scott-Smith, JJ.)*. BAWA SARUP SINGH *v.* THE CROWN. **88 I.C. 22= 7 L. L.J. 264=26 Cr. L. J. 1078= 26 P.L.R. 566=A.I.R. 1925 Lah. 299.**

—S. 36—Burden of proof.

———Permanent Settlement—Onus of proving that certain lands were included in the settlement is on party affirming same—Production of thak and survey maps does not necessarily shift onus: 30 C. 291 and 3 C. L. J. 316, *Ref.* *(Mookerjee and Buckland, JJ.)*. SECRETARY OF STATE *v.* WAZED ALI KHAN PANI. **65 I.C. 866=34 C.L.J. 141= A.I.R. 1921 Cal. 687.**

EVIDENCE ACT (1872), S. 36—Maps in criminal cases.

—S. 36—Maps in criminal cases.

———Maps prepared in criminal cases—Statements of witnesses or information received should not be recorded thereon : A.I.R. 1924 Cal. 1029, *Rel. on.* (*Suhrawardy and Panton, JJ.*). BHAGIRATHI CHOWDHURY *v.* EMPEROR. **92 I.C. 174= 30 C. W. N. 142=27 Cr.L.J. 222= A.I.R. 1926 Cal. 550.**

—S. 36—Report referring to map.

———Map referred to in Commissioner's report not produced—Commissioner, neither examined nor cross-examined—Statements were admitted in evidence. (*Lord Phillimore*). NARESH NARAYAN *v.* SECY. OF STATE. **77 I.C. 1048=32 M.L.T. 162= 1923 M.W.N. 511=50 Cal. 446=50 I. A. 121= 28 C.W.N. 453=4 L.R.P.C. 50= A.I.R. 1923 P.C. 1=45 M.L.J. 444 (P. C.).**

—S. 36—Site plan.

———Site plan prepared for a case has very little probative value on question of title. (*Sen, J.*). GAURI SHANKAR *v.* EMPEROR. **120 I. C. 547= 1930 A.L.J. 244=1930 Cr. C. 42= 31 Cr.L.J. 133=A.I.R. 1930 All. 26.**

—S. 36—Survey and Thak maps.

———Although the Thakbast map is a part of the thak survey, it is not meant to be and is not in fact a scientifically prepared plan, but merely a rough sketch, or at most, an unscientifically prepared plan showing the number and approximate position of the thak marks or dhuis for the guidance of the revenue surveyor who followed after, and who, having picked up and verified the thak marks indicated roughly in the Thakbast map prepared the revenue map by accurate observations made by expert surveyors with scientific instruments. Where it appears that he had the Thakbast map before him when he made his survey and prepared the revenue map then the revenue map must be accepted as shewing the result of the thak survey even more accurately than the Thakbast which was not intended to be scientifically accurate.

The signature of the Revenue Surveyor on a thak map means merely that he has satisfied himself that the boundary accepted and intended by the demarcation staff had been correctly picked up on the ground and correctly surveyed on the revenue survey map. (*Dawson-Miller, C.J. and Mullick, J.*). KESHBJI PITAMBAR *v.* SHASHI BHUSAN BANERJI. **96 I. C. 1027=1926 P.H.C.C. 210= A.I.R. 1926 Pat. 385.**

———An entry in a thakbast map is not sufficient to enable a Court of fact to hold that the disputed lands were really included in an estate at the time of the Permanent Settlement. They may be good evidence as to what the boundary of a particular plot was at the time of the Permanent Settlement. The revenue survey maps are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary they may properly be judicially received as correct when made. It may also be clearly presumed that the boundaries mentioned in the maps were the boundaries which existed at the time of the Permanent Settlement but they do not go further and do not show that the lands measured and included in a particular mauza were settled, at the time of the Permanent Settlement, with a particular man. This has to be proved by evidence *aliunde*. The onus of proving that the lands shown in the survey map as belonging to a particular mauza were included in the Permanent Settlement of 1793, is upon the plaintiffs who affirm that such was the case. 30 Cal. 297; 30 I.A. 44, *Foll.* (*Jwala Prasad and Ross, JJ.*). RAMANANDHAN SAHAY *v.* JAIGOBIND PANDEY. **75 I.C. 955=2 Pat. 839=A.I.R. 1924 Pat. 213.**

EVIDENCE ACT (1872), S. 36—'Thak' meaning.

———*Relative value.*

There is no inflexible rule that a survey map must have preference over a *thak* map. The *thak* and the survey maps should, as a rule agree. 6 C. W. N. 629, *Ref.* Where they differ, the one that more nearly agrees with the local landmarks is the one which should be followed. There is no general or definite rule making it incumbent upon the Court to follow either the one or the other. The Court may, if it considers the *thak* map more reliable, follow that in preference to the survey map. (*Mookerjee and Panton, JJ.*). MAHARAJA OF COOCH BEHAR *v.* MOHENDRA RANJAN RAI. **66 I.C. 923=34 C. L. J. 465=A.I.R. 1921 Cal. 277.**

—S. 36—Survey map.

———Ex parte *statements.*

Ex parte statements in survey maps should be regarded not as primary proof but merely corroborative proof—But if they relate to distant times and no direct evidence is available, their value assumes greater proportion. (*Dawson Miller, C. J. and Mullick, J.*). KAMAKHYA NARAYAN SINGH *v.* SURENDRA KARAN DEO. **113 I.C. 703= A.I.R. 1928 Pat. 284.**

———The revenue survey map is no doubt evidence of title and possession, but where there is no satisfactory direct evidence of acts of possession on the part of either of the parties, the evidence of possession of the cadastral survey entry must prevail until it is rebutted. (*Allanson and Sen, JJ.*). BRINDRABAN PRASAD *v.* GOPAL SARAN. **104 I.C. 514=8 P.L.T. 817=A.I.R. 1928 Pat. 36.**

———Survey maps prepared under Calcutta Survey Act are admissible as evidence of possession. (*C. C. Ghose, J.*)—Survey map is admissible evidence of state of things at the time it was made. (*Rankin, C. J. and C. C. Ghose, J.*). DEBENDRA NATH *v.* SURENDRA NATH. **102 I. C. 370= 31 C. W. N. 419=45 C.L.J. 474= A.I.R. 1927 Cal. 345.**

———Map prepared for partition affecting public revenue is admissible though for limited purpose. (*Chatterjea and Panton, JJ.*). ABDUL HAMID *v.* BROJENDRA KUMAR. **90 I.C. 643= A.I.R. 1926 Cal. 290.**

———A Survey map presumably prepared in the presence and to the knowledge of the parties is evidence between the parties *quantum valeat.* Primarily it is evidence of possession, which is always evidence of title. 10 W. R. 300, *Foll.*; 19 W. R. 202, *Ref. to.* (*Das and Bucknill, JJ.*). NAZIRUL HAQ *v.* ABDUL WAHAB KHAN. **64 I.C. 326=3 Pat. L.T. 140= 1 Pat. 65=A.I.R. 1922 Pat. 58.**

———Maps and Surveys in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible as valuable evidence of the state of things at the time they are made. 30 Cal. 291 (P. C.), *Foll.* (*Das and Adami, JJ.*). BIBI WAKILAN *v.* DEONANDAN PRASAD. **59 I.C. 298=2 P.L.T. 81=A.I.R. 1921 Pat. 268.**

—S. 36—'Thak' meaning.

———Per *Mullick, J.*—The words "as per Thak" mean as per thak pillars. A. I. R. 1924 Pat. 402, *Rel. on.* (*Dawson-Miller, C. J. and Mullick, J.*). KESHBJI PITAMBAR *v.* SHASHI BHUSAN BANERJI. **96 I.C. 1027=1926 P.H.C.C. 210= A.I.R. 1926 Pat. 385.**

EVIDENCE ACT (1872), S. 36—" Thak " map.

—S. 36—" Thak " map.

———In fixing the boundary line between two estates greater weight need not be attached to the *Thak* map than to the Revenue Survey map. (*Suhrawardy and Chotzner, JJ.*). KALI PROSANNA BAHADURI *v.* RANI HEMANTA KUMARI DEBI.
79 I.C. 1038=A.I.R. 1924 Cal. 977.

———*Thak* maps are good evidence of possession at the time they were made, but they are no evidence of title acquired by prescription or adverse possession. (*Das and Kulwant Sahay, JJ.*). CHATTRAPAT PRATAB BAHADUR *v.* G. G. LEES.
72 I.C. 648=1 P.L.R. 322=4 P.L.T. 487=A.I.R. 1923 Pat. 558.

———*Thak* map is valuable evidence in suit between successors of parties to the *thak* proceedings who were present. (*Mookerjee and Panton, JJ.*). MAHARAJA OF COOCH BEHAR *v.* MOHENDRA RANJAN RAI. **66 I.C. 923=34 C.L.J. 465=A.I.R. 1921 Cal. 277.**

—S. 39—Admissibility.

———*Section 27 governs S. 39.*

But if the accused wishes to challenge the veracity of the statement that it was on his information that the thing was discovered he may ask the deponent to depose to the exact words used by him. Then under S. 39 so much of the statement made by him can be given in evidence as the Court considers necessary in that particular case to full understanding of the nature and effect of the statement. (*Harrison and Dalip Singh, JJ.*). KARAM DIN *v.* EMPEROR. **115 I. C. 1=30 Cr. L.J. 385=A. I. R. 1929 Lah. 338.**

—S. 39—Admissibility of recitals.

———Because a document is admissible for a certain purpose all recitals, statements and references therein cannot be used as proof of the facts to which they relate. (*Sulaiman and Kendall, JJ.*). TIKA RAM *v.* MOTI LAL. **1930 A.L.J. 564=A.I.R. 1930 All. 299.**

—S. 39—Scope.

———Section 39 cannot be invoked for the purpose of letting in a confession in respect of which the bar created by Ss. 24, 25 and 26, Evidence Act, has not been removed by S. 27. (*Shadi Lal, C. J. and Harrison, Fforde, Tek Chand, Jai Lal, Dalip Singh and Agha Haidar, JJ.*). SUKHAN *v.* EMPEROR.
115 I.C. 6=10 Lah. 283=30 P.L.R. 197=11 L.L.J. 159=30 Cr. L.J. 414=12 A.I.Cr.R. 382=A. I. R. 1929 Lah. 344 (F.B.).

—S. 40—Applicability.

———Section 40 applies to a case in which the Court has jurisdiction to decide a matter and one party says it should not do so because that matter has been decided before. 6 Cal. 171, *held no good law in view of* 23 Cal. 533 (P.C.) ; 19 All. 277 (P.C.) and 25 Cal. 522, (P.C.). (*Rankin, C.J., C.C. Ghose, B.B. Ghose, Panton and Mukerjee, JJ.*). LAKSHAN CHANDRA *v.* RAMDAS MONDAL. **118 I.C. 857=33 C.W.N. 795=49 C.L.J. 441=A.I.R. 1929 Cal. 374 (F.B.).**

—S. 40—Foreign judgment.

———Where the subject-mater is a *res* so situated as to be within the lawful control of the State under the authority of which a Court sits, and that authority has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within that jurisdiction, that decision is conclusive, whether, according to the law of another country, it might seem right or wrong. *Castrique* v. *Imrie*, L. R. 4 H. L. 414, *Rel. on.* (*Viscount Haldane*). CARL FRANZ ADOLF OTTO INGENOHL *v.* WING ONAND CO. (SHANGHAI), LTD. **107 I. C. 352=47 C.L.J. 263=30 Bom. L.R. 753=A. I. R. 1928 P.C. 33.**

—S. 40—Judgment not inter partes.

———Observations in a judgment relating to a different matter though connected cannot bind a third party and the judgment itself cannot be evidence against him. (*Ramesam and Cornish, JJ.*). NARASIMHA SHASTRI *v.* OFFICIAL ASSIGNEE, MADRAS. **1930 M.W.N. 396=A.I.R. 1930 Mad. 751.**

———A judgment is not evidence against persons not parties to it—It is admissible only in so far as it shows assertion of title made therein. (*Dawson Miller, C.J. and Foster, J.*). KESHO PRASAD SINGH *v.* KIRTARATH. **97 I.C. 282=A.I.R. 1926 Pat. 577.**

—S. 40—Judgment not res judicata.

———Judgments not operating as *res judicata* may yet be admissible in evidence. (*Kinkhede, A.J.C.*). TULARAM *v.* MT. SUMRATI. **79 I.C. 621=A.I.R. 1924 Nag. 422.**

—S. 41—Binding effect.

———Judgment in probate proceedings operates as judgment *in rem* so far as genuineness or otherwise of will is concerned. 12 C.L.J. 91 ; 12 C.L.J. 185 and 79 I.C. 44, *Foll.* (*Fazl Ali and Chatterji, JJ.*). MST. PHENKI *v.* MANKI. **9 Pat. 698.**

———The finding as to the execution of the Will of a probate Court binds at any rate the parties and privies to the probate proceedings. (*Das and Foster, JJ.*). CHANDRESHWAR *v.* BISHESHWAR.
101 I.C. 289=5 Pat. 777=8 Pat. L. T. 510=A. I. R. 1927 Pat. 61.

———Decisions referred to in S. 41, are binding on all parties (*obiter*). (*Suhrawardy and Mukerji, JJ.*). GANGA PROSAD CHAUDHURY *v.* KULADANANDA ROY. **94 I.C. 235=44 C.L.J. 399=30 C.W.N. 415=A.I.R. 1926 Cal. 568.**

—S. 41—Grant of letters.

———The grant of letters of administration so long as it subsists is conclusive evidence as regards the proper execution of the will and the legal character conferred on the administrator. 4 Cal. 360, *Foll.* ; 13 P. R. 1918 ; 31 M. L. J. 277 ; 38 Bom. 427, *Ref.* (*Fforde and Bhide, JJ.*). MT. DAROPTI *v.* MT. SANTI. **116 I. C. 452=A.I.R. 1929 Lah. 483.**

———Grant of Letters is no bar to further proceedings under Penal Code, S. 477. (*Otter, J.*). MALI MUTHU SERVAY *v.* EMPEROR. **97 I.C. 1054=4 Rang. 251=27 Cr. L.J. 1230=A.I.R. 1926 Rang. 202.**

—S. 41—Judgment inadmissible under.

———Judgments not falling under S. 41 can be used only in evidence under S. 42—Legal effect of a judgment *in personam* will depend on facts of each case. (*Wallis, C. J., Spencer and Kumaraswami Sastri, JJ.*). SECY. OF STATE *v.* AHMAD BADSHA. **67 I.C. 971=44 Mad. 778=14 M.L.W. 128=14 M.L.W. 188=1921 M.W.N. 576=A.I.R. 1921 Mad. 248=41 M.L.J. 223=41 M.L.J. 278 (F.B.).**

—S. 41—Judgment in rem.

———Judgment that *A* is not the adopted son of *B* is not one *in rem*. 2 H. M. C. R. 276 and 7 W.R. 338, *Ref.* (*Sen and Niamatullah, JJ.*). URJUN *v.* MATHURA NATH. **116 I.C. 83=26 A.L.J. 797=A.I.R. 1928 All. 395.**

———Finding not essential in probate action is not one *in rem*—Probate is conclusive proof of the due execution of the Will. (*Das and Foster,*

EVIDENCE ACT (1872), S. 41—Judgment in rem and in personam.

JJ.). CHANDRESHWAR PRASAD NARAIN SINGH *v.* BISHESHWAR PRATAB NARAIN SINGH.
101 I. C. 289=5 Pat. 777=8 P. L. T. 510= A.I.R. 1927 Pat. 61.

—S. 41—Judgment in rem and in personam.
———*Judgment in rem is conclusive only as to status and not grounds for deciding the status though adjudicated.*

There is a broad distinction between the effect of a judgment *in rem* and a judgment *in personam.* The point adjudicated upon in a judgment *in rem* is always as to the status of the *res* and is conclusive against the world as to that status, whereas, in a judgment *in personam* the point, whatever it may be, which is adjudicated upon (it being as to the status of the *res*), is conclusive only between parties or privies: *Ballantyne and Co.* v. *Mackinnon*, (1896) L. J. Q. B. 616, *Rel. on.* (*Rupchand Bilaram and Tyabji, A. J. Cs.*). RADHAKISHAN *v.* MT. GANGABAI. **110 I.C.730=22 S.L.R. 105= A. I. R. 1928 Sind 121.**

—S. 41—Judgment not inter partes.
———*Admissibility.*

A decree in a previous suit to which one party in a subsequent suit was not party, is admissible in evidence for corroboration of a fact asserted by the party in oral evidence and the question of weight to be attached to the fact so established is a question of fact. It is not admissible as the proof of the claim. 6 Cal. 171 (F.B.), *Dist.* (*Courtney-Terrell, C. J. and James, J.*). RAM LAKHAN UPADHYA *v.* JAI UPADHYA. **A.I.R. 1929 Pat. 749.**

———C. P. Code, S. 11—Plaintiffs' title negatived in a former suit against a contesting claimant—Plaintiff can re-assert his title in another suit against third party. 33 Mad. 483 and 36 Mad. 141, *Overruled*; 18 C. W. N. 954, *Foll.* (*Wallis, C. J., Spencer and Kumaraswami Sastri, JJ.*). SECRETARY OF STATE *v.* SYED AHMAD BADSHA SAHIB BAHADUR. **67 I.C. 971=44 Mad. 778= 14 M. L. W. 128=14 M.L.W. 188= 1921 M.W.N. 576=A.I.R. 1921 Mad. 248= 41 M.L.J. 223=41 M.L.J. 278 (F.B.).**

—S. 41—'Legal character.'
———The legal characters that can be conferred or taken away in the exercise of the jurisdiction mentioned in S. 41 do not include the state of being a partner. (*Rupchand Bilaram and Tyabji, A.J.Cs.*). RADHAKISHAN *v.* MT. GANGABAI. **110 I.C. 730= 22 S.L.R. 105=A.I.R. 1928 Sind 121.**

—S. 41—Vacating—Adjudication.
———A firm declared insolvent—Order of adjudication against one partner vacated as he was not proved a partner—Judgment vacating the order does not come within S. 41. (*Rupchand Bilaram and Tyabji, A. J. Cs.*). RADHAKISHAN *v.* MT. GANGABAI. **110 I.C. 730=22 S. L. R. 105= A.I.R. 1928 Sind 121.**

—S. 42—Decisions about caste.
———Caste of a particular family—Evidence of members and decisions in previous litigations are relevant. (*Spencer, Offg. C. J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1= A.I.R. 1925 Mad. 497.**

—S. 42—Decree inter partes.
———*Obiter*: Decrees *inter partes* that recite the pleadings might be admitted in evidence. 27 Cal. 1004, (P.C.) *Foll.*; A.I.R. 1922 Mad. 71, *Expl.* (*F. B.*). (*Madhavan Nair, J.*). NALUPURATATIL IBRAINE *v.* PARAMESWARA. **85 I.C. 996= 22 M.L.W. 460=A.I.R 1925 Mad. 1019.**

EVIDENCE ACT (1872), S. 43—Essentials for relevancy.

—S. 42—Dispute about tenancy.
———Question as to what villages were included in tenure decided between landlord and tenant—Plaintiff having subordinate interest in tenure suing landlord—Question is not strictly *res judicata* but plaintiff must produce strong evidence in his support. 33 Mad. 459 and 29 Cal. 707, *Ref.* (*Ross and Fazl Ali, JJ.*). BALDEO DAS BIRLA *v.* LAL NILMANI NATH SAHI DEO. **113 I. C. 681= 8 Pat. 122= 9 P.L.T. 627= A. I. R. 1928 Pat. 615.**

—S. 42—Evidentiary value.
———Where a judgment is admissible, it is conclusive evidence for or against all persons whether parties, privies or strangers, or its own existence, date and legal effect as distinguished from the accuracy of the decision rendered. (*Sanderson, C.J. and Richardson, J.*). GOPI SUNDARI DASI *v.* KHEROD GOBINDA CHOWDHURY. **82 I. C. 99= 28 C.W.N. 942= A.I.R. 1925 Cal. 194.**

———Judgment after contest has more probative value than one on compromise. (*Moti Sagar, J.*). LEKH RAJ *v.* INDER MAL. **73 I.C. 658=4 Lah. 176= A.I.R. 1924 Lah. 161.**

—S. 42—Judgment not inter partes.
———Under certain circumstances and in certain cases, the judgment in a previous suit to which one of the parties in the subsequent suit was not a party may be admissible in evidence for certain purposes and with certain objects in the subsequent suit. (*Sanderson, C.J. and Richardson, J.*). GOPI SUNDARI DASI *v.* KHEROD GOVINDA CHOWDHURY. **82 I.C. 99=28 C.W.N. 942= A.I.R. 1925 Cal. 194.**

—S. 42—Remarks.
———Remarks about a plot of land not in dispute are not admissible. (*Campbell, J.*). BANWARI LAL *v.* SHEO CHAND. **85 I.C. 795= A.I.R. 1923 Lah. 384.**

—S. 43—Civil judgment.
———A decision of a Civil Court is admissible to disprove an allegation, the truth of which is the basis of conviction of a person in a criminal case. 41 Bom. 1, *Relied on.* (*Krishnan, J.*). VELAYUTHAM CHETTY, *In re.* **72 I.C. 172=24 Cr. L.J. 332= A.I.R. 1924 Mad. 516.**

—S. 43—Conclusiveness.
———The principle of conclusiveness of a decree is much wider than the terms of S. 11: A.I.R. 1921 P. C. 11 and A. I. R. 1922 P. C. 80, *Foll.* (*Wazir Hasan and Raza, JJ.*). DURGA PRASAD *v.* JAGAT JIT SINGH. **112 I.C. 169=5 O.W.N. 265= 3 Luck. 487=A.I.R. 1928 Oudh 359.**

—S. 43—Essentials for relevancy.

Per *Das, J.*—A judgment or decree is not admissible in evidence under S. 43 unless as a fact in issue or as a relevant fact under other sections of the Act. Thus if *A* has obtained a decree for the possession of land against *B*, and *C*, *B's* son, murders *A* in consequence, the existence of the judgment is relevant as showing motive for the crime. So again, in a suit for malicious prosecution the judgment in the criminal proceeding is evidence to establish the fact of acquittal, the fact, namely, that the criminal proceedings terminated in favour of the plaintiff. A reference to the finding of a judgment may explain the character, of the party's possession and the nature of the enjoyment had in the property in suit and so the finding of a judgment may be referred to in all other cases where the record is matter of inducement or merely in-

EVIDENCE ACT (1872), S. 43—Finding of Criminal Court.

troductory to other evidence. (*Dawson-Miller, C.J. on difference between Das, J. and Foster, J.*). HITENDRA SINGH *v.* RAMESWAR SINGH.
87 I.C. 849=4 Pat. 510=6 P.L.T. 634=A. I. R. 1925 Pat. 625.

—S. 43—Finding of Criminal Court.

———The finding of a Criminal Court cannot be treated as evidence in a Civil action between different parties. (*Lentaigne, J.*). MAUNG PEIN *v.* MA THE NGWE. **84 I. C. 1009=2 Rang. 549=A.I.R. 1925 Rang. 143.**

———Judgment of Criminal Court is relevant to show that certain parties were on bad terms. (*Simpson, A.J.C.*). JANGI SINGH *v.* GANGA SINGH.
77 I. C. 391=10 O. L. J. 393=A .I. R. 1924 Oudh 115.

—S. 43—Judgment inter partes.

———Judgment in former legal proceedings are admissible in evidence to prove plaintiff's former recognition of defendant's status. (*Prideaux and Kinkhede, A.J.Cs.*). JUMILAL *v.* MT. HALKI.
78 I.C. 981=A.I.R. 1924 Nag. 387.

———Judgment in previous suit holding he had no right is admissible for showing that the Granthi's right was questioned then also. 31 Bom. 143, *Foll.* Other cases *Ref.* (*Scott-Smith and Abdul Raoof, JJ.*). INDAR SINGH *v.* FATEH SINGH.
59 I. C. 734=49 P. L. R. 1921=A.I.R. 1921 Lah. 337.

—S. 43—Judgment not inter partes.

———*Recitals in.*

The Evidence Act does not make a finding of fact arrived at on the evidence before the Court in one case, evidence of the fact in another case when the parties are not the same. A recital, therefore, of a judgment not *inter partes* of a relevant fact is not admissible in evidence in another litigation, though the judgment may be used in evidence in certain circumstances as a fact in issue or as relevant fact or possibly as a transaction. A. I. R. 1929 P. C. 99; 20 C. W. N. 643 and A. I. R. 1922 Mad. 71, *Rel. on.* (*Addison, J.*). ASA SINGH *v.* MANSHA RAM. **121 I.C. 509=11 L.L.J. 526=A. I. R. 1930 Lah. 237.**

———*Admissibility—Common defendant.*

Section 43 excludes all judgments in a former suit as irrelevant if they are not *inter partes* unless the existence of such judgment is a fact in issue or is relevant under some other provision of the Act. The existence of the judgment may be relevant but not the decision of the Judge or the opinion expressed by him. It is immaterial if the defendant in both cases is the same and the decision of the Privy Council in 22 C. 533 is no authority for the general proposition that a judgment against a party can always be used against him in a subsequent suit by another person. 56 I.A. 119, *Ref. to.* (*Suhrawardy and Costello, JJ.*). BENODE LAL CHAKRABARTY *v.* SECRETARY OF STATE. **34 C. W. N. 1113.**

———A statement of opinion made by the Judge in a previous judgment not *inter partes* is no evidence in a subsequent case. (*Jai Lal, J.*). HAR NATH *v.* MOHAN DAL. **116 I. C. 422=10 L. L. J. 519=A. I. R. 1929 Lah. 123.**

———Judgment not *inter partes* is admissible if existence of judgment is relevant fact or fact in issue. 6 Cal. 171 (F. B.); 22 Cal. 533 (P. C.) and 25 Cal. 525 (F. B.), *Rel. on*; 19 All. 277 (P. C.); 29 Cal. 187; A. I. R. 1925 Cal. 194 and 40 I.C. 830,

EVIDENCE ACT (1872), S. 43—Relevancy.

Ref. (*Adami and Chatterji, JJ.*). SHAMSUNDER KUER *v.* RAMKHELAWAN. **121 I. C. 334=8 Pat. 783=A.I.R. 1929 Pat. 739.**

———Previous judgment not *inter partes* is admissible to prove title when such title is in issue. (*Findlay, J. C.*). ABDUL MAJID *v.* TUKARAM.
101 I. C. 774=A. I. R. 1927 Nag. 359.

———In a suit by plaintiffs for a declaration that the sale of suit land is not binding on them, the land being ancestral land, the judgment in a previous suit by the same plaintiffs, but not *inter partes*, for a declaration that alienation of part of the land in suit was not binding on the ground of the land being ancestral can only be treated as admissible for the purpose of showing that on a former occasion the right of the alienee to alienate part of the property in suit was called in question on the ground that the property was ancestral. The finding of the Court in the previous suit that the property was ancestral is not relevant. 1 Lah. 540, *Foll.* (*Fforde and Campbell, JJ.*). PARTAP SINGH *v.* MOTHU. **96 I. C. 998=8 L. L. J. 492=27 P. L. R. 544.**

———A judgment between the plaintiff and third parties is not admissible though the facts found therein may support plaintiff's title disputed in the present suit. (*Dawson-Miller, C. J., Mullick and Foster, JJ.*). HARIHAR PRASAD *v.* KESHO PRASAD. **93 I.C. 454=5 P.L.T. Sup. 1=A.I.R. 1925 Pat. 68.**

———A judgment of a Civil Court deciding a question of adoption is not admissible between third parties as evidence of the truth of the matters decided therein. (*Dawson-Miller, C. J. and B. K. Mullick, J.*). MAHADEO ASRAM PRASHAD SAHI *v.* MT. JAGATRAJ KUER. **71 I.C. 929=A.I.R. 1924 Pat. 298.**

———Judgments not *inter partes* are admissible in evidence for the purpose of showing that the title of a defendant was set up by third party and that the suit was decreed. (*Chatterjee and Panton, JJ.*). MOHAR ALI SARKAR *v.* MAFIZUDIN SARKAR.
65 I.C. 699 (Cal.).

———The statements of the plaintiff's age in a decree to which the defendants or their predecessors were no parties, are not conclusive and binding against them. (*Teunon and Newbould, JJ.*). NILARATAN MITRA *v.* ABDUL GAFUR.
59 I.C. 3=32 C. L.J. 75.

—S. 43—Judgment not res judicata.

———*Admissibility.*

Judgments not operating as *res judicata* may yet be admissible in evidence. (*Kinkhede, A. J. C.*). TULARAM *v.* MT. SUMRATI. **79 I.C. 621=A. I. R. 1924 Nag. 422.**

—S. 43—Land acquisition cases.

———Previous decisions in Land Acquisition cases are relevant in a subsequent Land Acquisition case where the market value of lands in the same neighbourhood is in issue. (*Newbould and Ghose, JJ.*). MADAN MOHAN BURMAN *v.* SECRETARY OF STATE. **78 I. C. 557=A. I. R. 1925 Cal. 481.**

—S. 43—Relevancy.

———Judgment that does not fall under Ss. 40, 41 and 42 is not relevant under S. 43 for decision of same point in subsequent suit. A.I.R. 1929 P.C. 99 and 1 Lah. 540, *Rel. on*: 19 All. 277 (P.C.), *Expl.*; 22 Cal. 533 (P. C.), *Dist.*; A. I. R. 1926 Nag. 109, *Overruled*; 29 Cal. 187 (P. C.); 35 Cal. 701 and A.I.R. 1921 Mad. 248, *Ref.* (*Macnair, Offg. J. C.*,

EVIDENCE ACT (1872), S. 44—Collusive decree.

Jackson and Subhedar, A. J. Cs.). SHANKAR GANESH *v.* KESHEO. **121 I.C. 644= 12 N. L. J. 164=26 N. L. R. 33= A. I. R. 1930 Nag. 1 (F.B.).**

—S. 44—Collusive decree.

———*Fraud and collusion—Difference.*

A collusive decree binds the parties thereto and is not a nullity. It is also binding on the representatives of the parties.

No doubt a decree can be avoided on the ground of fraud or collusion under S. 44 of the Evidence Act, but there is a great difference between fraud and collusion. A party who has been made the victim of a fraud can obviously avoid a decree on the ground that he has discovered the fraud subsequent to the decree which could not have been made a point of defence in the former litigation. On the other hand, the fact of collusion is a matter which must have been well known to both the parties and is a point which could and might have been raised before the decree was passed on the last occasion. A third party can undoubtedly avoid a decree on the ground that it has been obtained collusively, but a party to a collusive decree cannot avoid it on that ground : 11 Bom. 708; 20 Mad. 333; 31 Mad. 485 and 18 Mad. 378, *Rel. on.* (*Sulaiman, J.*). SAHIB RAI *v.* BAHARI RAI. **101 I.C. 765=A. I. R. 1927 All. 494.**

—S. 44—Fraud.

———Fraudulent decree—Not got cancelled—Party can show fraudulent nature of, in defence. (*Mookerjee and Chotzner, JJ.*). PULIN BEHARI DEY *v* SATYA CHARAN. **70 I.C. 548= 36 C. L. J. 367=A. I. R. 1923 Cal. 79.**

—S. 44—Gross negligence.

———Although only fraud or collusion and not gross negligence is mentioned in S. 44 the principle involved is applicable to cases of gross negligence also. 27 Cal. 71 and 16 I.C. 543, *Ref.* (*Oldfield and Venkatasubba Rao, JJ.*). BAPANNA *v.* YERRAMMA. **74 I.C. 218=18 M. L. W. 49= 1923 M. W. N. 452=33 M. L. T. 46= A.I.R. 1923 Mad. 718=45 M.L.J. 324.**

—S. 44—Judgment in rem.

———Judgment *in rem* can be contested by person not party to the judgment—Fraud or collusion need not go to the root of the jurisdiction of the Court—English law is different. (*Kulwant Sahay and Macpherson, JJ.*). SITA DEVI *v.* GOPAL SARAN. **111 I.C. 762=9 P.L.T. 397=A.I.R. 1928 Pat. 375.**

—S. 44—Letters of administration.

———Letters of administration—Court other than that issuing the letters can determine if they were obtained by fraud—But better course is to stay suit to enable application to be made to revoke grant. (*Walmsley and Greaves, JJ.*). RAKSHUB MANDAL *v.* FARUNGINI DEVI. **62 I. C. 448= 25 C.W.N. 207=A.I.R. 1921 Cal. 332.**

—S. 44—Setting aside decree.

———Time to set aside a decree expiring—Validity of the decree can be challenged in defence on the around of fraud. A. I. R. 1921 Bom. 257, *Appr.* (*Cuming and Mukherji, JJ.*). BHOLA NATH *v.* NAGENDRA BALA. **110 I.C. 571= A.I.R. 1928 Cal. 810.**

———*Limitations.*

Some limitation must be put upon S. 44. Where the case merely turns on in effect, a re-heaing of the previous suit on subs tantially the same evidence, then the Court will not hear the second suit. On the other hand, in a proper case the Court has jurisdiction to set aside a decree which has been obtained by fraud practised on the Court.

EVIDENCE ACT (1872), S. 45—Handwriting.

If, for instance, the existence of certain evidence has been stoutly denied by one party, and the Court has been induced to frame its decree on the basis that that evidence did not exist, then, if that evidence is afterwards discovered and it is of such a nature, that, if it had been before the first Court, the probabilities are that the Court would have arrived at a different conclusion, then, it may be, when all the circumstances are looked at, that in that case the Court would set aside the original decree. 41 Mad. 743 (F. B.), *Foll.*; *English case law Ref. to.* (*Marten, C. J. and Baker, J.*). BHIKAJI MAHADEO *v.* BALVANT RAMCHANDRA. **105 I. C. 296=29 Bom. L. R. 1046= A. I. R. 1927 Bom. 510.**

—S. 45—Assistant Mint Master.

———Assistant Mint Master is an expert. (*Daniels, J. C.*). MT. GILLI *v.* EMPEROR. **88 I.C. 848= 12 O. L. J. 497=2 O.W.N. 377=26 Cr.L.J. 1232= A. I. R. 1925 Oudh 616.**

—S. 45—Court as expert.

———Judge should not himself compare signatures without the help of other evidence. (*Newbould and Ghose, JJ.*). J. C. GLASTAUN *v.* SANATAN PAL. **78 I.C. 668=A.I.R. 1925 Cal. 485.**

———A Court's opinion based upon its own knowledge without the help of trained assistant to the effect that a certain amount of arsenic contained in certain prescriptions would produce arsenical poisoning, collapse and unconsciousness, is uusound and valueless especially where it is by itself untrained in medicine. Similarly it cannot say what medicines should be prescribed for billiary colic by reference to medical books. (*Greaves and Panton, JJ.*). SUPDT. AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* PURNA CHANDRA GHOSH. **83 I. C. 631=28 C. W. N. 579= 26 Cr.L.J. 71=A.I.R. 1924 Cal. 611.**

—S. 45—Evidence on commission.

———Expert evidence on commission loses much of its value. (*Broadway, J.*). NUR DIN *v.* EMPEROR. **108 I.C. 369=9 A.I.Cr.R. 561=10 L.L.J. 235= 29 Cr. L.J. 377=A.I.R. 1928 Lah. 533.**

—S. 45—" Expert."

———In law and as applied to a witness, the term "expert" has a special significance and no witness is permitted to express his opinion unless he is an "expert" within the terms of S. 45 or in special cases is permitted to express such opinion by some special law. (*Boys and Young, JJ.*). RAM DAS *v.* SECRETARY OF STATE. **A.I.R. 1930 All. 587.**

—S. 45—Expert opinion.

———An opinion of an expert witness not based on any well defined inexorable laws of nature cannot be taken as decisive especially where there is direct evidence opposed to it: 11 W.R. 25 (Cr.), *Ref.* (*Zafar Ali, J.*). H. MANSEL PLEYDELL *v.* EMPEROR. **96 I. C. 641=27 Cr. L.J. 977= A.I.R. 1926 Lah. 313.**

—S. 45—Handwriting.

———Court convinced against alleged signature—Witnesses deposing in its favour—Court would not declare it to be forgery in absence of other corroborating evidence. (*Page, J.*). LILA SINHA *v.* KUMAR BIJOY PROTAP DEO SINGH. **87 I.C. 534=41 C.L.J. 300=A.I.R. 1925 Cal. 768.**

———*Comparison.*

A comparison of handwriting is at all times, as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts.

EVIDENCE ACT (1872), S. 45—Hand writing—Proof.

Where the lower Appellate Court did not discuss either the oral evidence or the probabilities of the case, but simply relied upon what appeared to it to be a signature on the Will as a mere "tracing forgery" of some other signature of the testator and quashed the probate granted on a consideration of the evidence, by the first Court,

Held, that the lower Appellate Court had erred: 49 Cal. 235; A.I.R. 1922 Cal. 12, *Foll.* (*Sanderson, C.J. and Chakravarty, J.*). AMBIKA CHARAN BARNA *v.* NARESWARI DASI. **85 I. C. 525=29 C.W.N. 75= A.I.R. 1925 Cal. 145.**

—S. 45—Handwriting—Proof.

———*Person proving handwriting must prove his acquaintance with the handwriting to be proved.*

In order to prove the handwriting or signature of another person one must show that he is acquainted with the handwriting or signature of that person. (*Jwala Prasad and Adami, JJ.*). MT. JASODA KUAR *v.* JANAK MISSIR. **92 I.C. 1034= 4 Pat. 394=7 P.L.T. 507=A.I.R. 1925 Pat. 787.**

—S. 45—Handwriting—Expert.

———*Inspection by Court.*

It is always unsafe to hold that a document is a forgery on the personal inspection of the document by the Court. (*Das and Adami, JJ.*). MT. BIBI KANIZ ZAINAB *v.* SYED MOBARAK HOSSAIN. **72 I.C. 748=A.I. R. 1924 Pat. 284.**

———Expert evidence as to handwriting—Only similarities must be pointed out to Court—Court has to decide whether particular writing is to be assigned to particular person. (*Lord Birkenhead.*) WAKEFORD *v.* LINCOLN BISHOP. **A.I.R. 1921 P.C. 168 (P.C.).**

—S. 45—Medical witness.

———Experts—Medical witness—Opinion must not depend on which party calls him as witness'. (*Page, J.*). LILA SINHA *v.* KUMAR BIJOY PROTAP DEO SINGH. **87 I.C. 534=41 C.L.J. 300= A.I.R. 1925 Cal. 768.**

—S. 45—Non-expert.

———Evidence of person who is not "expert" in art of handwriting can be ruled out as inadmissible. (*Tek Chand, J.*). CHET RAM *v.* JOGI RAM. **31 P.L.R. 109=A.I.R. 1930 Lah. 336.**

—S. 45—Opinion on foreign law.

———Expert opinion on foreign law, where it is elaborately laid down in a Code, need not be called for—Court should itself interpret such law. (*Odgers and Wallace, JJ.*). PALANIPPA CHETTY *v.* NAGAPPA CHETTIAR. **123 I.C. 600= A.I.R. 1930 Mad. 146.**

—S. 45—Opinions on law.

———It is the duty of Courts themselves to interpret the law of the land and apply it and not to depend on the opinion of witnesses howsoever learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which Courts in British India are not supposed to be conversant. Opinions of experts on foreign law are therefore allowed to be admitted. (*Sulaiman and Mukerji, JJ.*). AZIZ BANU *v.* MAHOMED IBRAHIM. **89 I.C. 690= 47 All. 823=23 A.L.J. 768=A.I.R. 1925 All. 720.**

—S. 45—Palm impressions.

———Opinion of expert as to identity of palm impression is admissible. (*Madgavkar, J.*). EMPEROR *v.* BABULAL BEHARI. **108 I.C. 508= 52 Bom. 223=30 Bom. L. R. 321=29 Cr. L.J.410= 10 A.I. Cr. R. 84=A.I.R. 1928 Bom. 158.**

EVIDENCE ACT (1872), S. 45—Report of expert.

—S. 45—Report of expert.

———The opinion of an expert which is admissible against an accused is the opinion given by him at the trial. Opinion given for the purposes of a previous suit is not substantive evidence and when the accused has not the opportunity to cross-examine the expert regarding that opinion its evidential value is very little.

It is doubtful whether the opinion of an expert recorded for the purposes of a civil suit though proved in a criminal case is admissible at all at the latter trial: A. I. R. 1923 Lah. 622, *Ref.* (*Jai Lal, J.*). GAUDA MAL *v.* EMPEROR. **110 I.C. 810=11 A. I. Cr. R. 5= 29 Cr. L. J. 778=A.I.R. 1928 Lah. 921.**

———Reports of experts are not legal evidence unless they appear and are examined in Court—Evidence Expert. (*Tek Chand, J.*). WADHAVA *v.* JAI KISHAN DAS. **106 I.C. 493= 29 P. L. R. 125=A.I.R. 1928 Lah. 427.**

———Chemical examiner's negative report regarding absence of trace of blood in the earth, leaves and grass taken from the alleged place of occurrence will not displace strong direct evidence of the place of a certain murder. (*Newbould and C. C. Ghose, JJ.*). HASSENULLA SHEIKH *v.* EMPEROR. **83 I.C. 485=26 Cr. L. J. 5=28 C. W. N. 561= A.I.R. 1924 Cal. 625.**

———Report of finger print bureau is not admissible if not subjected to cross-examination though parties agree to abide by it. (3 N. L. R. 1; 22 C.W.N. 745, 28 I.C. 132. *Ref.*). (*Kinkkede, A.J.C.*). PITAIN *v.* BABOOSINGH. **79 I. C. 641= A. I. R. 1924 Nag. 183.**

———*Penal Code, S.* 193—*Opinion of hand expert not examined on oath—Magistrate's own observation may be used as evidence.*

Where in a trial for perjury in respect of a promissory note which the accused said on oath was in his handwriting, the Magistrate admitted in evidence the opinion of a handwriting expert against the accused without his being examined on oath and also had his own opinion after comparing the handwriting of the promissory note with various other handwritings, that the writing was not of the accused,

Held, that a conviction under S. 193 based on these materials is bad. The proposition that a Judge should not import his personal knowledge into his judgments and that if he wishes to rely on facts within his knowledge, he must go to the witness box and depose to them on oath is no doubt correct in the main, but it does not apply to facts of which a Judge is permitted to take judicial notice and nowhere in the Indian Evidence Act is it laid down that a Judge must not look at exhibits produced in Court or partly base his judgment on them. 11 W.R.Cr. 25, *Foll.* (*MacColl, J.*). S. C. GUPTA *v.* KING EMPEROR. **76 I.C. 425= 1 Rang. 290=25 Cr. L.J. 185=A.I.R. 1924 Rang. 17.**

———The Report of the Government Expert, who never came into witness-box and whose report is not supported even by an affidavit is inadmissible in evidence and should not form the basis of the order directing the prosecution on a charge of forgery. A sanction based on a piece of evidence that can in no circumstances be called legal evidence and especially when there is positive legal evidence against it is illegal. The power of sanction should be used with great caution. (*Rafique, J.*). PEARY LAL *v.* KIDAR NATH. **75 I.C. 148= 21 A.L.J. 399=4 L.R.A. Cr. 92= 24 Cr. L.J. 900=A.I.R. 1923 All. 601.**

EVIDENCE ACT (1872), S. 45—Thumb impression.

—S. 45—Thumb impression.

———Evidence of thumb-impression expert is valuable. (*Addison, J.*). DILEDAD *v.* EMPEROR. **113 I.C. 68=30 Cr. L.J. 52=11 A. I. Cr. R. 428=A.I.R. 1929 Lah. 210.**

———As to the probative value of the opinion of an expert on fingerprints, it must have the same value as the opinion of any other expert, such as a medical officer, etc. In each case the evidence is only a guide to the Court to direct its attention to judge of its value. The Court is at liberty to use its own discretion and to come to conclusion either in affirmance or differing from the view taken by the expert. Though it is not safe to convict an accused upon the sole testimony of an expert, yet the Court cannot refuse to convict a person on the evidence of a fingerprint expert, merely on the ground that it is unsafe to base a conviction upon such evidence: A.I.R. 1926 Cal. 531; A. I. R. 1923 Mad. 178 and 32 Cal. 759, *Foll.* (*Jwala Prasad and Macpherson, JJ.*). BASGIT SINGH *v.* EMPEROR. **104 I.C. 626=6 Pat. 305=28 Cr. L.J. 850=A.I R. 1928 Pat. 129.**

———Evidence of Finger Print Expert as to age of thumb impression opposed to date on the document—Court should be careful to accept expert opinion. (*Bucknill, J.*). RAMLAKHAN PANDE *v.* DHARAMDEO MISIR. **97 I. C. 335=A.I.R. 1926 Pat. 575.**

———Although finger prints sometimes afford valuable evidence of identity, great caution must be exercised in arriving at a conclusion by a comparison of thumb impressions, and the positive evidence of witnesses who were undoubtedly present and were eye-witnesses to the transaction should not be lightly brushed aside. (*Mookerjee and Cuming, JJ.*). BAIDYA NATH DUTT *v.* ALIFJAN BIBI. **70 I. C. 194=36 C. L. J. 9=A. I. R. 1923 Cal. 240.**

———Thumb impression—Conclusions from can be basis of conviction. 32 Cal. 759, *Ref.* (*Oldfield and Ramesam, JJ.*). PUBLIC PROSECUTOR *v.* VIRAMMAL. **69 I.C. 374=16 M. L. W. 663=1922 M. W.N. 642=31 M. L. T.427=23 Cr. L. J.694=46 Mad. 715=A. I. R. 1923 Mad. 178.**

—S. 45—Value of expert evidence.

———Expert evidence by itself is not sufficient to base a conclusion. (*Ross and Fazl Ali, JJ.*). GOBINDJEE MADHWAJEE *v.* C. J. SMITH. **113 I. C. 698=A. I. R. 1928 Pat. 568.**

———Land Acquisition Act, S. 23—Expert's evidence is useless if unsupported by data. 11 C. W.N. 875, 877; 10 Bom. L. R. 907, 913; 33 Bom. 325, *Foll.* (*Broadway and Fforde, JJ.*). SECRETARY OF STATE *v.* (SHRIMATI) SARLA DEVI CHAUDHRANI. **79 I. C. 74=5 Lah. 227=A. I. R. 1924 Lah. 548.**

———Expert evidence—Value—Opinion of an expert is not infallible—He is likely to be partial to the party citing him. 11 W.R. Cr. 25, *Foll.* (*Shadi Lal, C. J. and Le Rossignol, J.*). HARI SINGH *v.* LACHMI DEV. **59 I.C. 220=3 L.L.J. 110=12 P.L.R. 1921=A.I.R. 1921 Lah. 126.**

—S. 47—Comparison of handwriting.

———*Handwriting—Comparison of—Weight due to—Resemblance of signature—Denial of signature—*Onus.

Although it is true that under the Evidence Act comparison of handwriting is legitimate enough and the view of persons competent to express opinions may be in many cases of considerable value, the opinions of those who have not carefully studied the art of caligraphy is not as a rule of very great utility. Indeed so uncertain and inexact is the science of the study of caligraphy that it has been for some years past the tendency to regard evidence even of experts as of somewhat inconclusive character. The mere fact that there is a resemblance between the signature alleged to be false and a signature admitted to be genuine does not carry great weight. If a signature is denied, the *onus* of proving it is on the party relying on its genuineness. (*Bucknill, J.*). BATAHU JHA *v.* PARMESHWAR RAI. **64 I.C. 234 (Pat.).**

—S. 47—'Habitually.'

———The term "habitually" in S. 47 means "Usually," "generally," or 'according to custom.' It does not refer to the frequency of the occasions but rather to the invariability of the practice.

The opinion of a record-keeper, who in the course of his official duty has to examine and file papers sent to him, is relevant to prove the hand-writing of a person whose papers are so filed, though the number of such papers may not be great. (*Crump, J.*). P. B. PONDE *v.* EMPEROR. **89 I.C. 1042=27 Bom. L.R. 1031=26 Cr.L.J. 1474=A.I.R. 1925 Bom. 429.**

—S. 47—Proof.

———*Handwriting—Proof of—Comparison is always an unsafe method of proof—Standard writing must be admitted or proved to be writing of person to whom it is attributed and writing compared must purport to be in that person's hand.*

One of the ordinary methods of proving handwriting are (1) by calling as a witness a person who wrote the document or saw it written or who is qualified to express an opinion as to the handwriting by virtue of S. 47 of the Evidence Act. (*Mookerjee and Buckland, JJ.*). SAROJINI DASSI *v.* HARI DAS GHOSE. **66 I.C. 774=26 C. W.N. 113=49 Cal. 235=34 C.L.J. 373=A.I.R. 1922 Cal. 12.**

—S. 48—Inheritance.

———Tribal or family custom as to inheritance—Evidence of members of family or tribe is relevant—Specific instances are unnecessary. (*Mr. Ameer Ali.*) AHMAD KKAN *v.* MT. CHANNI BIBI. **91 I.C. 455=52 I. A. 379=3 O. W. N. 93=6 Lah. 502=30 C. W. N.506=6 L. R. A.P.C. 190=A. I. R. 1925 P. C. 267=50 M. L. J. 637 (P.C.).**

—S. 49—Opinions of dead.

———Opinion of dead person cannot be proved save under S. 32: 23 All. 37, *Foll.*; 11 Cal. 463, *Dist.* (*N. R. Chatterjee and Chotzner, JJ.*). PROTAP CHANDRA DEO DHANBAL DEB *v.* SRI RAJA JAGADISH CHANDRA DEO DHANBAL DEB. **82 I.C. 886=40 C. L. J. 331=A. I. R. 1925 Cal. 116.**

—S. 49—Wajib-ul-arz.

———Interpretation of *wajib-ul-arz* by some members of family is admissible when custom applicable to that family as entered in the *wajib-ul-arz* is in question. (*Dalal, J. C.*). SHARFUDDIN *v.* NIAMAT ALI. **87 I. C. 8=A. I. R. 1925 Oudh 688.**

—S. 50—Dispute about divorce.

———Where the question is whether *A* divorced *B* and *B*'s marriage to *C* was valid, the conduct and opinion expressed by the parties concerned and of all the people of their caste is relevant under S. 50. (*Hallifax and Macnair, A. J. Cs.*). JANGLIA *v.* JHINGRYA. **63 I. C. 594=A. I. R. 1921 Nag. 71.**

—S. 50—English Law and Indian Law.

———*General reputation of marriage relationship.*

S. 50 enacts a rule different from the law in England. According to English Law general

EVIDENCE ACT (1872), S. 50—Family conduct.

reputation is admissible to establish the fact of parties being married but S. 50 is limited to opinion as expressed by conduct. (*Venkatasubba Rao and Madhavan Nair, JJ.*). SESHAMMAL *v.* KUPPANAIYANGAR. **91 I. C. 462=A. I. R. 1926 Mad. 475.**

—S. 50—Family conduct.

———Distribution and devolution of family property is often very valuable evidence of "family conduct" under S. 50. (*Venkatasubba Rao and Madhavan Nair, JJ.*). SESHAMMAL *v.* KUPPANAIYANGAR. **91 I.C. 462= A.I.R. 1926 Mad. 475.**

—S. 50—Hearsay evidence.

———Mere hearsay evidence about relationship of parties is not admissible. 32 Cal. 84 (P.C.); A. I. R. 1922 P.C. 139; 39 Cal. 492 (P. C.); 26 I. C. 110 and 26 All. 581, *Ref. to.* (*Dalip Singh, J.*). MOHAN LAL *v.* MT. TULSAN. **109 I.C. 774= A.I.R. 1928 Lah. 824.**

—S. 50—Long co-habitation.

———*Presumption of marriage.*

Long co-habitation and conduct inconsistent with any other relationship would give rise to a strong presumption of the existence of a valid marriage : 21 Cal. 666 and 8 L.B.R. 222, *Foll.* (*Godfrey and Doyle, JJ.*). KYON HOE TSEE *v.* KYON WONG SI. **96 I.C. 762=5 Bur. L.J. 17= A.I.R. 1926 Rang. 90.**

———*Long co-habitation cannot establish marriage where proof to the contrary exists.*

The so-called sword wives of the Tanjore Raja were held to be mere concubines though permanent concubines and though treated in many respects as legally married wives. (*Spencer, Offg. C. J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705= 48 Mad. 1=A.I.R. 1925 Mad. 497.**

—S. 50—Marriage—Legality of.

———Where the question is as to the legitimacy of a certain type of marriage contracted by the members of a certain family, much may be gathered from the treatment accorded to the alleged wives and from the way in which they speak of themselves in official documents and petitions and legal proceedings in which they were parties. Evidence of this kind is conduct admissible under S. 50 of the Evidence Act (illustration B), as it shows the repute in which such marriage was held in the family. (*Spencer, Offg. C. J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1= A.I.R. 1925 Mad. 497.**

—S. 50—Marriage—Proof of.

———Proof of, by character and conduct of relatives of parties is not correct. (*Lord Shaw*). MOHABBAT ALI KHAN *v.* MD. IBRAHIM KHAN. **117 I.C. 17= 1929 A.L.J. 465=33 C.W.N. 645= 31 Bom. L.R. 846=6 O.W.N. 517=56 I.A. 201= 50 C.L.J. 89=30 M.L.W. 97=1929 M.W.N. 676= 10 Lah. 725=31 P.L.R. 1=A.I.R. 1929 P.C. 135= 57 M.L.J. 366 (P.C.).**

———A Court under the provisions of S. 50 while not directed to exclude evidence of opinion as expressed by conduct to prove such a marriage is directed not to base a finding that such a marriage has taken place upon the evidence of opinion alone. (*Stuart, C. J.*). RAGHUPAT SINGH *v.* KING EMPEROR.

100 I.C 535=4 O.W.N. 172=28 Cr. L. J. 311= 7 A. I. Cr. R. 436=A.I.R. 1927 Oudh 140.

—S. 50—Reversionership.

———Inam statements purporting to be filed on behalf of a certain Hindu woman but actually signed by her brother's son are inadmissible on a question as to whether certain persons are her reversioners. (*Ramesam, J.*). KRISHNAMACHARLU *v.* S. VIJAYASARATHY. **88 I.C. 646= 22 M. L. W. 73=1925 M. W. N. 117= A.I.R. 1925 Mad. 823=48 M.L.J. 467.**

EVIDENCE ACT (1872), S. 54—Evidence of bad character.

—S. 51—General repute.

———In an action for damages, for libel or slander, evidence may be given in mitigation of damages to show that the plaintiff had general bad character (8 Q. B. D. 491 and Odgers on Libel and Slander, 5th Edition, page 402). Similarly in Criminal prosecution where it is essential, in order to constitute the offence of defamation, that the person who makes or publishes the imputation complained of, should intend to harm, or know or have reason to believe that the imputation will harm the reputation of the person concerning whom it is made or published, the question what reputation the complainant had is relevant. If it is proved that the complainant had a notoriously bad reputation as a bribe-taker, the imputation made as to his having taken a bribe on the particular occasion even if false, could not damage his reputation as he had none to lose. (*Martineau, J.*). DEVI DIAL *v.* KING EMPEROR. **73 I.C. 805=4 Lah. 55= 2 P. W. R. Cr. 1923=24 Cr. L. J. 693= A.I.R. 1923 Lah. 225.**

—S. 54—Evidence of bad character.

———Evidence to show character of persons associating with accused and nature of association is also inadmissible. (*Kemp, J.*). EMPEROR *v.* WAHIDUDDIN HAMIDUDDIN (NO. 1.) **32 Bom. L.R. 324=A.I.R. 1930 Bom. 157.**

———It is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue : *Makin* v. *Attorney-General for New South Wales*, (1894) A. C. 57, *Foll.*

Evidence of defalcations both prior or subsequent whether such defalcations formed the basis of another charge on which the accused may have been acquitted or not are admissible in evidence to prove guilty intent as also to anticipate the defence of the non-existence of such intent. (*Kincaid, J.C. and Rupchand Bilaram, A. J. C.*). EMPEROR *v.* STEWART. **97 I.C. 1041=27 Cr. L. J. 1217= 21 S. L. R. 55=A. I. R. 1927 Sind 28.**

———Evidence of bad character to prove motive for the crime or otherwise relevant is not excluded. 47 Cal. 671 and A. I. R. 1923 Bom. 71, *Dist.* (*Mullick, Ag. C. J. and Jwala Prasad, J.*). JAGWA DHANUK *v.* EMPEROR. **93 I. C. 884= 5 Pat. 63= 7 P. L. T. 396=27 Cr. L. J. 484= A.I.R. 1926 Pat. 232.**

———Evidence of previous bad character is relevant except where it is given for the purpose of showing that the accused was of a bad character and therefore likely to commit offences of the kind in question. Under S. 167, improper admission is no ground for a new trial if there is other evidence sufficient to support the conviction. (*Rattigan, C.J. and Martineau, J.*). DAULAT RAM *v.* EMPEROR. **22 Cr.L.J. 128=59 I.C. 560.**

EVIDENCE ACT (1872), S. 54—Habitual theft.

—S. 54—Habitual theft.

———In a case where the offence for which the accused are being tried is the particular one of belonging to a gang of dacoits, evidence merely that the accused habitually commits thefts (as opposed to dacoity and possibly robbery) is not evidence indicating an intention to commit the particular crime of which the accused is charged and is therefore inadmissible. But where the accused himself has given evidence that he has a good character such evidence is admissible under S. 54: 32 Mad. 179, *Foll.* (*Fawcett, J.*). EMPEROR *v.* HAJI SHER MAHOMED.

75 I.C. 67=46 Bom. 958=25 Bom. L.R. 214=24 Cr. L.J. 867=A.I.R. 1923 Bom. 71.

—S. 54—Object.

———The object of S. 54 is to lay down that evidence of bad character including a previous conviction is, as a rule, irrelevant "to help to establish an accused person's guilt," but not to lay down that it may not be taken into account in passing sentence: 39 Bom. 326, *Foll.* (*Wallace, J.*). SUBAN SAHIB *v.* EMPEROR. **115 I.C. 483=52 Mad. 358=29 M.L.W. 194=2 M.Cr.C, 65=1929 M.W.N. 393=30 Cr.L.J. 471=12 A.I. Cr.R. 256=A.I.R. 1929 Mad. 306=56 M.L.J. 595.**

—S. 54—Past good character.

———*Past good character does not lead to presumption of innocence but to prove guilt of such a man; evidence against him must be of an unimpeachable character.*

The mere fact that a person has enjoyed the confidence of his superiors or that he had in fact led a life of honesty during the past, is no reason to suppose that he will not succumb to temptation at the close of his career, but before a man of this type and such antecedents is adjudged guilty, the evidence against him must be of an unimpeachable character. (*Tek Chand, J.*). MANGAL RAI *v.* EMPEROR. **110 I.C. 676=10 L.L.J. 262=29 P.L.R. 703=10 A.I.Cr.R. 519=29 Cr. L.J. 740=A.I.R. 1928 Lah. 647.**

—S. 54—Previous conviction.

———Previous convictions and proceedings under S. 110, Cr. P. Code, are admissible in a case under S. 401 for the purpose of proving habit though not of general bad character and are not excluded by S. 54, Evidence Act: 13 Cr.L.J. 539; 38 Cal. 438 and A.I.R. 1925 Bom. 195, *Rel. on*; 32 Mad. 179 and A.I.R. 1923 Bom. 71, *Diss.* and *Dist.* (*Percival, J.C. and Rupchand, A. J. C.*). BAKSHO *v.* EMPEROR. **A.I.R. 1930 Sind 211.**

———Section 54 does not apply to cases in which the bad character of any person is itself a fact in issue. If the evidence of bad character is introduced in order to establish a relevant fact, the evidence of bad character is admissible. Where the evidence of previous conviction or the evidence that a man has been bound over under the preventive sections can be considered only as evidence of character it must be excluded, but where such evidence is admissible *aliunde*, it should not be excluded. Such evidence is admissible under S. 14, not as evidence of character, but as evidence to prove habit and association. 27 Cal. 139; 32 Mad. 179; A.I.R. 1923 Bom. 71; A.I.R. 1925 Cal. 872 and A.I.R. 1925 Oudh 144, *Ref.* (*Stuart, C.J. and Raza, J.*). KHILAWAN *v.* EMPEROR. **112 I.C. 337=5 O. W.N. 760=29 Cr. L. J. 1009=11 A.I. Cr. R.273=A. I. R. 1928 Oudh 430.**

EVIDENCE ACT (1872), S. 54—Scope.

———Guilt of joint possession of cocaine—Evidence of previous conviction of trafficking in cocaine and history sheet opened by the police are inadmissible. (*Stuart, C.J.*). RAHIM BAKHSH *v.* EMPEROR. **109 I.C. 349=5 O.W.N. 124=9 A. I. Cr. R. 416=10 A.I. Cr. R. 169=29 Cr. L.J. 525=A.I.R. 1928 Oudh 215.**

———Former judgment more than 25 years old and convicting accused of dacoity is admissible in a case under S. 401, I.P.C., for showing criminal tendency to commit theft and not habit of committing theft. 14 Bom. L. R. 373 and 38 Cal. 408, *Foll.* (*Marten and Fawcett, JJ.*). MOTIRAM HARI *v.* EMPEROR. **89 I.C. 527=26 Bom. L.R. 1223=26 Cr. L.J. 1391=A.I.R. 1925 Bom. 195.**

———The principle underlying the legal provision may also be seen in S. 54 of the Indian Evidence Act under which a previous conviction is declared inadmissible against an accused person, except where evidence of bad character is relevant. A.I.R. 1923 Cal. 707, *Dist.* (*May Oung, J.*). MAUNG E. GYI *v.* THE CROWN. **81 I.C. 106=1 Rang. 520=A.I.R. 1924 Rang. 91.**

———During the trial of the accused for a substantive offence, the evidence about the previous conviction should not be recorded. Such evidence is forbidden by S. 54 unless the accused offers evidence of good character. (*Jwala Prasad and Sultan Ahmed, JJ.*). TEKA AHIR *v.* EMPEROR. **60 I..C 331=22 Cr. L.J. 219=5 Pat. L.J. 706.**

—S. 54—Previous dishonesty.

———Evidence of a previous act of dishonesty of the accused can only be allowed to prevent the accused person from pleading that the act under consideration was committed without a dishonest intention. (*Addison and Kemp, JJ.*). EMPEROR *v.* BAKHWOR LAL. **102 I.C. 492=8 A.I. Cr. R. 196=28 P.L.R. 313=28 Cr. L.J. 556= A. I. R. 1927 Lah. 549.**

—S. 54—Previous Security proceedings.

———Order under S. 118, Cr. P. Code can be proved against a person proceeded against under S. 110, though the order is not a conviction under Evidence Act, S. 54, Expln. 2. (*Ashworth and King, JJ.*). EMPEROR *v.* KUMERA. **51 All. 275=1929 Cr. C. 346=A.I.R. 1929 All. 650.**

—S. 54—Previous sedition.

———As a general rule in sedition cases evidence of previous sedition is inadmissible. It is no doubt open to the prosecution, where the accused himself tries to show that he is a well affected man, because he has been particularly making loyal speeches, to prove that he has been in the habit of making seditious speeches. Also the speech, the subject of charge, may be of such a character that its meaning is not patent. It may contain obscure, political, social or historical references, elucidation of which may be sought from previous speeches of the same accused. In such a case previous speeches would be admissible. (*Kennedy, J.C.*). EMPEROR *v.* GOVINDANAND. **84 I.C. 448=26 Cr. L.J. 304=A.I.R. 1921 Sind 199.**

—S. 54—Scope.

———S. 54 of the Evidence Act does not apply to cases in which the bad character of any person is itself a fact in issue. (*Raza and Nanavutty, JJ.*). BACHCHU *v.* EMPEROR. **7 O.W.N. 862=1930 Cr. C. 1079=A.I.R. 1930 Oudh 455.**

———Section 54 regulates what is relevant for the purpose of proof at an enquiry or trial, not what is relevant for the purpose of deciding whether a longer or shorter sentence is to be imposed.

EVIDENCE ACT (1872), S. 56—Custom.

(*Rutledge, C. J., Carr, Cunliffe and Das, JJ.*). EMPEROR *v.* NGA BA SHEIN. **111 I.C. 453= 6 Rang. 391=11 A.I.Cr.R. 126= 29 Cr. L.J. 869=A.I.R. 1928 Rang. 200 (F.B.).**

—S. 56—Custom.

———Custom repeatedly brought to the notice of Court may be taken judicial notice of. (*Baker, Offg. J.C.*). MT. SANO *v.* PURAN SINGH. **A.I.R. 1925 Nag. 174.**

—S. 56—Fact transpiring in Court.

———A Court can take judicial notice of facts transpiring in Court. (*Kulwant Sahay and Macpherson, JJ.*). CHATTRA KUMARI DEVI *v.* MOHAN BIKRAM SHAH. **121 I.C. 337.**

—S. 56—Judgments.

———*Court will take judicial notice of judgments but not of statements of facts therein—Custom proved in a previous suit between certain parties will not affect other parties in a subsequent suit.*

When a custom has been repeatedly proved, the Court may take judicial notice of the fact that a certain class of people is governed by the custom. (*Tyabji, A.J.C.*). TULSIDAS KESHOWDAS *v.* FAKIR MAHOMED. **93 I.C. 321=19 S.L.R. 376= A.I.R. 1926 Sind 161.**

—S. 56—Registration endorsement.

———Judicial notice should be taken of the endorsement of the Sub-Registrar and his signature. (*B. B. Ghose and Roy, JJ.*). RADHA MOHUN *v.* NRIPENDRA NATH. **105 I.C. 422= 47 C.L.J. 118=A.I.R. 1928 Cal. 154.**

—S. 57—Custom of privacy.

———There is a customary right of privacy prevailing in Oudh which is so well established and known, as not to require proof, in any case by a party setting it up and the Court itself may take judicial notice of the custom. 10 All. 358, *Rel. on.* (*Ashworth, J.*). BAGRIDI *v.* RAHIM BUX. **93 I.C. 332=13 O. L. J. 512= A. I. R. 1926 Oudh 352.**

—S. 57—Government notification.

———Judicial notice of a Government notification should not be taken by Court. (*Sulaiman and Ashworth, JJ.*). COLLECTOR OF CAWNPORE *v.* JUGAL KISHORE. **107 I.C. 578= A.I.R. 1928 All. 355.**

—S. 57—Matter of public history.

———The questiou of title between trustee of property, alleged to be dedicated to religious user, though an old and historical institution, and a private person cannot be deemed to be a "matter of public history" within the meaning of S. 54 and historical works cannot be used to establish title to such property. Books written as late as when the dispute has already arisen cannot be referred to even if S. 57 is held applicable. 46 I. C. 119, *Foll.* (*Tek Chand and Agha Haidar, JJ.*). SANT SINGH *v.* B. RALLIA RAM. **31 P.L.R. 372= A.I.R. 1930 Lah. 744.**

—S. 57—Municipal rules.

———Rules by the Hyderabad (Sind) Municipality in regard to Water rates and purporting to have the force of law, can be taken judicial notice of by the Court. (*Fawcett, J.C. and Kemp, A.J.C.*). COMMITTEE OF MANAGEMENT OF HYDERABAD *v* SETH RAMCHAND LOWNKIRAM. **87 I. C. 258= 16 S.L.R. 98=A.I.R. 1923 Sind 1.**

—S. 57—Registered letter.

———Court can take judicial notice that registered letter reaches the destination 24 hours later than an ordinary letter. (*Walsh, Ag. C.J. and Banerji, J.*). CHATURBHUJ RAM LAL *v.* SECRETARY OF STATE. **99 I.C. 622=A.I.R. 1927 All. 215.**

EVIDENCE ACT (1872), S. 56—Applicability.

—S. 57—Signature of officer.

———*Signature of a Gazetted officer—Judicial notice can be taken.*

The applicability of the sub section is not contingent on the exhibition of a copy of the Fort Saint George Gazette containing a notification of his appointment as such officer. (*Ayling and Ramesam, JJ.*). CHOLANCHERI AYAMMA, *In re.* **72 I.C. 515= 24 Cr.L.J. 403=17 M. L. W. 615= 32 M. L. T. 300=1923 M. W. N. 290= A.I.R. 1923 Mad. 600=44 M.L.J. 557.**

—S. 57—Thefts on Railways.

———It is obviously unfair to the railway company to take judicial notice of thefts on the railways. It is for the plaintiff asking for damages to prove "wilful neglect" on the part of the defendant railway. If he wishes to rely on the occurrence of thefts and inadequacy of the method of sealing waggons, it is for him to lead evidence on the point. A.I.R. 1926 All. 641, *Rel. on.* (*Addison, and Bhide, JJ.*). SECRETARY OF STATE *v.* GHANAYA LAL SRIKISHAN OF AMRITSAR. **111 I. C. 523=10 Lah. 329= A. I. R. 1928 Lah. 837.**

—S. 57—Warrant.

———*Warrant issued under S.* 46, *Calcutta Police Act is not public record—Its contents must be proved in a regular way.*

A warrant issued under the provisions of S. 46 of the Calcutta Police Act is not a public record and there is no presumption of any kind attaching to it; therefore the contents thereof must be proved in the popular way and, therefore, it is incumbent upon the prosecution to prove that a warrant of this description was in strict compliance with the provisions of S. 46 of the Act and that it was issued after information upon oath had been brought before the issuing officer and after such enquiry as he thought it necessary to make had been made. (*C.C. Ghose and Chotzner, JJ.*). B. WALVEKAR *v.* KING EMPEROR. **96 I. C. 264= 53 Cal. 718=30 C. W. N. 713= 27 Cr.L.J. 920=A.I.R. 1926 Cal. 966.**

—S. 58—Admission of execution.

———Admission of execution of a document dispenses with the necessity of proof of proper attestation. 6 Pat. L. J. 465, *Appl.*

Where the defendant mortgagor was an illiterate *pardanashin* lady,

Held, that the mere admission of her execution of the document is not sufficient to dispense with the necessity of proving the passing of consideration. (*Das and Ross, JJ.*). RAM LAL SINGH *v.* MT. SEPTI. **94 I. C. 558= 1926 P.H.C.C. 117=A.I.R. 1926 Pat. 295.**

—S. 58—Admission, what is.

———Mere reference in plaint to suit contract being made on 'office dhara' is no indication to the defendants that plaintiffs rely on one of the terms of the "office dhara" in support of their claim. (*Kennedy, J.C. and Rupchand Bilaram, A.J.C.*). FIRM OF DASSOMAL RAMCHAND *v.* FIRM OF YUSAFALI ADAMI. **86 I. C. 364=18 S.L.R. 265= A. I. R. 1925 Sind 80.**

—S. 58—Applicability.

———Section 58 makes no exception of criminal trials and the Criminal Courts, as a matter of

EVIDENCE ACT (1872), S. 58—Applicability.

practice, do not insist on every fact which is admitted by accused being proved by the prosecution. But, under the proviso, the practice is to insist on proof of all really essential facts. (*Wazir Hasan and Simpson, Ag.J.Cs.*). BHULAN *v.* EMPEROR.
91 I.C. 233=27 Cr.L.J. 57=
A.I.R. 1926 Oudh 245.

———Section 58 normally relates to agreed statements of facts made between both parties to save time and expense at a trial. But where there is no agreement to admit facts, and no pleading has been put in by a party it cannot be said any such admission has been made in his pleading. (*Shah, Ag. C. J., Marten and Fawcett, JJ.*). JOHN OVER *v.* MURIEL A. I. OVER. **91 I.C. 20=**
49 Bom. 368=27 Bom. L.R. 251=
A.I.R. 1925 Bom. 231.

———Divorce cases—Section does not apply. (*Shah, Ag. C. J., Marten and Fawcett, JJ.*). JOHN OVER *v.* MURIEL A. I. OVER. **91 I.C. 20=**
49 Bom. 368=27 Bom. L.R. 251=
A.I.R. 1925 Bom. 231.

—S. 58—Document.

———Proof of, may be waived by party affected by it, but validity of document is not affected thereby. 35 Mad. 607; A.I.R. 1918 P. C. 3, *Ref.* (*Dawson-Miller, C.J. and Mullick, J.*). BRIJNATH SINGH *v.* BRIJRAJ KUER. **68 I.C. 383=**
2 Pat. 52=4 P.L.T 239=
A.I.R. 1922 Pat. 514.

—S. 58—Partition.

———Where the defendants alleged that the plaintiff had executed certain unregistered deeds by which the inheritance of a common ancestor was partitioned, and the plaintiff in his pleadings by necessary implication admitted the said allegation.

Held, that oral partition being permissible S. 58 of the Evidence Act made evidence on this point unnecessary and therefore the provisions of Ss. 91 and 92 of the Evidence Act would not prevent defendants from relying on the partition. (*Heald and Lentaigne, JJ.*). MAUNG PO KIN *v.* MAUNG SHWE BYA. **76 I.C. 855=1 Rang. 405=**
A.I.R. 1924 Rang. 155.

—S. 60—Direct evidence.

———*Under S. 67 direct evidence of handwriting is not always necessary—S. 60 does not exclude circumstantial evidence of a thing which could be seen, heard and felt.*

It was never intended by S. 60 to exclude circumstantial evidence of a thing which could be seen, heard and felt, though at first sight the section might appear to have that meaning. 12 B.L.R. App. 18 *Foll.* (*Cuming and Mukerji, JJ.*). KARALI PROSAD DUTTA *v.* E.I. RY. CO. **111 I.C. 792=48 C.L.J. 32=**
A.I.R. 1928 Cal. 498.

———Oral evidence must in all cases be direct including the occasion when secondary evidence is being taken under S. 63 (5) of the contents of a document so that the deponent's having read the document becomes necessary. (*Young and Baguley, JJ.*). KALENTHER AMMAL BY HER ATTORNEY MEERA LEBBAI MERICAIR *v.* MA MI.
84 I.C. 175=2 Rang. 400=3 Bur.L.J. 172=
A.I.R. 1924 Rang. 363.

—S. 60—Dying declaration.

———*Proof of.*

Witnesses should not be allowed to prove a dying declaration as if it is a substantial piece of evidence in the case. The relevant fact to be proved

EVIDENCE ACT (1872), S. 60—Jail identification.

is the statement made by a deceased person admissible under S. 32 of the Evidence Act, and that statement is not a document made by the Magistrate but the verbal statement made by the deceased person. The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over to him at or about the time the statement is made. (*Abdul Qadir, J.*). KUNJ LAL *v.* EMPEROR. **67 I.C. 577=23 Cr.L.J. 417=**
6 L.L.J. 115=A.I.R. 1924 Lah. 12.

—S. 60—Exparte affidavits.

———Ordinary documents are not proved by mere *exparte* affidavits when the person trying to prove them does not submit himself to cross-examination. Under special circumstances affidavits under Order XIX may be allowed to be read in evidence, but even then if the opposite party *bona fide* desires the attendance of the witness for cross-examination he has to appear. (*Sulaiman, J.*). HABIB BUX *v.* SAMUEL FITZ & CO., LTD.
89 I.C. 22=23 A.L.J. 961=6 L.R.A. Civ. 553=
A. I. R. 1926 All. 161.

—S. 60—Fact of deposing.

———Fact of deposing might be proved by any one who has seen and heard witness. 27 Cal. 639. (P. C.) and 34 Mad. 349 (F. B.), *Ref.* (*Ramesam, J.*). K. S. GANAPATHI AIYAR *v.* SAKHARAYAPPA MUDALIAR. **115 I. C. 147=**
A. I. R. 1929 Mad. 187.

—S 60—Hearsay evidence.

———Evidence of a witness that he learnt that one of the accused is known by a certain name is hearsay evidence and is therefore inadmissible. (*Boys, J.*). DANNA *v.* KING-EMPEROR.
108 I. C. 689=9 A.I Cr. R. 194=
9 L.R.A. Cr. 27=29 Cr. L. J. 449.

———Hearsay evidence is inadmissible. (*Teunon and Ghose, JJ.*). ASHUTOSH DAS *v.* KING EMPEROR. **66 I. C. 513=34 C. L. J. 53.**

———The introduction as evidence of a hearsay statement regarding the nature of the occurrence in question and the absence from the Judge's charge to the jury of any caution against the attaching of any value thereto was reprehensible. (*Teunon and Ghose, JJ.*). EMPEROR *v.* LALIT MOHAN SINGH ROY. **62 I. C. 578=**
25 C. W. N. 788=22 Cr. L. J. 562=
A I. R. 1921 Cal. 111.

—S. 60—Jail identification.

———Statements of witnesses at jail identification are not made on oath, and again, they are made in the course of extra-judicial proceedings. The law does not allow statements of this kind to be made available as evidence at the trial unless and until the persons who made those statements are called as witnesses. When these persons are called as witnessess then these previous statements become admissible, not as substantive evidence in the case, but merely as evidence to corroborate or contradict the statements made by these witnesses in Court. If when an identifying witness called in the Sessions Court, states there that he can identify no one, there is obviously nothing to corroborate and so the evidence of the previous statement, express or implied, made in the course of the identification proceedings in the jail is not admissible. (*Lindsay and Sulaiman, JJ.*). NAGINA *v.* EMPEROR. **95 I. C. 477=19 A. L. J. 947=**
27 Cr. L. J. 813=A. I. R. 1921 All. 215.

EVIDENCE ACT (1872), S. 60—Opinions and impressions.

—S. 60—Opinions and impressions.

———Only what the witness actually saw and heard as to what a mob was doing and saying is admissible to prove the nature of the assembly; his opinion and impressions that the assembly appeared to be unlawful are not admissible. (*Jwala Prasad, J.*). JOGI RAUT *v.* EMPEROR.
105 I. C. 234=9 P.L.T. 260=28 Cr. L. J. 906= A. I. R. 1928 Pat. 98.

—S. 60—Solicitor's books.

———Entries in solicitor's books of account regarding object of purchase for client are neither inadmissible nor irrelevant nor hearsay. (*Viscount Sumner.*) HARIRAM SEROUGEE *v.* MADAN GOPAL BAGLA. **114 I.C. 565=1929 A.L.J. 406= 49 C.L.J. 335=33 C.W.N. 493=31 Bom. L.R. 710= 1929 M. W. N. 422=30 M.L.W. 835= A.I.R. 1929 P.C. 77=57 M. L. J. 581 (P.C.).**

—S. 60—Statement of accused.

———Statement by accused immediately after the offence is relevant but statement by another person to the accused must be proved by the person who heard it. (*Broadway and Campbell, JJ.*). KAKAR SINGH *v.* THE CROWN. **81 I.C. 717= 6 L.L.J. 575=25 Cr. L.J. 1005= A.I.R. 1924 Lah. 733.**

—S. 61—Copy of document.

———That the man producing a document used the same to settle disputes between the villagers, and before him the document was in the possession of his father, does not make the document a true copy of the original (chitta). (*B. B. Ghose and Bose, JJ.*). ABDUL BARI *v.* HRISHIKESH MITTRA. **49 C.L.J. 546=A.I.R. 1929 Cal. 459.**

—S. 62—Newspaper.

———One specimen of a newspaper is not a copy of another specimen of the same newspaper of the same date. There is no relation between them of copy and original. They are all counterpart originals, each being primary evidence of the contents of the rest. (*Hilton, J.*). RAM CHANDRA *v.* EMPEROR.
120 I.C. 798=1930 Cr. C. 331=31 Cr L.J. 168= A.I.R. 1930 Lah. 371.

—S. 63—Certified copy.

———A certified copy is sufficient secondary evidence under S. 63 of the existence, conditions and contents of the deed but not of its execution, which must be proved as required under S. 68. (*Dalal, J.*). SHEIKH KARIMULLAH *v.* GUDAR KOERI. **82 I. C. 306=5 L. R. A. Civ. 686= A. I. R. 1925 All. 56.**

———The registration copy of a document cannot be admitted in evidence in absence of proof of loss of the original. (*Devadoss, J.*). T. K. APPALACHARYULU *v.* T. K. VENKATA RAMANUJACHARYULU. **85 I.C. 524=21 M. L. W. 67= A. I. R. 1925 Mad. 345=47 M. L. J. 906.**

———Where the Sub-Registrar being doubtful about the execution of a document brought to him for registration, prepared a copy of the same for forwarding it to District Registrar for opinion,

Held, that such a copy was secondary evidence of the document. (*Kinkhede, A. J. C.*). BAYA *v.* BHAURAO. **78 I. C. 865=A.I.R. 1924 Nag. 375.**

—S. 63—Contents of document.

———Secondary evidence of a document is evidence of its contents by person who read the document and oral evidence as to the terms of a mortgage which have been reduced to writing is not evidence of the contents of the document. U. B. R. (1907-09).

EVIDENCE ACT (1872), S. 63—Oral evidence.

II Evidence P. 13, *Foll.* (*Saunders, J. C.*). MAUNG PO DIN *v.* MAUNG PO NYEIN.
66 I. C. 360=4 U. B. R. 80= A.I.R. 1921 U.B. 3.

—S. 63—Copy of copy.

———Copy of copy of document produced and admitted to record by consent—Although it cannot prove anything which under Evidence Act cannot be proved, yet it can be admitted to show contents of original. A. I. R. 1925 Mad. 257, *Appr.* (*Reilly, J.*). NARASAYYA *v.* KRISHNAMURTHI.
115 I.C. 509=A.I.R. 1928 Mad. 1255.

—S. 63—Direct evidence.

———Oral evidence must in all cases be direct including the occasion when secondary evidence is being taken under S. 63 (5) of the contents of a document so that the deponent's having read the document becomes necessary. (*Young and Baguley, JJ.*). KALENTHER AMMAL BY HER ATTORNEY A. S. MEERA LEBBAI MERICAIR *v.* MA MI.
84 I.C. 175=2 Rang. 400= 3 Bur. L. J. 172=A.I.R. 1924 Rang. 363.

—S. 63—Illiterate witness.

———If a document is read over to a man because he cannot read himself, and he thereupon signs it and as containing what has been read over to him, he may be said within S. 63 to have seen the contents of that document: 12 A.L.J. 239, *Dist.* (*Walsh, J.*). PUDAI SINGH *v.* BRIJ MANGAL.
73 I.C. 654=A.I.R. 1923 All. 612.

———Witness unable to read the document—His evidence is not secondary evidence of the contents of that document. 12 A. L. J. 239, *Foll.* (*Daniels, J.*) RAMJI DAS *v.* MIHIN LAL.
71 I.C. 654=A.I.R. 1923 All. 441.

———Where the only witness in support of the mortgage is one Bindeshri, an illiterate person, and no other witnesses have been produced,

Held, that such an illiterate person could not be deemed to be one who has seen the mortgage within Cl. 5 of S. 63, of the Evidence Act. (*Gokul Prasad, J.*). JANKI *v.* RAM KISHORE.
66 I.C. 557=A.I.R. 1922 All. 232.

—S. 63—Objections.

———Admissibility of a copy of a copy of the original document—Objection regarding admissibility not raised in lower Court—Objection is not open in appeal. (*Devadoss, J.*). K. LATCHAYYA SUBUDHI *v.* V. SEETHARAMAYYA. **84 I.C. 921= 20 M.L.W. 719=35 M.L.T. 129= 1924 M.W.N. 923=A.I.R. 1925 Mad. 257.**

—S. 63—Oral evidence.

———Evidence that the witness saw the document and heard it read out by some one else is only hearsay so far as the contents are concerned, and does not fulfil the requirements of S 60. A. I. R. 1927 P. C. 15, *Foll.*; A. I. R. 1924 All. 792, *Diss. from.* (*Srivastava, J.*). RAM PIARAY *v.* RAM RAGHUBIR LAL. **112 I.C. 310.**

———Oral evidence to be secondary evidence of the contents of a document must be of persons who have read the document. (*Sir John Wallis.*) MA MI *v.* KALLANDER AMMAL. **100 I. C. 1= 45 I.C. 263=5 Rang. 18=54 I.A. 61= 25 A.L.J. 65=38 M.L.T. 41= 1927 M.W.N. 80= 25 M.L.W. 342= 28 P.L.R. 109= 31 C.W.N. 621= 8 P.L.T. 280=6 Bur. L.J. 40= 29 Bom. L.R. 800=A.I.R. 1927 P.C. 15= 52 M.L.J. 376 (P.C.).**

———*"Seen it" meaning of.*

Mere fact of having seen the document is enough the witness need not have read it or have been

EVIDENCE ACT (1872), S. 63—Oral evidence.

able to do so, in order to make his evidence admissible. (*Walsh, A. C. J. and Sulaiman, J.*). MEHI LAL *v.* RAMJI DASS. **80 I.C. 939= 22 A.L.J. 864=5 L.R.A. Civ. 720= 47 All. 13=A.I.R. 1924 All. 792.**

———The argument that if a witness has seen a document without reading it, nevertheless under S. 63 (5) he becomes qualified through knowledge that he has acquired otherwise than by reading it or seeing it in such a way that he became acquainted with its contents by so seeing it, is wrong. (*Young and Baguley, JJ.*). KALENTHER AMMAL BY HER ATTORNEY A. S. MEERA LEBBAI MERICAIR *v.* MA MI. **84 I.C. 175=2 Rang. 400= 3 Bur. L.J. 172=A.I.R. 1924 Rang. 363.**

—S. 63—Paper book.

———Paper-book containing translation of documents is not secondary evidence of the contents of these documents. (*Suhrawardy and Mukerji, JJ.*). RAMANUJ RAI *v.* DAKSHINESHWAR RAO. **93 I.C. 101=43 C.L.J. 237=30 C.W.N. 259= A.I.R. 1926 Cal. 752.**

—S. 63—Printed copy of deposition.

———Printed copy of depositions coming up to Madras High Court after Government Press took up printing of High Court papers—Depositions in English—Copy is admissible in evidence as papers are compared with original before giving final order for striking off. A. I. R. 1927 Pat. 61, *Rel. on.* (*Ramesam, J*). GANAPATHI AIYAR *v.* SAKHARAYAPPA MUDALIAR. **115 I.C. 147= A.I.R. 1929 Mad. 187.**

—S. 63—Survey and Settlement Report.

———Survey and Settlement Report which was based on a *jamabandi*, the original of which was not produced and which itself was not exhibited in evidence, cannot be treated as secondary evidence of the contents of the *jamabandi* statement under Cl. (5), S. 63 or under any other section of the Evidence Act. A.I.R. 1928 Pat. 284, *Reversed.* (*Sir John Wallis.*) SURENDRA NATH KARAN DEO *v.* KAMAKHYA NARAIN SINGH. **123 I.C. 145= 31 M.L.W. 352=32 Bom. L.R. 515= 51 C.L.J. 502=A.I.R. 1930 P. C. 45.**

—S. 63—Translation of document.

———*Translation of document in judgment not* inter partes *is inadmissible as secondary evidence.*

Section 63 gives an exhaustive statement of secondary evidence admissible. (*Spencer and Devadoss, JJ.*). JAGANNATHA NAIDU *v.* THE SECY. OF STATE. **70 I.C. 107= 16 M.L.W. 11=1922 M.W.N. 432= 31 M.L.T. 46=A.I.R. 1922 Mad. 334= 43 M.L.J. 37.**

—S. 64—Objections.

———Admission of secondary evidence—Objection as to mode of proof cannot be taken after Court has admitted the document. (*Das and Kulwant Sahay, JJ.*). KESHO PRASAD SINGH *v.* BABU PERMESHRI PRASAD SINGH. **71 I.C. 902=4 P.L.T. 135= 1923 P.H.C.C. 65=1 Pat. L.R. 111= 2 Pat. 414=A.I.R. 1923 Pat. 276.**

—S. 65.

Admissibility of secondary evidence.
Condition precedent.
Discretion of Court.
Objection.
Original instrument invalid.
Miscellaneous.

EVIDENCE ACT (1872), S. 65—Admissibility of secondary evidence—Loss of original.

—S. 65—Admissibility of secondary evidence—Account books.

———In the absence of the original account books, a summary of the result of that examination, as given by a person who had examined them for a pleader is admissible in evidence under S. 65. (*Lindsay and Kanhaiya Lal, JJ.*). MUST. PHULWANT KUNWAR *v.* JANESHAR DAS. **83 I.C. 782= 46 All. 575=22 A. L.J. 521= 5 L.R.A. Civ. 785=A.I.R. 1924 All. 625.**

—S. 65—Admissibility of secondary evidence—Admission of party.

———Where a previous admision of a party is sought to be used against him the statement containing the admission must be put in. Court's order referring to the admission is not sufficient proof. (*Dalip Singh, J.*). MOLAR *v.* RAMPRASAD. **102 I.C. 198=28 P. L. R. 196= A.I.R. 1927 Lah. 377.**

—S. 65—Admissibility of secondary evidence—Income-tax returns.

———Certified copies obtained by private persons of Income-tax Returns are inadmissible as the issue of such copies is unlawful under S. 54 of the Income Tax Act, 1922. (*Carr, J.*). ANWAR ALI *v.* TAFOZAL AHMED. **84 I.C. 487=3 Bur. L.J.194= 2 Rang. 391=A.I.R. 1925 Rang. 84.**

—S. 65—Admissibility of secondary evidence—Loss of original.

———*Proof.*

Whether or not sufficient proof of loss of an original document, to lay a ground for admission of secondary evidence has been given is a point proper to be decided by the Judge of first instance and is treated as depending very much on his discretion. His conclusion should not be overruled, except in a clear case of miscarriage: 19 Cal. 438 (P.C.), *Foll.*; A.I.R. 1922 P.C. 56, *Rel. on.* (*Srivastava, J.*). JAS KARAN SINGH *v.* RAM TAHAL. **114 I.C. 307 (Oudh).**

———S. 57, Registration Act only shows that when secondary evidence has in any way been introduced as by loss of original document copy certified by Registrar is admissible to prove contents of original. (*Mya Bu, J.*). MA YIN *v.* MA BOK. **A.I.R. 1929 Rang. 277.**

———Mortgage deed executed in England—Deed lost before registration in British India—Suit brought for recovery of money—Secondary evidence was held admissible. 23 Mad. 49; 4 M. H. C. R. 312 and 7 Mad. 440, *Dist.* (*Ross and Wort, JJ.*). HERBERT FRANCIS *v.* MAHOMED AKBAR. **105 I.C. 502=7 Pat. 99=9 P.L.T. 221= A.I.R. 1928 Pat. 134.**

———It is well settled that certified copies of registered deeds evidencing private transactions are admissible only when a case for reception of secondary evidence has been made out. Section 57, Registration Act, only shows that when secondary evidence has in any way been introduced, as by proof of the loss of the original document, a copy certified by the Registrar shall be admissible for the purpose of proving the contents of the original. 22 W. R. 303 and 11 I. C. 50, *Ref.* (*Tek Chand and Agha Haidar, JJ.*). BADHAWA RAM *v.* AKBAR ALI. **103 I.C. 752=9 L.L.J. 428=A.I.R. 1927 Lah. 817.**

———Omission to plead loss of a document at the earliest stage of proceedings is not a ground for rejecting its secondary evidence. (*Hallifax, A.J.C.*). KAMOD SINGH *v.* KHEMKARAN. **103 I.C. 186= 10 N.L.J. 129=A.I.R 1927 Nag. 269.**

EVIDENCE ACT (1872), S. 65—Admissibility of secondary evidence—Loss of original.

———The rule laid down in S. 65 that a certified copy is the only secondary evidence admissible when the original is a public document does not apply where the original has been lost or destroyed. 6 Mad. 80, *Foll.*; 27 Cal. 632 (P. C.), *Rel. on.* (*Das and Foster, JJ.*). CHANDRESHWAR PRASAD NARAIN SINGH *v.* BISHESWAR PRATAB NARAIN SINGH. **101 I.C. 289=5 Pat. 777=8 P.L.T. 510= A.I.R. 1927 Pat. 61.**

———Evidence as to a statement made by the executor under the Will as to the same having been burnt is admissible as justifying a party in giving secondary evidence of the Will. *The Queen* v. *Braintree*, 120 E.R. 827 and *The Queen* v. *Kenilworth*, 115 E. R. 631, *Rel. on.* (*Phillips and Madhavan Nair, JJ.*). VENKATARAMANUJACHARYULU *v.* APPALACHARYULU. **97 I. C. 785= 24 M. L. W. 227=A. I. R. 1926 Mad. 1003.**

———Document lost after it was filed in Court—Secondary evidence is allowed (*Lord Sumner*). TULSI RAM *v.* RAM SARAN. **86 I.C. 552= 27 Bom.L.R 777=29 C.W.N. 965=22 M.L.W. 86= 26 P.L.R. 419=23 A.L.J. 109=2 O.W.N. 256= 6 L.R.P.C. 70=A.I.R. 1925 P.C. 80= 49 M.L.J. 132 (P.C.).**

———Suit on bond—Loss of bond alleged—Defendant denying execution—Plaintiff proving execution—Plaintiff need not prove loss of bond. (*Neave, A.J.C*). BENI MADHO *v.* RAM LAKHAN. **81 I.C. 570=A.I.R. 1925 Oudh 100.**

———Where the loss of the original has not been proved the copy cannot be accepted in evidence. (*Abdul Raoof and Moti Sagar, JJ.*). HUKAM CHAND *v.* SHAHAB DIN. **71 I.C. 495=4 Lah. 90= A.I.R. 1924 Lah. 40.**

———One of the attesting witnesses to a will deposed to its due execution. He stated that after the death of the testator the original will came into the possession of *D* who was the brother of Mt. R, the legatee and who acted as her Mukhtar. He further deposed that *D* was dead and that no other members of the family either of *R* or of her husband were now in existence.

Held, that a sufficient foundation had been laid for the admission of secondary evidence. (*Lindsay and Sulaiman, JJ.*). RAM CHARAN LAL *v.* RAGHU BIR SINGH. **75 I.C. 387=21 A.L.J. 495= 45 All. 618=4 L.R.A. Civ. 294= A.I.R. 1923 All. 551.**

———The evidence of a witness, who deposes to the loss of a deed which should be in his custody, is sufficient to allow secondary evidence. (*Lord Phillimore*). MT. DHTISHAN ALI *v.* JAMNA PRASAD. **64 I.C. 299=15 M. L.W. 104= 24 Bom. L.R. 675=9 O.L.J. 71= 30 M.L.T. 132=48 I.A. 365= 27 C.W.N. 8=20 A.L.J. 961=24 O.C. 272= A.I.R. 1922 P.C. 56 (P.C.).**

———Certified copy—Original produced in an old suit—Copy can be relied upon by Court. (*Macleod, C.J. and Shah, J.*). CHUDASAMA KHODUBA SARTANSANG *v.* CHUDASAMA TAKHATSANG NARASINGJI. **76 I.C. 155=46 Bom. 32= A.I.R. 1922 Bom. 177.**

—S. 65—Admissibility of secondary evidence—Original in another Court.

———Original filed in another Court and not produceable without delaying suit—Certified copy is admissible. (*Suhrawardy and Costello, JJ.*). JOBEDA KHATUN *v.* SHEIKH MONABALI. **A.I.R. 1930 Cal. 479.**

EVIDENCE ACT (1872), S. 65—Condition precedent.

—S. 65—Admissibility of secondary evidence—Original with hostile person.

———Where original document was with defendant's brother who was on bad terms with defendant, certified copy was held admissible. (*Dalal, J.C.*). BASHIRUDDIN KHAN *v.* MAHADEO SINGH. **79 I.C. 663=27 O.C. 26=11 O.L.J. 565= A. I. R. 1924 Oudh 306.**

—S. 65—Admissibility of secondary evidence—Original with opposite party.

———The production of a certified copy of the registered deed is sufficient proof when the original of that deed is in the possession of the opposite party. (*Mukerji and Bennet, JJ.*). MT. SALIMAN *v.* HAKIM MUKHDUM BUX. **116 I.C. 277= A.I.R. 1928 All. 394.**

———Proof that party against whom deed is sought to be proved appears to be in possession of it is enough. (*Misra, A.J.C.*). MT. ZAIB-UN-NISSA *v.* IRSHAD HUSAIN. **89 I. C. 284=12 O. L.J. 354= 2 O.W.N. 505=A.I.R. 1925 Oudh 504.**

———Where the original receipts are with the defendant and are not produced by him the plaintiff is entitled to produce in evidence copies of the Receipts they being secondary evidence of the Receipts. (*Hallifax, A.J.C.*). CHOUDHRI RAMPRASAD *v.* NATHURAM. **68 I.C. 494= A.I.R. 1923 Nag. 32.**

—S. 65—Admissibility of secondary evidence—Public document.

———*Abstracts.*

An abstract from mutation records showing the number of transfers of land in a particular tribe is admissible in evidence under S. 65 (g) for proving that members of the tribe have unrestricted powers of alienation. (*Abdul Raoof and Moti Sagar, JJ.*). SHER MUHAMMAD KHAN *v.* DOST MUHAMMAD KHAN. **78 I.C. 451= A.I.R. 1925 Lah. 231.**

———An entry in a public document such as a settlement record can be proved only by the original or by a certified copy. (*Martineau, J.*). RAM LAL *v.* GHANASHAM DASS. **71 I.C. 825= A.I.R. 1923 Lah. 150.**

—S. 65—Admissibility of secondary evidence—Telegram.

———Three months after sending a telegram it can be proved by secondary evidence. (*Dalal, J.C.*). BISHAMBHAR NATH TANDON *v.* EMPEROR. **90 I.C. 760=26 Cr. L.J. 1602= 2 O.W.N. 760=A.I.R. 1926 Oudh 161.**

—S. 65—Admissibility of secondary evidence—Will.

———*Bona fide* impossibility of producing original must be proved before secondary evidence as to contents can be adduced. (*Spencer, Offg. C.J. and Srinivasa Aiyangar, J.*). RANGAPPA NAYAKER *v.* RANGASAMI NAYAKAR. **88 I.C. 249= 1925 M.W.N. 232= A.I.R. 1925 Mad. 1005.**

—S. 65—Condition precedent.

———Distinction between admissibility and manner of proof—Secondary evidence cannot be admitted when primary evidence is not admissible. A.I.R. 1922 Lah. 401 (2), *Foll.* (*Shadi Lal, C.J. and Le Rossignol, J.*). MUHAMMAD DIN *v.* ALLAH DITTA. **95 I.C. 444=8 L.L.J. 158= 27 P. L. R. 268.**

———Where primary evidence of the contents of a document is inadmissible. secondary evidence of that primary evidence can be in no better position. (*Le Rossignol, J.*). RAHIM BAKSH *v.* MOHAMMAD AYUB. **66 I. C. 153=A.I.R. 1922 Lah. 354.**

EVIDENCE ACT (1872), S. 65—Discretion of Court.

—S. 65—Discretion of Court.

———The question whether the non-production is due to any other sufficient reason not arising from his own default or neglect is one of fact and depends mainly on the discretion of the Court. (*Sulaiman and Kendall, JJ.*). GAYAPRASAD *v.* JASWANT RAI. **A.I.R. 1930 All. 550.**

———Trial Court is to decide whether or not sufficient proof of search for, or loss of, original documents for admission of secondary evidence is given. (*Jackson, A. J. C.*). PANDU *v.* BAPUDAS. **121 I.C. 33=A.I.R. 1929 Nag. 288.**

———What evidence is sufficient to prove loss of document is discretionary with trial Court. Discretion should not be disturbed unless there is miscarriage of justice. 19 Cal. 438 (P. C.), *Foll.* (*Wild, J.C. and Rupchand Bilaram, A. J. C.*). CHOITHRAM *v.* KHUNCHAND. **113 I.C. 370= A.I.R. 1929 Sind 7.**

———The question of the admissibility of secondary evidence is a point properly to be decided by the Judge of first instance and is treated as depending very much on his discretion. His conclusion therefore should not be overruled except in a clear case of miscarriage. 19 Cal. 438 (P. C.), *Foll.* (*Shadi Lal, C. J. and Fforde, J.*). CHUHA MAL *v.* HAJI RAHIM BAKHSH. **71 I. C. 568= 18 P.W.R, 1923=A. I. R. 1924 Lah. 303.**

—S. 65—Objection.

———Copy of document admitted in trial Court without objection—No objection is open in appeal. (*Campbell, J.*). JIWAN MALL *v.* JIWAN. **88 I.C. 541= 7 L. L. J. 79=26 P. L. R. 455= A. I. R. 1925 Lah. 347.**

———Absence of objection in trial Court to secondary evidence on the ground of want of proof of loss of original precludes the objection being raised in appeal. (*Young, J.*). MA THE NU *v.* MG NI TU. **84 I.C. 486=3 Bur. L. J. 193= A.I.R. 1925 Rang. 113.**

———When secondary evidence is produced in the first Court and no objection is taken either by the other side or by the Presiding Officer, it is not open to the Court of Appeal to reject that evidence. 6 Cal. 666; 31 Cal. 155 and 11 Bom. 320, *Foll.* (*Scott-Smith, J. on difference between Martineau and Harrison, JJ.*). JAWALA SINGH *v.* TEJA SINGH. **71 I.C. 801=A.I.R. 1924 Lah. 273.**

———When secondary evidence has once been admitted by the lower Appellate Court, the High Court sitting in second appeal cannot reject it. (*Dalal, J. C.*). BASHIRUDDIN KHAN *v.* MAHADEO SINGH. **79 I. C. 663= 27 O. C. 26=11 O.L.J. 565= A.I.R. 1924 Oudh 306.**

———Original in the possession of one defendant—Co-defendant cannot for the first time in appeal object to plaintiff producing copy. (*Shah and Crump, JJ.*). VINAYAK SHIVRAO ARAS *v.* ATMARAM RAYAJI NETRAMALI. **76 I.C. 152= 24 Bom.L.R. 1308=A.I.R. 1923 Bom. 170.**

———Admission of a copy without objection—Objection cannot be raised in appeal. (*Coutts and Das, JJ.*). RAMLOCHAN MISRA *v.* HARINATH MISRA. **67 I.C. 628= 3 Pat. L. J. 397=1 Pat. 606= A.I.R. 1922 Pat. 565.**

—S. 65—Original instrument invalid.

———Deed of relinquishment requiring registration not registered—Secondary evidence of the document is not admissible—Registration Act, S. 49. (*Kinkhede, A.J.C.*). 33 Cal. 613, *Ref. to.* JANARDHAN KASHINATH KASAR *v.* JANARDHAN VISHWANATH SHASTRI. **101 I.C. 839= A.I.R. 1927 Nag. 214.**

EVIDENCE ACT (1872), S. 65—Miscellaneous.

———*Unstamped documents.*

Held, production and presentation are not identical with admission and secondary evidence of the contents of an unstamped document, which has been lost or destroyed can, under no circumstances, be allowed. A non-existent document cannot be admitted, though under certain circumstances, of which the most essential is that before its disappearance the original should have borne the necessary stamp, secondary evidence is permitted. (*Shadi Lal, C.J. and Harrison, J.*). MUHAMMAD AYUB *v.* RAHIM BAKHSH. **69 I.C. 723= 5 L.L.J. 172=3 Lah. 282=A.I.R. 1922 Lah. 401.**

———*Specific performance.*

As the written agreement of sale was not on a stamped paper, it was not open to the plaintiff to adduce secondary evidence of it even upon payment of penalty. 23 Mad. 49 (P.C.), *Foll.* (*Macleod, C.J. and Shah, J.*). HIRALAL RAMNARAYAN *v.* SHANKAR HIRACHAND. **62 I.C. 637= 45 Bom. 1170=23 Bom. L.R. 506= A.I.R. 1921 Bom. 401.**

———Absence of original not explained—Secondary evidence of the contents was not admissible. (*Teunon and Newbould, JJ.*). DOMAI BARA *v.* KEREO KOLITA. **62 I.C. 444 (Cal.).**

—S. 65—Miscellaneous.

———*Scope—Documents produced merely as evidence—Applicability.*

According to S. 65 of the Evidence Act the loss of the original must be proved not only in a case where the document is being enforced in a suit but also where it is produced merely as a piece of evidence. (*Sulaiman and Kendall, JJ.*). MAQBUL AHMAD *v.* BRIJDEO TEWARI. **122 I. C. 751.**

———Certified copy of document relied upon—Before any presumption under S. 90 can be made party relying must lay foundation by leading secondary evidence under S. 65 : 22 All. 294; 41 All. 592; 6 Cal. 720 and 14 Cal. 486 (P. C.), *Foll.* (*Sulaiman and Kendall, JJ.*). GAYA PRASAD *v.* JASWANT RAI. **A. I. R. 1930 All. 550.**

———'*Produce.*'

The word "produce" only means "procure the production or give it in evidence." (*Sulaiman and Kendall, JJ.*). GAYAPRASAD *v.* JASWANT RAI. **A. I. R. 1930 All. 550.**

———*Loss of document.*

Transaction in nature of relinquishment—Agreement to relinquish unregistered but enforceable under the doctrine of part performance—Secondary evidence of its contents may be given if it is lost. A. I. R. 1924 Rang. 214, *Ref.* (*Chari and Maung Bu, JJ.*). MA NGWE HMON *v.* MAUNG SAN YAUK. **A. I. R. 1929 Rang. 181.**

———*Certified copy.*

It is well settled that certified copies of registered deeds evidencing private transactions are admissible only when a case for reception of secondary evidence has been made out. S. 57, Registration Act, only shows that when secondary evidence has in any way been introduced, as by proof of the loss of the original document, a copy certified by the Registrar shall be admissible for the purpose of proving the contents of the original: 22 W. R. 303 and 11 I. C. 50, *Ref.* (*Tek Chand and Agha Haidar, JJ.*). BADHAWA RAM *v.* AKABAR ALI **103 I.C. 752=9 L.L.J. 428=A.I.R. 1927 Lah. 817.**

EVIDENCE ACT (1872), S. 65—Miscellaneous.

———Registration Act, S. 49—Secondary evidence of partition-deed inadmissible—Oral evidence can be adduced to prove lawful origin of possession. (*Pratt and Mya Bu, JJ.*). MA PWA ZON *v.* MA PAN I. **102 I.C. 696=5 Rang. 154. A. I. R. 1927 Rang. 203.**

———S. 65 does not dispense with production of existing bond. (*Walsh and Pullan, JJ.*). MD. ZAFAR *v.* ZAHUR HUSAIN. **97 I.C. 82= 49 All. 78=24 A. L.J. 964=A.I.R. 1926 All. 741.**

———*Acquiescence to reception of evidence.*

Where the reception of secondary evidence is in direct contravention of an imperative prohibition of law, the fact that there was no objection cannot convert irrelevant evidence into relevant evidence. The principle of acquiescence can only be applied when the secondary evidence has been given of the contents of a document which, if produced, itself could have been admitted under the provisions of the law. (*Campbell, J.*). JHANDA SINGH *v.* HARNAM SINGH. **94 I. C. 75=27 P.L.R. 260= A. I. R. 1926 Lah. 415.**

———*Scope.*

S. 65 has no reference to a case where mere secondary evidence of the documents has not been tendered, but it is the document itself which is put in as secondary evidence of facts which have to be proved *aliunde*. Hence newspapers are not secondary evidence of facts narrated by them. (*Fforde and Scott-Smith, JJ.*). BAWA SARUP SINGH *v.* THE CROWN. **88 I. C. 22= 7 L.L.J. 264=26 Cr. L.J. 1078=26 P.L.R. 566= A. I. R. 1925 Lah. 299.**

———A party entitled to produce and producing secondary evidence of a document is not relieved from the duty cast upon him by law namely of proving the execution of the original. (*Shadi Lal, C.J. and Fforde, J.*). CHUHA MAL *v.* HAJI RAHIM BAKSH. **71 I.C. 568=18 P.W.R. 1923= A.I.R. 1924 Lah. 303.**

———Party in possession of document cannot let in secondary evidence. (*Dawson-Miller, C.J. and Mullick, J.*). BUDHAN TELI *v.* MADAN MOHAN LAL. **68 I.C. 653=3 P.L.T. 485= A.I.R. 1923 Pat. 111.**

———*Judgment.*

Statements of persons who merely heard judgment pronounced are not admissible in evidence. What is required is an oral account of the contents of the judgment or decree by some one who had read the one or the other. (*MacColl, A.J.C.*). MAUNG CHIT U *v.* MAUNG THA KU. **77 I.C. 258=4 U.B.R. 135=A.I.R. 1923 Rang. 113.**

———*Written statement.*

Where an acknowledgment in the written statement in a previous suit is relied on the statement itself or a certified copy thereof must be proved and neither the plaint nor the decree can be admitted as secondary evidence of the same. (*Piggott and Walsh, JJ.*). HARIMURAT *v.* RAMHIT. **63 I.C. 490=3 U.P.L.R. (All.) 179.**

—S. 66—Absence of notice.

———*Effect.*

Under S. 66 of the Evidence Act secondary evidence may not be given unless the party proposing to give it as previously given to the party in whose possession or power the document is, such notice to produce it as is prescribed by law or as the Court considers reasonable. The omission to give notice to the persons said to possess the original is a fatal objection to the admission of secondary evidence. (*Curgenven, J.*). SUBBARAYALU NAIDU *v.* VENGAMA NAIDU. **123 I.C. 197.**

EVIDENCE ACT (1872), S. 67—Plaint.

———Oral evidence of contents of letter inadmissible under S. 66 cannot become admissible by subsequent dispensing with notice. 20 Cal. 53, *Rel. on.* (*Mukerji and Jack, JJ.*). PROFULLA KUMAR BOSE *v.* EMPEROR. **50 C.L.J. 593= 1930 Cr. C. 209=A.I.R. 1930 Cal. 209.**

—S. 66—Adverse party.

———*Pro forma* defendant is not necessarily "adverse party." (*Banerji and King, JJ.*). MT. DURGANTI KUNWAR *v.* JAGANNATH PRASAD. **118 I. C. 663=1929 A.L.J. 1091= A.I.R. 1929 All. 680.**

—S. 66—Notice when necessary.

———Plaintiff suing on pro-note transferred to him under settlement deed—Note not produced but alleged to be in possession of widow of transferor —Widow on that account joined as defendant but not given notice under S. 66—Settlement deed cannot be admitted as secondary evidence of pro-note. (*Curgenven, J.*). SUBBARAYULU NAIDU *v.* VENGAMA NAIDU. **A.I.R. 1930 Mad. 742.**

———Redemption suit—Mortgagee denying existence of mortgage deed—Notice is not necessary. 6 Cal. 720 (P.C.) and 14 Cal. 486 (P.C.), *Dist.* (*Ross and Macpherson, JJ.*). DINANATH RAI *v.* RAMA RAI. **97 I.C. 348= 6 Pat. 102= 1926 P.H.C.C. 286=A.I.R. 1926 Pat. 512.**

———The second proviso to S. 66 does not apply in a case against a mortgagee and notice to produce must be given before secondary evidence can be given of the mortgage. 2 U. B. R. (1907-08), Evidence, 13, *Foll.* (*Duckworth, J.*). MAUNG PO NI *v.* MA SHWE KYI. **84 I.C. 373= 2 Rang. 397=A.I.R. 1925 Rang. 7.**

—S. 66—Service of notice.

———Pardanashin woman living with her brother—Summons served on brother constitutes notice such as is required by S. 66. (*Banerji and King, JJ.*). MT. DURGAWATI KUNWAR *v.* JAGANNATH PRASAD. **118 I.C. 663=1929 A.L.J. 1091= A.I.R. 1929 All. 680.**

—S. 67—Kind of proof required.

———Section 67 makes proof of execution of a document something more difficult than proof of matter other than the execution of a document. (*Sulaiman and Ashworth, JJ.*). SALAIK CHAND *v.* MT. TANIZ BANO. **107 I.C. 564= A. I. R. 1928 All. 303.**

———Sections 60 and 67 are somewhat ambiguous, but it was never intended by S. 67 that direct evidence of handwriting was always necessary. The section merely stated with reference to deeds what was the universal rule in all cases, that the person who makes an allegation must prove it and lays down no new rule as to the kind of proof to be given. (*Cuming and Mukerji, JJ.*). KARALI PRASAD DUTTA *v.* E. I. RY. CO. **111 I.C, 792= 48 C.L.J. 32=A. I. R. 1928 Cal. 498.**

———Signatures attributed to accused persons—Handwriting must be proved. (*Fforde and Scott-Smith, JJ.*). BAWA SARUP SINGH *v.* THE CROWN. **88 I.C. 22=7 L.L.J. 264=26 Cr. L.J. 1078= 26 P.L.R. 566=A. I. R. 1925 Lah. 299.**

———Section does not require any special kind of proof of execution. (*Mittra, Offg. A. J. C.*). MT. LAHANI *v.* BALA. **77 I.C. 798=18 N. L.R. 85= A.I.R. 1922 Nag. 227.**

—S. 67—Plaint.

———A plaint is a private document and must be proved by direct evidence. (*Lindsay, J. C. and Daniels, J.C.*). AHMAD KHAN *v.* HURMUZI KHANAN. **61 I. C. 177=8 O. L. J. 27= A. I. R. 1921 Oudh 81.**

EVIDENCE ACT (1872), S. 68—Account-book.

—S. 68—Account-book.

———Account book is not document required by law to be attested. (*Young and Sen, JJ.*). EMPEROR *v.* NARBADA PRASAD. **121 I.C. 819= 1930 Cr. C. 54=51 All. 864= 31 Cr. L. J. 356=A.I.R. 1930 All. 38.**

—S. 68—Admission of execution.

———Under the law, as it now stands, it is not necessary to call an attesting witness in proof of the execution of any document not being a will which has been registered in accordance with the provisions of the Indian Registration Act unless its execution by the person by whom it purports to have been executed is specifically denied. (*Pullan, J.*). BASDEO UPODHYA *v.* RAJ BEHARI SINGH. **104 I.C. 344=1 L.C. 268= A.I.R. 1927 Oudh 535.**

—S. 68—Applicability.

———There is no law which requires the attestation of a sale-deed so far as Punjab is concerned. Section 68 therefore has no application to sale-deeds in that province. (*Fforde and Jai Lal, JJ.*). MAHARAJA OF FARIDKOT *v.* ANANT RANI. **114 I. C. 62=10 Lah. 447=A.I.R. 1929 Lah. 1.**

———Section 68 applies only to cases where a document is required to be attested. There is no rule of law in force in the Punjab which requires bahi entry to be attested at all. Section 68 has therefore no applicability to such a document. (*Tek Chand, J.*). KANWAR RAM *v.* GHUGI. **108 I.C. 57=A. I. R. 1928 Lah. 148.**

———*Dawson-Miller, C. J.*—A document executed in England and requiring to be attested under the English law but not requiring to be attested under Indian Law, relating to property in India may be proved only by proving the signature of the executant. *Adams* v. *Clutterbuck*, 10 Q. B. D. 403, *Ref.* (*Dawson-Miller, C. J. and Mullick, J.*). G. M. TOOMEY *v.* BHUPENDRA NATH. **111 I. C. 57=7 Pat. 520=A. I. R. 1928 Pat. 304.**

—S. 68—Attestation—Proof of.

———The question as to the mode in which a mortgage or a gift can be legally effected ought not to be confounded with the question as to how the mortgage or deed of gift should be legally proved. The absence of attestation invalidates the deed. Where the executant of the document does not admit its execution the document has to be proved in accordance with the provisions of Ss. 68 and 69 of the Evidence Act which relates to the mode of proof. (*Sen and Niamatullah, JJ.*). BALBADAR SINGH *v.* LAKSHMI BAI. **1930 A.L.J. 623.**

———One of three attesting witnesses called but resiling—Document can be proved by other evidence. (*Cuming and Mullick, JJ.*). HASON ALI *v.* GURUDAS KAPALI. **116 I. C. 726= 49 C.L.J. 16=33 C.W.N. 248= A.I.R. 1929 Cal. 188.**

———Attesting witness not remembering at distance of time place of execution or order of attestation is no reason for disbelieving his evidence which is formally sufficient to prove execution and attestation. (*Ross and Chatterji, JJ.*). BISWANATH SINGH *v.* KAYESTHA CORPORATION. **119 I. C. 405=8 Pat. 450= 10 P.L. T. 379=A.I.R. 1929 Pat. 422.**

———Suit on mortgage—Execution of mortgage admitted but attestation denied—Plaintiff not examining any attesting witness (one being dead, the other's whereabouts not known)—Mortgage was held not proved. (*Cf.* Act 30 of 1926). (*Prideaux, A.J.C.*). DEORAO *v.* DHONDIRAO. **109 I.C. 576=A.I.R. 1928 Nag. 244.**

EVIDENCE ACT (1872), S. 68—Certified copy.

———Admission of mortgage bond in evidence without objection is not proof of execution or attestation. (*Das and Ross, JJ.*). BANWARI PRASAD SINGH *v.* MT. BIGNI KUER. **101 I.C. 277= 8 P.L.T. 7=A.I.R. 1927 Pat. 131.**

———The production of one attesting witness satisfies the requirements of S. 68 of the Evidence Act and from a mere failure to do more than is required of the mortgagee and to produce both the witnesses even if he knows where the other is, it cannot be inferred that the mortgagee is intentionally keeping back the other and that therefore his evidence would damage the plaintiff's case. (*Baker, J. C. and Hallifax, A. J. C.*). LACHHMI NARAYAN *v.* ZEHIRUL SAID ALVI. **76 I. C. 772= A. I. R. 1923 Nag. 322.**

———T. P. Act, S. 59—Mortgage—Attestation—Witness denying seeing executant sign—Witness found to be false—Attestation was held proved. (*Robinson, C.J. and May Oung, J.*). DAWSON'S BANK LTD. *v.* CHETTY FIRM. **76 I. C. 522= 1 Rang. 121=A.I.R. 1923 Rang. 254.**

———Section 68 of the Evidence Act does not in any way affect the requirements of S. 59, T. P. Act. 39 All. 109 and 39 All. 241, *Diss.*

There may be cases where all the attesting witnesses are dead, when the requirements of the law would be satisfied by any evidence which would show that the document was executed in the presence of two attesting witnesses. 39 All. 112, *Ref.* (*Wallis, C. J., Seshagiri Aiyar and Abdur Rahim, JJ.*). NAMBERUMAL CHETTIAR *v* RAGHAVA CHARIAR. **71 I. C. 390=14 M.L.W. 563= A. I. R. 1921 Mad. 701.**

———All that Ss. 68 and 69 do is to impose a particular mode of proof and to require that certain documents shall be proved in a particular way and in no other way, that is to say, if one attesting witness is alive execution and attestation cannot be proved by other witnesses without calling the attesting witness, and if no attesting witness is available then similarly S. 69 says that execution and attestation cannot be proved by other evidence unless the handwriting of at least one attesting witness is proved. (*Wallis, C.J. and Krishnan, JJ.*). T. GANGAYYA *v.* B. SUBBAMMA. **69 I.C. 284= 14 M.L.W. 344=1921 M.W.N. 747= A.I.R. 1921 Mad. 472=41 M.L.J. 305.**

———To prove the creation of a valid charge by a mortgage deed the evidence of one of the attesting witnesses, is sufficient to prove the execution of the mortgage; but this proof may be rebutted by the proof on the other side that the other witness or witnesses did not really see its execution. (*Sadasiva Aiyar and Spencer, JJ.*). VENKATA REDDI *v.* MUTHU PAMBULU NAIK. **60 I.C. 554= 39 M.L.J. 463.**

———Execution of—Mortgage-deed must be proved at least by one attesting witness. (*Saunders, J.C.*). MAUNG PO THAUNG *v.* P. L. N. R. M. MUTHIA CHETTY. **65 I.C. 64=4 U. B. R. 78= A. I. R. 1921 U. B. 1.**

—S. 68—Attesting witness.

———*Meaning.*

An "attesting witness" in S. 68 of the Evidence Act, has the same meaning as an "attesting witness" under S. 59 of the Transfer of Property Act. (*Newbould and Panton, JJ.*). JAGANNATH KHAN *v.* BAJRANG DAS. **62 I.C. 97=48 Cal. 61= A.I.R. 1921 Cal. 208.**

—S. 68—Certified copy.

———A certified copy is sufficient secondary evidence under S. 63 of the existence, conditions and

EVIDENCE ACT (1872), S. 68—Death of attesting witness.

contents of the deed but not of its execution, which must be proved as required under S. 68. (*Dalal, J.*). SHEIKH KARIMULLAH *v.* GUDAR KOERI.
82 I. C. 306=5 L. R. A. Civ. 686=A. I. R. 1925 All. 56.

—S. 68—Death of attesting witness.

———Executant of document denying execution —Attesting witnesses either dead, or turned hostile or not available—Signatures of attesting witnesses proved—There is nothing to prevent Court from holding execution proved. 11 Bom. 690; 37 Cal. 467; 12 B.L.R. 18; *Adam* v. *Keer*, 1 Bos. and Pull. 360 and *Joshua Hands* v. *Harbert James*, 2 Comyns. 531, *Rel. on*; *Whitelocke* v. *Musgrove*, 2 Cr. & M. 511, *Dist.*; 35 All. 364, *Not appr.* (*Ananthakrishna Ayyar, J.*). POONUSWAMI GOUNDAN *v.* KALYANASUNDRA AYYAR. **A.I.R. 1930 Mad. 770.**

———Mortgagor, scribe and attesting witnesses dead—In view of amended definition of attestation and varied mode of proving attested document as amended by S. 68 proof of probability of execution is sufficient. (*Barlee, J. C. and Kalumal, A.J.C.*). PARUMAL *v.* ABDUL RAUF. **120 I. C. 91=A.I.R. 1929 Sind 235.**

—S. 68—Denial of execution.

———Mere fact that mortgagor does not admit genuineness of mortgage is not sufficient to put mortgage to proof of attestation. (*Ross and Chatterji, JJ.*). BISWANATH SINGH *v.* KEYESTHA CORPORATION. **119 I.C. 405=8 Pat. 450=10 P.L.T. 379=A.I.R. 1929 Pat. 422.**

———Where the execution of a document is not specifically denied, it is not strictly necessary for the party proving the document to call an attesting witness in proof of the execution of it. (*Madgavkar and Patkar, JJ.*). YAKUBKHAN *v.* GULJARKHAN.
111 I.C. 287=52 Bom. 219=30 Bom.L.R. 565=A.I.R. 1928 Bom. 267.

———Examination of the attesting witness is not necessary when execution is not specifically denied. (*Allanson, J.*). LAKHO TEWARI *v.* LALIT KOERI.
104 I.C. 622=A.I.R. 1927 Pat. 403.

—S. 68—Execution by Pardanashin lady.

———Where the witness did not see the executant a *pardanashin* lady, but saw her signing the deed behind the pardha and where the other witnesses knew her by voice,

Held, the deed is properly attested. (*Das and Adami, JJ.*). RADHA KISHAN *v.* JAG SAHU.
60 I.C. 173=3 U.P.L.R. (Pat.) 14.

—S. 68—Note by attestor.

———An attesting witness noted near his signature that he attested the deed at the request of the executant,

Held, that the ordinary meaning of such a note by an attesting witness would certainly be that he had not seen the executant with his own eyes execute the receipt, but had attested it at his request upon an admission by the latter of the genuineness of his signature. (*Mears, C. J. and Piggott, J.*). SHAMBHU DAYAL *v.* LALLU MAL. **80 I. C. 717=4 L.R.A. Civ. 458=A.I.R. 1924 All. 256.**

—S. 68—Omission of proof.

———Where no attempt is made to prove a mortgage-deed either by calling in an attesting witness or even by putting any question to the scribe of the deed, who was examined as a witness, regarding the attesting witnesses or attestation, the document cannot be used as evidence. (*Banerji and King, JJ.*). JIWAN SINGH *v.* DALIP SINGH.
115 I.C. 450=1929 A. L. J. 588=A. I. R. 1929 All. 389.

EVIDENCE ACT (1872), S. 68—Provisions mandatory.

—S. 68—Oral evidence.

———Where an attestor denies having witnessed the execution of a document, it is open to the parties to let in other oral evidence to show that the attestor did, as a matter of fact, see the execution and was an attesting witness. (*N.R. Chatterjee and Panton, JJ.*). SASHIMUKHI DASI *v.* MON MOHINI DASI. **67 I.C. 87 (Cal.).**

—S. 68—Principal and collateral purposes.

———No distinction should be drawn between documents which are the basis of the suit and those whose production is required for collateral purposes so far as their admissibility in evidence is in question. A. I. R. 1924 Oudh 255, *Foll.* 21 O. C. 312, *Not foll.* (*Ashworth, A. J. C.*). BHARATH SINGH *v.* SHEODAT SHARMA. **91 I.C. 189=A.I.R. 1926 Oudh 266.**

———*No distinction between documents to be used principally and collaterally exists.*

There is no distinction between documents which are the basis of a suit and those whose production is required for a collateral purpose so far as their admissibility in evidence is in question. The direction in S. 68, Evidence Act is mandatory and draws no such distinction. (*Dalal, J. C. and Neave, A. J.C.*). AVADH RAM SINGH *v.* MABHUB KHAN. **79 I.C. 725=10 O.L.J. 525=A.I.R. 1924 Oudh 255.**

———Section 68 of the Evidence Act applies not only to cases where the document is attempted to be enforced to prove the legal right or relation it creates, but in a case where such document is sought to be proved for a collateral purpose.

This view is also supported by the imperative and stringent wording of S. 68 which does not permit the issue of the instrument as evidence for any purpose whatsoever unless and until it is proved in strict accordance with the provisions of the section. The rigour of the English law on which the present section is founded has been to a certain extent lessened by the proviso as contained in S. 70 of the Evidence Act. The enactment of this proviso clearly indicates that the Indian Legislature intended to provide only one exception to this inflexible rule and no other. (*Suhrawardy and Cuming, JJ.*). SHIB CHANDRA SINGHA *v.* GOUR CHANDRA PAUL. **68 I. C. 86=27 C.W.N. 134=35 C.L.J. 473=A.I.R.1922 Cal. 160.**

—S. 68—Proof by scribe.

———Where the only available attesting witness to a mortgage denies his attestation when examined under S. 68, (before it was amended by Act 31 of 1926), the deed may be proved by calling its writer under S. 71 to depose to the execution of the deed by the mortgagor and to its attestation by the two witnesses. (*Marten, C. J. and Crump, J.*). LAKSHMAN PUNJU *v.* KRISHNAJI MAHARU.
105 I.C. 769=29 Bom. L.R. 1425=A.I.R. 1927 Bom. 655.

———Where one of the witnesses to a mortgage deed is dead and the other witness, when the document is read over to him, is unable to say whether that was or was not the document which he attested, it is open to the plaintiff to prove execution of the deed by a person who was present at the time of the execution and for that purpose he can examine the scribe. (*Cuming and Panton, JJ.*). DHIRAJUDDIN *v.* BHARULLA.
90 I.C. 630=A.I.R. 1926 Cal. 318.

—S. 68—Provisions mandatory.

———The provisions of S. 68 are mandatory and they are not controlled by S. 90.

EVIDENCE ACT (1872), S. 68—Provisions mandatory.

The mere fact that the only surviving attesting witness is considered hostile by the party does not relieve him from the duty of examining him as a witness. Nor is it enough that summonses and warrants had been issued upon the witness and the witness had failed to appear, but the processes of the Court such as are mentioned in O. 16, R. 10, C. P. Code, have all got to be exhausted. 1 P. L. J. 369, *Foll.* (*Greaves and Mukerjee, JJ.*). GOBINDA CHANDRA PAL *v.* PULIN BIHARI. **98 I.C. 147= 31 C.W.N. 215=A.I.R. 1927 Cal. 102.**

———Failure to call as witnesses, any of the persons who had attested mortgage-deed where it was not shown that they had died or were not subject to the process of the Court or were incapable of giving evidence, was held to be fatal. (*Dalal, J.*). SHEIKH KARIMULLAH *v.* GUDAR KOERI. **82 I.C 306= 5 L.R.A. Civ. 686=A.I.R. 1925 All. 56.**

———Provisions are imperative—Likelihood of witness proving hostile is no ground for not examining him. 1 P.L.J. 369, *Foll.* (*Coutts and Macpherson, JJ.*). DHIRA SINGH *v.* MOTI LAL. **63 I.C. 266=2 P.L.T. 614.**

—S. 68—Retrospective effect.

———Amendment added by Act 31 of 1926 is retrospective. (*Ramesam and Jackson, JJ.*). THAYAMMAL *v.* MUTHUKUMARASWAMI CHETTIAR. **121 I.C. 858=30 M.L.W. 677= A. I. R. 1929 Mad. 881=57 M.L.J. 588.**

—S. 68—Scope.

———Section 68 has nothing to do with the question about the legality or validity of the instrument itself as an effective document of title if there has been no proper attestation as required by law. (*Sen and Niamatullah, JJ.*). BALBHADAR SINGH *v.* LAKSHMI BAI. **A. I. R. 1930 All. 669.**

———The question of the validity of a mortgage bond is distinct from that of the necessity of proving it by an attesting witness. (*Chatterjea and Panton, JJ.*). PAHAN KHAN *v.* BUDAL SARDAR. **66 I.C. 906=34 C.L.J. 498=26 C.W.N. 951= A.I.R. 1921 Cal. 276.**

—S. 68—Search for witness.

———The enquiry for an attesting witness must be strict, diligent, honest and satisfactory. It should be made at the residence of the witness and of the relatives who may have information. Where, an attesting witness is out of the jurisdiction of the Court, however, the document can be proved by other evidence. (*Maung Kin and Rigg, JJ.*). ASOOMEAH *v.* V.S.R.M. CHETTY. **61 I C. 637=13 Bur.L.T. 114.**

—S. 68—Will.

———Although where an instrument requiring attestation is subscribed by several witnesses, it is in general sufficient to call only one of them (Evidence Act, S. 68) in the case of Wills, it is desirable that all capable of being called should be examined to remove all suspicion of fraud. (*Mookerjee and Fletcher, JJ.*). SURENDRA KRISHNA *v.* RANEE DASSEE. **59 I. C. 814=33 C.L.J. 34= A.I.R. 1921 Cal. 677.**

—S. 69—Attestors dead.

———Transfer of Property Act, S. 59—Attestors dead—Their handwriting proved—Attestor should be presumed to have seen execution. 39 All. 112, *Appl.* (*Waller, J.*). VENKATRAMAYYA *v.* GATTAYA. **101 I. C. 498=A. I. R. 1927 Mad. 662= 53 M. L. J. 216.**

EVIDENCE ACT (1872), S. 70—Effect. —S. 69—Condition for applicability.

———In order that the case may attract the operation of S. 69, it must be proved that "no such attesting witness can be found." Before a party is entitled to rely upon S. 69, he must ask the Court to exhaust all processes of the Court as laid down in paras. 2 and 3, R. 10, O. 16: 1 P. L. J. 369 and 27 C. W. N. 60 (Notes), *Rel. on.* (*Das and Kulwant Sahay, JJ.*). MT. SHAHZADI BEGAM *v.* MUHUMMAD QASIM. **110 I. C. 756=7 Pat. 312= A.I.R. 1928 Pat. 356.**

—S. 70—Before Sub-Registrar.

———Suit on mortgage bond—Defendant admitting execution before Sub-Registrar but averring that he would not have done so had he known it to be mortgage is no admission of execution under S. 70. (*Mitter, J.* Contra.) 29 Cal. 355, *Ref.* (*Jack and Mitter, JJ.*). AYENALI SHIKDAR *v.* MD. ESMAIL. **49 C. L. J. 347=A. I. R. 1929 Cal. 441.**

———Admission must be in the proceedings—Admission of execution before the registering officer is not sufficient. 13 N. L. R. 197, *Rel. on.* (*Prideaux, A. J. C.*). DEORAO *v.* DHONDIRAO. **109 I. C.576=A. I. R. 1928 Nag. 244.**

———Admission referred to in section must be other than that required by Registrar in registration. (*Kennedy, J. C. and Aston, A. J. C.*). PRIBHDAS *v.* SAHIB KHAN. **93 I. C. 660= 18 S. L. R. 282=A. I. R. 1926 Sind 88.**

—S. 70—By representative.

———An admission by the representative of a party to an attested document of its execution by the party cannot be treated as an admission of the party to an attested document of its execution by himself. (*Mukerjee and Rankin, JJ.*). BENOY BHUSHAN ROY *v.* DHIRENDRA NATH DEY. **74 I.C. 178=38 C.L.J. 114= A.I.R. 1924 Cal. 415.**

—S. 70—Effect.

———*Shah, Ag. C. J.*—(*Crump, J. dissenting*)—Where the defendant admits the execution of the mortgage bond and there is no evidence or plea that the attestations were not proper, the mortgagee need not prove attestation.

Per *Crump, J.*—The word "execution" means that the party affixing his signature has signified his assent to the contents of the document and if a party admits that he has done this then he admits execution. Such admission however will not be taken to mean an admission not only of the signature of assent by him, but also that all the legal formalities, such as due attestation, have been complied with as required by the statute requiring attestation. (*Shah, Ag. C. J. and Crump, J.*). JAGANNATH NARSINDAS *v.* RAOJI TULSIRAM. **76 I. C. 73=47 Bom. 137=24 Bom.L.R. 1296= A. I. R. 1923 Bom. 90.**

———*Admission of executant is not sufficient as against strangers.*

It must be proved according to law as against them unless S. 58, Evidence Act applies to the case and relieves the plaintiffs from the burden of proving attestation. (*Mullick and Ross, JJ.*). ARJUN SAHU *v.* KELAI RATH. **74 I.C. 150= 2 Pat. 317=A.I.R. 1923 Pat. 436.**

———Even in case of a document requiring attestation, where admission by a party to the suit of the execution is on record, the attestation need not be proved. (*Walsh and Wallace, JJ.*). ASHARFI LAL *v.* MT. NANNHI. **64 I.C. 11=44 All. 127= 19 A.L.J. 855=A.I.R. 1922 All. 153.**

EVIDENCE ACT (1872), S. 70—Effect.

———Proof of attestation is not necessary where execution is admitted by defendant. (*Das and Adami, JJ.*) MT. HIRA BIBI *v.* RAMDHAN LAL.
62 I. C. 540=1922 P.H.C.C. 42=6 P.L.J. 465=2 P.L.T. 752=A.I.R. 19 22 Pat. 70.

—S. 70—Invalid document.

———Section 70 cannot and does not affect to render valid, document which, it is apparent from the evidence before the Court, is invalid in law: A.I.R. 1925 P.C. 203 and A.I.R. 1918 P.C. 3, *Rel. on*; 16 C.W.N. 585, *Dist.*

A mortgage was duly executed and attested but the Sub-Registrar finding a technical defect had the document re-executed by the mortgagors in his office. This re-execution was duly registered though not re-attested. In a suit upon the mortgage the mortgagor admitted execution,

Held, that in spite of the admission the document did not amount to a mortgage and, therefore, was not an instrument creating a mortgage upon which the plaintiff could base his claim. (*Cuming and Page, JJ.*). SHEIKH KOCHU *v.* MD. ALI MAHOMUD. **105 I. C. 28=45 C. L. J. 577=A. I. R. 1927 Cal. 926.**

———Admission by the executant of execution is not sufficient to validate a mortgage-deed which has not been duly attested as required. A. I. R. 1924 Rang. 139, *Expl.*; A. I. R. 1925 P. C. 203, *Rel. on.* (*Carr and Mya Bu, JJ.*). MG PO GYI *v.* MG MIN DIN. **104 I.C. 386=5 Rang. 561=6 Bur. L.J. 88=A.I.R. 1927 Rang. 233.**

—S. 70—Pardanashin lady.

———*T. P. Act, S.* 59.

Where the persons who signed a mortgage deed executed by a *pardanashin* lady, as witnesses were not present at the execution of the deed, but the *pardanashin* lady admitted that she had executed the mortgage deed.

Held, that notwithstanding her admission, the mortgage deed was void even as against her. The words of S. 70 of the Evidence Act apply only to a document duly attested. 35 Mad. 607 (P. C.) and 45 Cal. 748 (P. C.), *Foll.*; 37 All. 474 (P. C.). *Dist.* (*Lord Darling.*) MT. HIRA BIBI *v.* RAM HARI LAL.
89 I.C. 659=23 A.L.J. 815=2 O.W.N. 641=6 P. L. T. 575=27 Bom. L. R. 1144=42 C.L.J. 148=22 M.L.W. 373=1925 M. W. N. 728=52 I. A. 362=3 Pat. L.R. 296=5 Pat. 58=30 C.W.N. 365=A.I.R. 1925 P.C. 203=49 M.L.J. 240 (P.C.).

—S. 70—Prior to suit.

———The executant's admission need not have been made during the civil proceedings, but may be an admission made antecedent to the institution of legal proceedings. 4 Pat. L.J. 511, *Foll.* (*Duckworth, J.*). AUNG RHI *v.* MA AUNG KRWA PRU. **77 I.C. 362=1 Rang. 557=A. I. R. 1924 Rang. 139.**

—S. 70—Scope.

———Section 70 relates to admission in the course of proceedings in which the document is produced. (*Das and Ross, JJ.*). BANAWARI PRASAD SINGH *v.* MT. BIGNI KUER. **101 I.C. 277=8 P.L.T. 7=A.I.R. 1927 Pat. 131.**

—S. 70—Witnesses not present.

———Where the mortgagor admitting his having signed the mortgage document but denied his having done so in the presence of attestors,

Held, that such admission does not amount to an admission of due execution within the meaning of S. 70.

Per *Richardson, J.*—Where an admission of *execution* is unqualified it may well be equivalent to an admission of due execution or a waiver of proof of due execution, but not where the admission is of the signature, coupled with the denial of his having done so in the presence of attestors.

Per *Suhrawardy, J.*—S. 70 provides an exception to the rule in S. 68, *viz.*, where the executant admits that a document was *executed* by him, *i.e.*, executed according to law, no further proof of execution is necessary. It thus qualifies S. 68 of the Act but does not affect or control S. 59 of the T. P. Act. The word '*execution*' in S. 70 is used in the sense of due execution or execution in a way in which a particular document is required to be executed. (*Richardson and Suhrawardy, JJ.*). ARJUN CHANDRA BHADRA *v.* KAILAS CHANDRA DAS.
70 I.C. 532=36 C.L.J. 373=27 C. W. N. 263=A.I.R. 1923 Cal. 149.

EVIDENCE ACT (1872), S. 72—Receipt.

—S. 71—Evidence of scribe.

———Where it was found by the Courts below that the attesting witnesses had been won over and gave evidence hostile to the plaintiff and the plaintiff examined the writer of the deed to prove execution under S. 71 and his evidence was accepted,

Held, that the contention that it is necessary that this witness should have been able to swear that both the attesting witnesses were present when the executant signed the deed and that they witnessed it is untenable: 17 A. L. J. 141 and A.I.R. 1922 Pat. 415, *Foll.*

The law provides that the attesting witnesses, if available, must be called and that in their absence no other evidence to prove execution shall be accepted: If they are dead or have been won over by the other side the person claiming under the document is allowed to prove it as best he can. It is sufficient if he can prove execution by any evidence that may be available. (*Ryves and Daniels, JJ.*). PATESAWARI *v.* SHANKER DAYAL. **74 I.C. 969=A.I.R. 1924 All. 217.**

—S. 71—One witness hostile.

———*Jack, J.*—Where out of two attesting witnesses one is produced but turns hostile, other evidence becomes admissible under S. 71, and the plaintiff is not bound to produce the other, though alive, whom there are grounds for him to believe to be hostile: A.I.R. 1929 Cal. 188, *Rel. on.*

Mitter, J.—(*Obiter*):—It is not intended by enacting S. 71 to differ from the rule of English Law that the evidence of the other witnesses should not be introduced unless the absence of the other attesting witness is satisfactorily explained in the case where one of the two attesting witnesses had been called and has denied execution: A.I.R. 1929 Cal. 188, *Not appr.*; *Coles* v. *Coles*, (1866) 1 P. 70; *Pilkington* v. *Gray*, (1899) A.C. 401; A.I.R. 1927 Cal. 102, *Ref.* (*Jack and Mitter, JJ.*). AYENALI SHIKDAR *v.* MD. ESMAIL. **49 C.L.J. 347=A.I.R. 1929 Cal. 441.**

—S 71—Proof of execution.

———S. 71 does not require execution in the presence of the attesting witnesses to be proved. 17 All. 141, *Foll.* (*Ryves and Daniels, JJ.*). LALTA PRASAD *v.* DARSHAN SINGH. **74 I.C. 839=A.I.R. 1924 All. 149.**

—S. 71—Witness not recollecting.

———Mortgage—One attesting witness dead—Others having no recollection—Document can be proved by other evidence. (*Das and Adami, JJ.*). LAKSHMAN SAHU *v.* GOKHUL MAHARANA.
70 I.C. 298=1 Pat. 154=A.I.R. 1922 Pat. 415.

—S. 72—Receipt.

———The executant of a receipt need not be examined where the payer has sworn to the payment. (*Mukerji, J.*). ABDUL SAMAD *v.* GUNENDRA KRISHNA ROY. **82 I.C. 974=A.I.R. 1925 Cal. 452.**

EVIDENCE ACT (1872), S. 73—Applicability.

—S. 73—Applicability.

———It is only where other evidence is not available and the handwriting has not been proved by independent evidence to be the handwriting of a particular person, that it is necessary to have recourse to the provisions of S. 73 to see whether by comparison it can be determined whether the document was written by that person or not. (*Cuming and Mukerji, JJ.*). KHIJIRUDDIN *v.* EMPEROR.
92 I.C. 442=53 Cal. 372=42 C.L.J. 504=27 Cr.L.J. 266=A. I. R. 1926 Cal. 139.

—S. 73—Handwriting.

———It is not fair to compare the free handwriting spread over a folio page of a will with plenty of space, and a post card in which a writer has to condense all he wishes to say in a small space. The writing must necessarily be far more cramped and naturally various letters in the post card writing would differ from the writing which is not cramped. (*Macleod and Coyajee, JJ.*). IRABASAPPA BIN GANGAPPA DALAL *v.* BHADRAWA KOM DOD BASAPPA PRABHU SHETTI. **80 I.C 189=A.I.R. 1922 Bom. 296.**

———*Comparison.*

In applying the provision of S. 73 of the Evidence Act, it is important not to lose sight of its exact terms. It does not sanction the comparison of any two documents but requires that the writing with which the comparison is to be made or the standard writing as it may be called, shall be admitted or proved to have been written by the person to whom it is attributed and next the writing to be compared with the standard or in other words, the disputed writing must purport to have been written by the same person, that is to say, the writing itself must state or indicate that it was written by that person. A comparison of handwriting is at all times, as a mode of proof, hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. A comparison of writings has consequently been deemed a mode of ascertaining the truth which ought to be used with very great caution. Although from the dissimilarity of signatures a Court may legitimately draw the inference that a particular signature is not genuine because it varies from an admittedly genuine signature, yet resemblance of two signatures affords no safe foundation that one of them is genuine. (*Mookerjee and Buckland, JJ.*). SAROJINI DASS *v.* HARI DAS GHOSE. **66 I. C 774=49 Cal. 235=26 C.W.N. 113=34 C. L. J. 373=A.I.R. 1922 Cal. 12.**

—S. 73—Signature.

———The Court has power to compare the alleged genuine signature with admittedly genuine signature to come to a conclusion from it. (*Jackson, A.J.C.*). GONDU *v.* TULSIRAM.
120 I.C.335=A.I.R. 1930 Nag. 27.

———Genuineness of a signature disputed—Mere comparison of admitted signatures without expert advice or microscopic examination is dangerous. (*Lord Atkin*). KERSARBAI *v.* JETHABHAI JIVAN.
111 I.C. 169=28 M. L. W. 737=A.I.R. 1928 P.C. 277 (P.C.).

—S. 73—Thumb impression.

———A Court can direct an accused person to give his thumb impression in Court. A. I. R. 1924 Rang. 115 (F. B.), *Foll.* ; A. I. R. 1922 Pat. 73, *Dist.* (*Mullick and Wort, JJ.*). ZAHURI SAHU *v.* EMPEROR. **106 I. C. 212=6 Pat. 623=8 P.L.T. 847=28 Cr. L. J. 1028=9 A. I.Cr. R. 173=A.I.R. 1928 Pat. 103.**

EVIDENCE ACT (1872), S. 74—Crop-cutting report.

———Thumb-impressions on a deed compared with others not shown to be of executant—Evidence of expert is of no value. (*Kulwant Sahay and Scroope, JJ.*). GAFFAR BUKSH KHAN *v.* EMPEROR. **101 I.C. 187=8 A. I.Cr. R. 4=8 P. L. T. 393=28 Cr. L.J. 411=A. I. R. 1927 Pat. 408.**

—S. 73—Thumb impression of accused.

———Section 73 specifically directs that any person present in Court may be directed to make a finger impression for the purpose of comparing it with any finger impression alleged to have been his. There is no exception made in favour of an accused person. Section 342, Criminal Procedure Code, does not prohibit the taking of the finger impression from an acoused. (10 B. L. T. 32, *Overruled*).

Per *Young, Offg. C. J.*—Such a direction is specifically allowed by the Evidence Act and S. 342, Cr. P. Code, does not operate to prevent it.

Per *Heald, J.*—There is no possible connection between S. 73, Evidence Act and S. 342 of the Cr. P. Code.

Per *May Oung, J.*—There is nothing in common between the power to examine the accused under S. 342, Cr. P. Code, and the power to take his finger impression under S. 73, Evidence Act unless it can be held that by directing the accused to make his finger impression the Court is, in effect, compelling him to provide evidence against himself. (*Young, Offg. C. J., Heald and May Oung, JJ.*). EMPEROR *v.* NGA TUN HLAING.
83 I.C. 668=1 Rang. 759=2 Bur. L.J. 270=26 Cr. L. J. 108=A.I.R. 1924 Rang. 115 (F. B.).

———*Criminal trial—Thumb impression of accused taken in Court for comparison—Conviction based on such comparison by expert—Is highly irregular.*

There is no law by which an accused person can be, either by words or by gestures or by exposing himself to certain physical treatment, made to implicate himself in the crime with which he is charged. When he is on trial such an idea is highly repugnant to all thoughts of the proper administration of justice in this or in any other British country. (*Das and Bucknill, JJ.*). BAZARI HAJAM *v.* KING EMPEROR. **68 I. C. 958=1 Pat. 242=3 P.L.T. 526=1922 P.H.C.C. 46=23 Cr. L.J. 638=A.I.R. 1922 Pat. 73.**

—S. 74—'Act' or 'Record of an Act.'

———A circular by which the Director General of Post and Telegraphs notified that stamps of a certain kind would soon be issued to Post Offices for sale to the public was not an 'Act' or 'Record of an act' of a public officer within the meaning of S. 74 of the Evidence Act and the same was inadmissible in evidence. (*Reilly, J.*). VELAYUDHAM PILLAI *v.* EMPEROR. **115 I.C. 509=1929 M.W.N. 193=30 Cr. L.J. 483.**

—S. 74—Admissibility.

———Document neither shown to be prepared by public servant nor shown as forming the act or record of public officer is inadmissible. (*Sen, J.*). GOURI SHANKAR *v.* EMPEROR.
120 I.C. 547=1930 A.L.J. 244=1930 Cr. C. 42=31 Cr.L.J. 133=A.I.R. 1930 All. 26.

—S. 74—Crop-cutting report.

———Crop-cutting report of Collector prepared under S. 40, Bengal Tenancy Act, falls under S. 74.

EVIDENCE ACT (1872), S. 74—Crop-cutting report.

(*Dawson-Miller, C. J. and Foster, J.*). KISHIN DAYAL GOPE *v.* ISHWARNATH SINGH.

102 I.C. 391=8 P.L.T. 74=A.I.R. 1927 Pat. 167.

———Crop-cutting report of Deputy Collector under S. 40, Bengal Tenancy Act, is public document and admissible to prove quantity of crops cut. 4 Cal. 79, *Rel. on.* (*Adami, J.*). HARGOBIND SINGH *v.* KISHUN DAYAL GOPE. **95 I.C. 966= 7 P.L.T. 671=A.I.R. 1926 Pat. 436.**

—S. 74—Dakhalnamah.

———A dakhalnamah is a public document and its copy is admissible without proof. 13 A. L. J. 935, *Foll.* (*Banerji, J.*). SILA RAM *v.* EMPEROR.

98 I.C. 471=7 L.R.A. Cr. 173=27 Cr. L.J. 1351= A.I.R. 1927 All. 52.

—S. 74—Departmental enquiry.

———Departmental enquiry by a Magistrate in his executive capacity is not judicial enquiry and statements recorded therein is not evidence taken on oath. Such statements, therefore, are not public documents. (*Pearson and Patterson, JJ.*). GOVERNMENT OF BENGAL *v.* SANTIRAM MONDAL.

A.I.R. 1930 Cal. 370.

—S. 74—Depositions.

———Depositions of witnesses taken by an officer of the Court are public documents within the meaning of that term as used in S. 74. (*Das and Foster, JJ.*). CHANDRESHEN PRASAD NARAYAN SINGH *v.* BISHESHWAR PRATAP NARAIN SINGH.

101 I. C. 289=5 Pat. 777= 8 P. L. T. 510=A. I. R. 1927 Pat. 61.

—S. 74—Letters of officers.

———Letters from the Controller of the Military Accounts acknowledging attachment is a public document. (*Srivastava, J.*). EDU *v.* HIRA LAL.

114 I.C. 502=5 O.W.N. 886=A.I.R. 1928 Oudh 488.

——— Magistrate sending an official memo to a Civil Surgeon to examine an accused and report his age—Civil Surgeon's report is not a record of "act" in official capacity—It is not admissible in evidence without formal proof. 20 Mad. 189, *Rel. on.* (*Gokaran Nath Misra, J.*). ABDUL HALIM KHAN *v.* SOADAT ALI KHAN. **108 I. C. 817= 1 L. C. 733=A. I. R. 1928 Oudh 155.**

—S. 74—Mutation registers.

———Mutation — Quinquennial and settlement registers prepared under Regulation 48 of 1793, S. 16, are public documents—Entries therein are admissible but not conclusive. (*Jwala Pasad and Ross, JJ.*). RAMANANDHAN SAHAY *v.* JAIGOVIND PANDEY. **75 I. C. 955=2 Pat. 839= A. I. R. 1924 Pat. 213.**

—S. 74—Patwari's abstract.

———Abstract statement prepared by *patwari* even though based on papers in his possession and filed in suit is only private document. (*Sulaiman, J.*). SHEO DAS *v.* SHEO DAYAL SINGH.

A.I.R. 1930 All. 712.

—S. 74—Pedigree.

———If it can be shown that the law requires that entries dealing with ownership of land should be included in pedigree tables then such pedigree tables are properly part of the revenue records and constitute an entry in a public document which is *prima facie* evidence of the truth of its contents. (*Fforde and Jai Lal, JJ.*). GURDIT SINGH *v.* KARTAR SINGH. **103 I.C. 182= 29 P.L.R. 675=A.I.R. 1928 Lah. 214.**

—S. 74—Plaint.

———Plaint is not a public document. (*Hallifax, A. J. C.*). MANBODH *v.* HIRASAI. **93 I.C. 650= A.I.R. 1926 Nag. 339.**

EVIDENCE ACT (1872), S. 78—Acts.

—S. 74—Record of acts of officers.

———Under S. 74, Evidence Act, documents forming records of the acts of public officers are public documents, but they do not furnish proof of all facts to which they refer. (*Findlay, J. C. and Macnair, A. J. C.*). MT. RUPA *v.* CHAUDHARI BHAIRAON PRASAD. **105 I.C. 353= A.I.R. 1928 Nag. 93.**

—S. 74—Reports.

———Execution of decree—Report of an officer of the Court, entrusted with the execution, is a public document and can be proved by a certified copy—Evidence Act, S. 77. (*Neave, A. J. C.*). BALKU *v.* EMPEROR. **81 I.C. 533=25 Cr. L. J. 917= A.I.R. 1925 Oudh 183.**

—S. 74 (i) (iii)—Reports to Police.

———(*Obiter*)—The reports made to the police by a woman that she had been married to a certain person are not public documents within the meaning of S. 74 (*i*) (*iii*) of the Evidence Act and secondary evidence of their contents cannot be given under S. 65 (*e*) of the Act. (*Tapp, J.*). MT. NAWAB BIBI *v.* SHER ZAMAN. **123 I.C. 285= 31 Punj. L.R. 214.**

—S. 74—Schoolmaster.

———A school-master comes under the words "executive officers." (*Fawcett and Madgavkar, JJ.*). BHANU DAS NARAYANBOA *v.* KRISHNABAI CHINTAMAN. **99 I.C. 307=50 Bom. 716= 28 Bom. L.R. 1225=A.I.R. 1927 Bom. 11.**

—S. 74—Settlement record.

———History of Multan District attached to Settlement Record, was held to be a Public document. (*Martineau and Moti Sagar, JJ.*). MUHAMMAD KHAN *v.* SULTAN AZAM. **75 I.C. 1040= A.I.R. 1924 Lah. 639.**

—S. 74—Village papers.

———Village papers are *prima facie* proof of what they record. (*Wazir Hasan, J.*). RAM SABAD *v.* RAM SARUP. **103 I.C. 497=A.I.R. 1927 Oudh 441.**

—S. 76—Foreign copies.

———Copy of evidence given in a Court in Kutch, was not certified by the Political Agent in a manner which fully satisfied the requirements of Ss. 76 (*a*) and 86.

Held, that S. 86 did not exclude other proof. 27 Cal. 639, *Foll.* (*Fawcett, J.*). VALLABH DAS MULJI *v.* PRANSHANKAR NARBHESHANKAR. **113 I.C. 313=30 Bom. L.R. 1519= A.I.R. 1929 Bom. 24.**

—S. 76—Plaint.

———Certified copy of a plaint is not admissible in proof of age of the signatory as plaint is not a public document. (*Das and Ross, JJ.*). TARKESHWAR PRASAD TEWARI *v.* DEVENDRA PRASAD TEWARI. **92 I.C.184=3 Pat. L.R. 270= 7 P.L.T. 267=A.I.R. 1926 Pat. 180.**

—S. 77—Reports.

———Execution of decree—Report of an officer of the Court, entrusted with the execution, is a public document and can be proved by a certified copy. (*Neave, A.J.C.*). BALKU *v.* KING EMPEROR. **81 I.C. 533=25 Cr.L.J. 917= A.I.R. 1925 Oudh 183.**

—S. 78—Acts.

———Text of an Act published in Gazette of India is authority and must be followed even though intention of Legislature is not carried out—Interpretation of statutes. (*Adami and Bucknill, JJ.*). RAI BRINANDAN PRASAD *v.* MAHABHIR PRASAD. **97 I.C. 316=A.I.R. 1927 Pat. 142.**

———Conflict between version of Act published in Gazette and that published by Superintendent,

EVIDENCE ACT (1872), S. 78—Diplomatic agent.

Govennment Printing—Gazette version must be preferred. (*Phillips, J.*). SUBRAMANIA AIYAR *v.* SHANMUGAM CHETTIAR.
92 I.C. 566=22 M.L.W. 538=
A.I.R. 1926 Mad. 65=49 M.L.J. 363.

—S. 78—' Diplomatic agent.'

———The words "diplomatic agent" are very wide and *prima facie* cover the Resident of Hyderabad, who is the Political Agent of the Government of India. (*Fawcett and Madgavkar, JJ.*). BHANUDAS NARAYANBOA *v.* KRISHNABAI CHINTAMAN.
99 I.C. 307=50 Bom. 716=28 Bom. L.R. 1225=
A.I.R. 1927 Bom. 11.

—S. 78—Foreign copies.

———Copies of entries in registers kept by the officers of a Native State are not admissible in evidence having regard to the provisions of S. 78 (6). (*Kulwant Sahay, J.*). SHAMSHER NARAIN SINGH *v.* MOHAMMAD SALE. 90 I.C. 329=
A.I.R. 1926 Pat. 29.

—S. 78—Municipal proceedings.

———Municipal proceedings may be proved by copy certified by the keeper. (*Mookerjee and Chotzner, JJ.*). AKSHAY KUMAR CHAND *v.* COMMISSIONERS OF BOGRA MUNICIPALITY. 75 I.C. 506=
37 C.L.J. 589=A.I.R. 1923 Cal. 675.

—S. 78—Notifications.

———The production of the Gazette printed under the authority of the Government will be sufficient proof of the notification under S. 78. (*Sulaiman and Ashworth, JJ.*). COLLECTOR, CAWNPORE *v.* JUGAL KISHORE. 107 I.C. 578=
A.I.R. 1928 All. 355.

———Where a notification fixing the election is published in the Gazette, it is proof of the order of Government fixing that election under S. 78. (*Phillips, Ramesam and Wallace, JJ.*). COMMISSIONER, MADRAS CORPORATION *v.* EKAMBARA NAICKER. 106 I.C. 144=39 M.L.T 367=
26 M.L.W. 569=A.I.R. 1927 Mad. 980=
53 M.L.J. 603.

—S. 78—Order of Government.

———Circular issued by the Director-General of Post and Telegraphs notifying that stamps if a certain kind would soon be issued to post offices for sale to the public is not an order of Government within the meaning of S. 78 and the same is inadmissible in evidence. (*Reilly, J.*). VELAYUDHAM PILLAI *v.* EMPEROR. 115 I.C. 509=
1929 M.W.N 193=30 Cr. L.J. 483.

—S. 79—Certificate of registration.

———Registering Officer's evidence is not necessary to prove the certificate of registration, the genuineness of which is to be presumed under S. 79: 38 I.C. 605, *Appr.*; 34 I.C. 281; 38 A. 1 and 17 C. 903, *Diss.* (*Martineau, J.*). MUHAMMAD HASSAN *v.* SOHARA. 71 I.C. 805=A.I.R. 1924 Lah. 389.

—S. 79—Sanction.

———Letter not signed by Chief Secretary but by an officer for him, is not a certified copy and cannot be basis of prosecution. (*Walmsley and Suhrawardy, JJ.*). MD. OZIULLAH *v.* BENI MADHAB CHOWDHARY. 71 I.C. 239=50 Cal. 135=
36 C.L.J. 180=26 C.W.N. 878=
24 Cr. L.J. 111=A.I.R. 1922 Cal. 298.

—S. 80—Confession.

———Confession recorded according to law is presumed to be genuine. (*Harrison and Jai Lal, JJ.*). HARI RAM *v.* EMPEROR. 89 I.C. 897=
26 Cr. L.J. 1425=A.I.R. 1926 Lah. 122.

———Confession containing memorandum under S. 164 (3)—Presumption under S. 80, Evidence Act, arises that all formalities have been performed—Court must be satisfied that confession was voluntarily made. (*Broadway and Addison, JJ.*). PRATAP SINGH *v.* EMPEROR. 93 I.C. 978=
27 Cr. L.J. 514=6 Lah. 415=
7 L.L.J. 482=A.I.R. 1926 Lah. 605.

EVIDENCE ACT (1872), S. 81—Newspaper.

—S. 80—Deposition.

———If the deposition has not been read over to the witness in the presence of the presiding Judge, it does not prove itself under S. 80, but it may be proved in some other way. The Judge who recorded it can prove it or the accused can admit it. (*Prideaux, A.J.C.*). MIRABUX *v.* EMPEROR.
68 I.C.36=18 N.L.R. 192=23 Cr.L.J. 500=
A.I.R. 1923 Nag. 39.

———Though there is no oral evidence to identify the deponent of a deposition made 60 years ago, it is not a sufficient reason to render S. 80 inapplicable and though there is no signature of the presiding officer over it, the presumption that the copy is a true copy may safely be drawn. (*Daniels, A. J.C.*). SARABJIT *v.* MATA DIN. 69 I.C. 437=7 O.L.J. 542.

—S. 80—Scope.

———Section 80 does not deal with admissibility of documents—Only formal proof is dispensed with. (*Rankin, C.J., C. C. Ghose, Suhrawardy, Mukerji and Jack, JJ.*). PADAM PRASHAD *v.* EMPEROR.
119 I. C. 193=50 C.L.J. 106=33 C.W.N. 1121=
30 Cr. L. J. 993=1929 Cr. C. 228=
A.I.R. 1929 Cal. 617 (S.B.).

———Under S. 80 the presumption has to be made as to the genuineness of the statement recorded. No presumption, however, can be made regarding the identity of the deponent: but where the document containing the deposition of a particular person is a very old document, one can turn to the deposition itself to find out whether there is inherent evidence of the identity of the deponent. 7 O. L. J. 542, *Rel. on.* (*Misra, J.*). BHAGWAT PRASAD *v.* SHER KHAN. 94 I.C. 985=
A. I. R. 1926 Oudh 489.

—S. 80—Statements of witnesses.

———Where, therefore there has been an attempt by the presiding officer to comply with provisions of S. 360, Cr. P. Code and to secure the accuracy of the record of evidence, the provisions of S. 80 do not lead to complete exclusion of the document, and the Court is bound to admit under S. 5, but it is open to each side to adduce evidence as to its faithfulness or otherwise and as to the degree of presumption under S. 80 and the weight to be attached to it. 46 Cal. 895, *Foll.* (*Madgavkar, A. J. C.*). PITOOMAL *v.* EMPEROR.
86 I. C. 33=16 S. L. R. 255=26 Cr. L. J. 657=
A.I.R. 1921 Sind 151.

—S. 81—Gazette.

———Under the provisions of S. 81 the genuineness of the Gazette must be presumed, though it is not formally tendered at the trial. It is enough if the Court has the Gazette before it. (*Eforde and Scott-Smith, JJ.*). BAWA SARUP SINGH *v.* THE CROWN.
88 I. C. 22=7 L. L. J. 264=26 Cr. L. J. 1078=
26 P. L. R. 566=A. I. R. 1925 Lah. 299.

—S. 81—Newspaper.

———Newspaper actually produced—Presumption of genuineness arises. (*Hilton, J.*). RAM CHANDRA *v.* EMPEROR. 120 I. C. 798=1930 Cr. C. 331=
31 Cr. L. J. 168=A. I. R. 1930 Lah. 371.

———Even if newspapers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to

EVIDENCE ACT (1872), S. 82—Certificate of Chamber of Commerce.

an anonymous statement. (*Fforde and Scott-Smith, JJ.*). BAWA SARUP SINGH *v.* THE CROWN.
88 I. C. 22=7 L. L. J. 264=26 Cr. L. J. 1078=26 P. L. R. 566=A. I. R. 1925 Lah. 299.

—S. 82—Certificate of Chamber of Commerce.

———Certificate of Manchester Chamber of Commerce as to coal strike in England to show consequent shortage of coal is not admissible. (*Fawcett, J.*). GIRDHARDAS *v.* KERWALA AND CO.
93 I. C. 622=28 Bom. L. R. 232=A. I. R. 1926 Bom. 253.

—S. 83—Chittas.

———Chittas made by a Government for private use in connection with resumption proceedings are not admissible either under S. 83 or S. 13. 9 Cal. 741, *Rel. on.* (*Greaves and Mukerji, JJ.*). UPENDRA NATH *v.* RADHA GOVINDA.
98 I.C. 85=A.I.R. 1927 Cal. 189.

—S. 83—Kistwari map.

———Court may not only presume the correctness of the physical features represented in the map but also the correctness of the statements as to the possession. (*Das and Bucknill, JJ.*). NAZIRUL HAQ *v.* ABDUL WAHAB KHAN. **64 I.C. 326=3 Pat. L.T. 140=1 Pat. 65=A.I.R. 1922 Pat. 58.**

—S. 83—Map.

———*Map is admissible without field book.*

A map is admissible in evidence without the field book. The failure to produce the field book affects the weight to be attached to the map and not its admissibility. (*Das and Macpherson, JJ.*). SHASHI BHUSAN BANERJI *v.* RAMJAS AGARWALA.
83 I.C. 205=3 Pat. 85=A.I.R. 1924 Pat. 402.

—S. 83—Rennell's map.

———Rennell's map in Bengal can be presumed to be accurate. (*Woodroffe and Cuming, JJ.*). SECY. OF STATE *v.* ANANDA MOHAN. **66 I.C. 287=34 C.L.J. 205=A.I.R. 1921 Cal. 661.**

—S. 83—Settlement register.

———Where Settlement Register of 1876 was signed by Acting Director of Revenue Settlement and was dated from the Revenue Settlement Office,

Held, it cannot be too clearly premised, that any such record would not be held to be conclusive evidence of ownership; but upon the other hand one cannot be blind to the importance of such a document which appears *de facto*, to have settled the bounds of the possession of certain plots for a period of thirty-five years (that is to say, from 1876 to 1910). (*Lord Shaw*). SHRINIVASA CHARIAR *v.* EVALAPPA MUDALIAR. **68 I.C. 1=45 Mad. 565=16 M.L.W. 247=31 M.L.T. 1=49 I.A. 237=24 Bom.L.R. 1214=21 A.L.J. 250=27 C.W.N. 317=36 C.L.J. 524=A.I.R. 1922 P.C. 325=43 M.L.J. 536 (P.C.).**

—S. 83—Survey maps.

———Revenue Survey map should be properly judicially received in evidence as correct when made. 30 Cal. 291, P.C. A Cadastral Survey Map is a map of very great importance. The entry in the record of rights operates in the same way between landlord and tenant, as between landlords of the same or of the neighbouring estates, or between tenant and tenant. The entry must be presumed to be correct until it is shown by evidence to be incorrect. (*Das and Ross, JJ.*). MAZHARUL EKBAL *alias* MUNA MIA *v.* RAJA GOPAL LAL RAY BAHADUR.
84 I. C. 488=1924 P.H.C.C. 213=A. I. R. 1924 Pat. 719.

—S. 85—Powers of attorney.

———Statements in powers of attorney are required to be proved like any other statements. (*Kumaraswami Sastri, J.*). PRATAP BHATTADU *v.* COMMISSIONER of INCOME-TAX, MADRAS. **84 I.C. 131=20 M.L.W. 395=1924 M.W.N. 785=A. I. R. 1924 Mad. 880.**

EVIDENCE ACT (1872), S. 90—Custody.

—S. 86—Certifying of document.

———Where copies of the statements of certain witnesses who were examined in a succession certificate case in a Court of a Native State were sought to be put in evidence in a British India Court under S. 33 of the Evidence Act,

Held, that (1) the mere fact that the Resident of the State forwarded the copies in due course is not equivalent to the certificate referred to in S. 86 (2). When a certificate is required by law it cannot be dispensed with merely because it can be obtained at any time. (*Scott-Smith and Fforde, JJ.*). MURLI DAS *v.* ACHUT DAS. **92 I.C. 138=5 Lah. 105=A.I.R 1924 Lah. 493.**

—S. 86—Official translation.

———The Court must accept the official translation as correct. (*Sir John Edge.*) SASIMAN CHOWDHURAIN *v.* SHIB NARAIN CHAUDHURY.
66 I.C. 193=26 C. W. N. 425=3 P. L.T. 133=15 M. L.W. 434=24 Bom. L. R. 576=35 C. L. J. 427=20 A. L.J. 362=1922 M. W.N. 368=30 M. L.T. 242=1 Pat. 305=49 I.A. 25=A.I.R. 1922 P.C. 63=42 M. L.J. 492 (P.C.).

—S. 88—Evidentiary value.

———On the only evidence of telegrams, it cannot be presumed that they are issued from a particular person but they can be considered with the other evidence. (*Fawcett and Madgavkar, JJ.*). EMPEROR *v.* ABDUL. **91 I.C. 690=49 Bom. 878=27 Bom.L.R. 1373=27 Cr.L.J. 114. A.I.R. 1926 Bom. 71.**

—S. 90.

Computation of Period.
Custody.
Discretion of Court.
Evidentiary value.
Extent of presumption.
Interference in appeal.
Presumption when arises.
Secondary evidence.
Unimpeachable document.

—S. 90—Computation of period.

———30 years should be counted from the date of its genuineness being subjected to proof. (*Phillips, J.*). KONDA REDDI *v.* PICHIREDDI.
82 I.C. 487=A.I.R. 1925 Mad. 184.

———Date of production is immaterial—Date of challenging genuineness is to be looked to. (*Martineau and Zafar Ali, JJ.*). LADHA SINGH *v.* MT. HUKAM DEVI. **75 I.C. 57=4 Lah. 233=6 L.L.J. 97=A.I.R. 1924 Lah. 145.**

—S. 90—Custody.

———*Question of fact in each case.*

The question whether the custody is proper or not cannot be determined by any general principles but is one, as the law declares it to be determined on the facts "of the particular case." (*Boys and Sen, JJ.*). BHAGWATI SARAN *v.* RAM SAHAI.
126 I.C. 19.

———Mere production of an ancient document by a party affords no proper custody and it is for the party producing it to explain how the document came to be in his custody. (*Findlay, J. C. and Subhedar, A. J. C.*). TRIMBAKDAS *v.* MT. MATHABAI. **124 I.C. 609=A.I.R. 1930 Nag. 225.**

EVIDENCE ACT (1872), S. 90—Custody.

———*Partition papers.*

Collectorate is not normally a proper custodian for a chitta relating apparently to a private partition among certain persons of certain property. (*Greaves and Cuming, JJ.*). PURNA CHANDRA SINGH *v.* RADHIKA MOHAN DEB. **90 I.C. 722= A.I.R. 1926 Cal. 370.**

—S. 90—Discretion of Court.

———Documents more than 30 years old—Genuineness disputed—Court should consider external and internal evidence for basing presumption of proper signature and execution. 6 Cal. 209; 29 Cal. 740 and 26 All. 581, *Ref.* (*Madgavkar and Murphy, JJ.*). MANSUKH PANACHAND SHAH *v.* TRIKAMBHAI ICHHABHAI PATEL. **123 I. C. 492= 31 Bom.L.R. 1279=A.I.R. 1930 Bom. 39.**

———Whether genuineness of a document over 30 years old and produced from proper custody should be presumed under S. 90 or not is a matter which is within the discretion of the Court below. (*Srivastava, J.*). JAS KARAN SINGH *v.* RAM TAHAL. **114 I.C. 307 (Oudh).**

———The wording of S. 90 shows that it is not compulsory upon any Court before whom a document purporting or proved to be 30 years old is produced, to presume that the said document is genuine. That section only gives a discretion to the Court that if under the circumstances established in a case, it considers proper to raise such presumption, it can do so. 26 All. 581 (P. C.), *Foll.* (*Misra, J.*). HUSAINI *v.* BASIT ALI. **110 I.C. 415=5 O. W. N. 424.**

———The presumption referred to in S. 90 is one which the Court is not bound to make and notwithstanding that the elements mentioned in that section are satisfied the Court may require the document to be proved in the ordinary manner. 26 All. 581 (P.C.), *Rel. on.*

Where the plaintiff do not rely upon such presumption but adduce evidence in order to prove the genuineness of a document but such evidence is disbelieved by the Court, they cannot complain if such presumption was not made by the Court. (*Mukerji and Mitter, JJ.*). SURENDRA NATH *v.* SAMBHU NATH. **104 I. C. 219= 55 Cal. 210=A.I.R. 1927 Cal. 870.**

———Court is not bound to presume the correctness of every statement in a document thirty years old. (*Cuming and Gregory, JJ.*). KHETRA MOHAN DAS *v.* BHARAT CHANDRA. **98 I.C. 1021=A.I.R. 1927 Cal. 229.**

———Presumption must be cautiously applied—In proper cases presumption may be relied on, whether the document forms foundation of party's title or it is sought to be used as evidence. 11 Cal. 539 and 29 Cal. 740, *Foll.* (*Greaves and Mukerji, JJ.*). GOBINDA CHANDRA *v.* PULLIL BEHAR. **98 I.C. 147=31 C.W.N. 215=A.I.R. 1927 Cal. 102.**

———Direct evidence available—Presumption under S. 90 may be refused to be drawn. (*Wazir Hasan, A. J. C.*). RAGHUBAR SINGH *v.* SANWAL SINGH. **61 I.C. 125=8 O.L.J. 23= A.I.R. 1921 Oudh 55.**

———Any question regarding the presumption to be made in favour of the genuineness of a document under S. 90 is a matter eminently within the discretion of the Trial Court. (*Lindsay, J.C.*). HAR PRASAD UPADHYA *v.* BIKRAMAJIT SINGH. **61 I.C. 959=8 O.L.J. 131=A.I.R. 1921 Oudh 36.**

—S. 90—Evidentiary value.

———Mere production of an ancient document unless supported by some corroborative evidence of acting under it is not entitled to any weight. An ancient deed must be corroborated by evidences of ancient or modern corresponding enjoyment or by other equivalent or explanatory proof; it is then presumed to have constituted part of the actual transfer of property mentioned, because this is the usual course of such transactions, *i.e.*, though absence of proof of possession does not affect its admissibility, it undoubtedly affects the weight to be attached to the document. *Doe on the demise of Earl of Egremont* v. *Pulman*, (1842) 3 Q. B. 622 and 27 Cal. 943, *Ref.*; 20 C.L.J. 407, *Dist.* (*Asutosh Mookerji and Rankin, JJ.*). SWARNAMOYI *v.* SOURINDRA NATH MITRA. **89 I.C. 747=42 C.L.J. 14= A.I.R. 1925 Cal. 1189.**

EVIDENCE ACT (1872), S. 90—Extent of presumption.

———If one is dealing with a document some thirty-five years old the mere fact that the proof of consideration is not at all satisfactory, is by itself a slender ground for holding that the document known to have come into existence was entirely unreal. (*Rankin and B.B. Ghose, JJ.*). SAILAJA NATH RAY CHOUDHURY *v.* RAJA RESHEE CASE LAW. **81 I.C. 493=51 Cal. 135=39 C.L.J. 380= A.I.R. 1924 Cal. 693.**

—S. 90—Extent of presumption.

———The presumption arising under S. 90 applies even to the fact that the testator was in a sound disposing state of mind, for the phrase "duly executed" if effect is to be given to the word "duly" means execution by a person legally competent to execute the document. 3 Cal. 557 and A.I.R. 1924 Cal. 82, *Not appl.*; A.I.R. 1925 All. 1, *Rel. on*; A.S. Nos. 82 and 295 of 1924, *Foll.* (*Curgenven, J.*). KOTAYYA *v.* KARANCHETI VARDHAMMA. **A.I.R. 1930 Mad. 744.**

———There is no presumption under S. 90 with regard to unsigned accounts not purporting to be in the handwriting of any particular person: 33 M.L.J. 84, *Foll.* (*Findlay, J.C. and Subhedar, A.J.C.*). TRIMBAKDAS *v.* MT. MATHADAS. **124 I.C. 609= A.I.R. 1930 Nag. 225.**

———If a document purporting to be 30 years old is not duly tendered, proved or exhibited, S. 90 cannot cure the defect. That section only gives discretion to Courts to dispense with proof as to the execution of a document. It raises no presumption whatever as regards the accuracy of the document and cannot be used so as to dispense with formal proof of the contents of the document. (*Bhide, J.*). ABDUL GHANI *v.* FAQIR MOHOMED. **111 I.C. 361=A.I.R. 1929 Lah. 78.**

———Even where an ancient document does not purport to have been signed by the executant, it is open to the Court to presume that the party who signed for the executant signed it with an authority from him. A.I.R. 1925 All. 1 (F. B.), *Foll.* (*Mukerji, J.*). GANGA RAM *v.* CHUNNI LAL. **99 I.C. 759=A.I.R. 1927 All. 765.**

———The presumption of genuineness of a document 30 years old can only dispense with the necessity of its proof, but the question of sufficieny of evidence is not affected thereby. (*Sulaiman, J.*). BALDEOMISIR *v.* BHARAS KUNBI. **95 I.C. 261= A.I.R. 1926 All. 537.**

———Presumption of genuineness includes presumption of executant's authority. A.I.R. 1925 All. 1 (F. B.), *Foll.* (*Mears, C.J. and King, J.*). BALKARAN SINGH *v.* MT. DULARI BAI. **97 I.C. 292=49 All. 55= 24 A.L.J. 920=A.I.R. 1927 All. 231.**

———*Statement—Identity of deponent.*

Under S. 80 the presumption has to be made as to the genuineness of the statement recorded.

EVIDENCE ACT (1872), S. 90—Extent of presumption.

No presumption, however, can be made regarding the identity of the deponent: but where the document containing the deposition of a particular person is a very old document, one can turn to the deposition itself to find out whether there is inherent evidence of the identity of the deponent. 7 O.L.J. 542, *Rel. on.* (*Gokaran Nath Misra, J.*). BHAGWAT PRASAD *v.* SHER KHAN. **94 I.C. 985= A.I.R. 1926 Oudh 489.**

———The presumption permitted by S. 90 in the case of a document purporting to be 30 years old, includes the presumption that when the signature of the executant purports to have been made by the pen of the scribe, the latter was duly authorized to sign for him. 13 A.L.J. 921 and 15 A.L.J. 121, *Overruled.* (*Walsh, Ag. C.J., Sulaiman, Mukerjee, Dalal and Neave, JJ.*). HAJI SHEIKH BODHA *v.* BABU SUKHRAM. **83 I.C. 5=47 All. 31= 22 A.L.J. 857=5 L.R.A. Civ. 775= A.I.R. 1925 All. 1 (F.B.).**

———*Grant—Executant's authority—Surrounding circumstances.*

The application of S. 90 does not justify the inference that the documents, which are established to be genuine, were in fact executed by persons of the requisite authority, but when a grant has been in operation for a long series of years, it may be impossible to adduce direct evidence of authority. In such a contingency the Court may draw an inference from all the surrounding circumstances.

Where the grantee and his successors in interest from generation to generation had been in possession for more than 70 years and the grantor had taken no steps to eject the grantees,

Held, that the burden shifts upon the Zamindar plaintiff to prove how he came to acquiesce in the long possession of the grantee and his successors, and if no evidence, is forthcoming from his side the grants must be presumed to have been made by persons who possessed the requisite authority. (*Mookerjee and Rankin, JJ.*). TARAKESWAR PAL CHAUDHURY *v.* SIRISH CHANDRA GHOSH MANDAL. **80 I.C. 628=27 C.W.N. 964= A.I.R. 1924 Cal. 236.**

———The presumption under S. 90 of the Evidence Act, only exonerates the plaintiff from calling executant for the purpose of proving that he signed the document for the principal. He must prove that executant had authority from the principal to sign his name. (*Walmsley and B.B. Ghosh, JJ.*). RAMANI KANT RAY *v.* BHIMNANDAN SINGH. **85 I.C. 221=50 Cal. 526=A.I.R. 1924 Cal. 82.**

———Although in the case of sale-deeds more than 50 years old, the presumption of law is that they were executed by the persons who purported to execute them, there is no presumption that the scribe who signed these documents for the executants had authority from the executants to do so. 15 A.L.J. 121 and 60 I.C. 96, *Foll.* (*Gokul Prasad, J.*). HAJI SHAIKH BOODHA *v.* SUKHRAM SINGH. **73 I.C. 980=A.I.R. 1923 All. 420.**

———If a Court is prepared to presume the genuineness of a document under S. 90 the question whether the endorsement of the stamp-vendor thereon sets out the true facts as to the name of the purchaser of the stamp and the object for which he wanted the stamped *Cadjan* is not so much a question governed by S. 90 as by S. 114 an illustration to which provides that the regularity of official acts might be presumed. The presumption under S. 90 as to documents over thirty years old, has to be made with some care. In the case of

EVIDENCE ACT (1872), S. 90—Presumption—When arises.

registered documents such a presmption is very readily raised; and in the case of other documents unless by reason of their appearance or by reason of internal evidence there are some cogent considerations which recommend them to the favour of the Court, the Court is not bound to raise such a presumption usually. (*Sadasiva Iyer and Spencer, JJ.*). VAIDYANATHA SWAMY IYER *v.* MADAVANARAYUN. **69 I.C. 289=14 M.L.W. 416=1921 M.W.N. 750= A.I.R. 1921 Mad. 452=41 M.L.J. 310.**

———When another person signs for an illiterate executant, there is no necessary presumption in law that the person who signed had an authority to sign. (*Wazir Hasan, A.J.C.*). RAGHUBAR SINGH *v.* SANWAL SINGH. **61 I.C. 125=8 O.L.J. 23= A.I.R. 1921 Oudh 55.**

—S. 90—Interference in appeal.

———It is at the discretion of the trying Judge either to raise or not to raise the presumption arising under S. 90. And the Court of Appeal cannot overrule his exercise of discretion in that matter without sending the case back for retrial. (*Ross and Wort, JJ.*). RAJENDRA PRASAD *v.* GOPAL PRASAD. **108 I.C. 545=7 Pat. 245= 9 P.L.T. 123=A.I.R. 1929 Pat. 51.**

———In a suit for redemption of the Othis the question was whether the documents evidencing them were genuine. The trial Court presumed that they were genuine, but the first appellate Court refused to draw the presumption and considered that the evidence was not sufficient to establish the genuineness of the documents,

Held, that it was open to the lower Appellate Court to refuse to draw the presumption under S. 90 and to form an independent opinion upon the evidence as to the genuineness of the documents, as the trial Court did not record and communicate to the party affected before the opportunity for receiving evidence had passed, that it was prepared to make the presumption under the section and that the party was shut out from adducing further evidence. 37 Mad. 455, *Foll.* (*Curgenven and Ananthakrishna Aiyar, JJ.*). MUTHIYAN CHETTY *v.* VAYYDAYAN. **108 I.C. 412 (Mad.).**

———The exercise of the discretion under S. 90 may be challenged in second appeal where it is shown that the exercise was made arbitrarily and not on judicial grounds. (*Hasan, J.*). MAHADIN SINGH *v.* BIKRAMA SINGH. **93 I.C. 13= 13 O.L.J. 456=A.I.R. 1926 Oudh 362.**

———Where the lower Court for reasons not *prima facie* unsound had refused to raise the presumption of genuineness under S. 90.

Held, that the High Court should not interfere in second appeal. (*Sadasiva Aiyar and Spencer, JJ.*). VAIDYANATHASWAMY IYER *v.* NATESA MALAVARAYAN. **69 I.C. 289=14 M.L.W. 416= 1921 M.W.N. 750=A.I.R. 1921 Mad. 452= 41 M.L.J. 310.**

—S. 90—Presumption—When arises.

———*Pedigree satisfying conditions of Ss.* 32 (6) *and* 90.

Where relationship as described in a genealogical tree is corroborated in material parts by evidence on record and it *prima facie* satisfies all the conditions prescribed by S. 32 (6) and S. 90, presumption ought to be made in favour of its genuineness. 37 All. 600; A.I.R. 1921 Nag. 49 and A.I.R. 1925 Nag. 271, *Rel. on.* (*Kinkhede, A.J.C.*). JAGADEO *v.* VITHOBA. **105 I.C. 81= A.I.R. 1928 Nag. 20.**

EVIDENCE ACT (1872), S. 90—Presumption—When arises.

———Where all the executants are dead, the scribe is dead, the persons who purport to have been the attesting witnesses are dead, the Registrar before whom the deed was registered is also dead, there is a strong case for applying the presumption under S. 90. (*Stuart, C.J. and Raza, J.*). LAL BAHADUR SINGH *v.* RAMESHWAR PRASAD. **105 I.C. 581=4 O.W.N. 965=A.I.R. 1927 Oudh 510.**

———When a document is suspicious, on the face of it, and when the very place of importance has been erased and re-written, presumption under S. 90 does not arise. (*Sulaiman, J.*). BALDEO MISIR *v.* BHAROS KUNBI. **95 I.C. 261=A.I.R. 1926 All. 537.**

———Where a will was more than thirty years old, and all the attesting witnesses except one were dead and the surviving attesting witness spoke against the due attestation of the will.

Held, in the circumstances of the case, that presumption as to its genuineness and proper attestation might be drawn under S. 90. (*Dalal, J. C. and Wazir Hasan, A. J. C.*). THAKUR SHIAM SUNDER SINGH *v.* THAKUR JAGANNATH SINGH.

85 I.C. 558=28 O.C. 91=A.I.R. 1925 Oudh 465.

———The document was more than 30 years old and was produced from proper custody and all the witnesses were dead.

Held, that the presumption must be made under S. 90 of the Evidence Act that the attestation was duly made. (*Dalal, J. C. and Neave, A. J. C.*). MOHAMMAD HASAN *v.* ALI HAIDER.

85 I. C. 509=12 O. L. J. 1=28 O. C. 8=A. I. R. 1925 Oudh 337.

———*Ancient document produced from Collector's custody was held presumably genuine in the circumstances of the case.*

Though the mere fact of a certain document having been produced from a Court where it had been filed does not necessarily bring that document within the requirements of S. 90, yet, the question depends upon the circumstances of each particular case.

The document was 54 years old and was submitted to the Magistrate and Collector with the express purpose that he might take the necessary steps in order to bring the estate under the management of the Court of Wards. The Collector recorded an order which did not throw any doubt upon the genuineness of the document.

Held, that the Court was entitled to accept the document, as presumably genuine under the provisions of S. 90. (*Adami and Sen, JJ.*). RAJENDRA PRASAD *v.* GOPAL PRASAD. **94 I. C. 814=4 Pat. 67=A. I. R. 1925 Pat. 442.**

———*Mortgage-deed more than fifty years old produced from proper custody presumed to be genuine*

In a redemption suit plaintiff's ancestor was shown to have been in possession in 1840 and the mortgage-deed was executed in 1872 and was registered. It was produced by a person who was admittedly one of the alleged mortgagees. The mark of the executant was made by the village *patwari* who also signed before the Sub-Registrar. An old witness examined to prove the execution of the deed was discredited.

Held, that still the deed should be deemed to be genuine and that the presumption mentioned in S. 90, Evidence Act, should be used in its favour. (*Mukerji, J.*). RAMACHARI *v.* SADHO SARAN.

79 I. C. 405=A. I. R. 1924 All. 869.

———Document duly registered by executants and over thirty years old is admissible where there is no reason to doubt its genuineness. **31 All. 482,** *Foll.* (*Kanhaiya Lal, J.*). GAYA SINGH *v.* SURAJBALI SINGH. **75 I. C. 931=A. I. R. 1924 All. 832.**

EVIDENCE ACT (1872), S. 90—Secondary evidence.

———*Execution of a deed by another for an illiterate person held proved from Registration endorsement.*

One *G*, executed a sale-deed but he being illiterate it was signed by one *D*, for *G*. The deed was registered and its execution was admitted by *G*, before the Registration Officer. It was more than thirty years old and was produced from proper custody,

Held, that the Court was justified in drawing a presumption from the registration endorsement that *G*, had authorised *D* to sign on his behalf. (*Dalal, J. C.*). BHIM SHANKAR DATT *v.* MANI RAM. **80 I. C. 457=10 O. L. J. 643=A. I. R. 1924 Oudh 265.**

———Where a document is undated, no presumption can be drawn under S. 90, as it cannot be said that it is thirty years old. It must then be proved in the ordinary way. (*Phillips and Devadoss, JJ.*). VEERABHADRAYYA *v.* RAMACHANDRA.

73 I.C. 66=18 M.L.W. 404=1923 M.W.N. 454=A.I.R. 1923 Mad. 674.

———*Execution of Will suspicious—Delay in probate—Presumption not made.*

A Will purported to be executed in 1887 was brought to light for the first time in 1907 when it was produced in a Court of Law. In 1910 an application for probate in respect of it was made by a brother of the present applicant but the application was ultimately withdrawn. At that time only one of the attesting witnesses was said to have been alive. Yet no further attempt was made to bring the Will into Court till some ten years later when even that witness was dead. There was no reasonable explanation about the delay after 1910 in making the application for probate. There was no evidence as to the custody of the Will before 1907,

Held, that the applicant cannot get the benefit of S. 90. (*Prideaux and Kotval, A.J.Cs.*). CHAMANLAL *v.* PUNA. **75 I.C. 660=A.I.R. 1923 Nag. 169.**

———*Ancient document never questioned till suit—Consideration may be presumed.*

The passing of consideration for a document which is more than 30 years old and which was never questioned till suit should be taken as proved even if the direct evidence is not as strong as might be naturally expected in respect of recent transactions. (*Sadasiva Aiyar and Spencer, JJ.*). SANYASIAH *v.* M.P. ATCHANNA NAIDU.

70 I.C. 759=15 M.L.W. 289=A.I.R. 1921 Mad. 624=42 M.L.J. 339.

———*Ancient documents—Proper custody—Admission without proof.*

Where the documents are ancient documents, 60 years old, and have been produced from proper custody, that is, from the custody of the lessees who are in possession of the mouza under those documents, the presumption under S. 90 afforded to 30 years old documents will apply to them and they can be admitted without proof. (*Jwala Prasad and Adami, JJ.*). RAMLAL KAVIRAJ *v.* SATYANIRANJAN CHAKRAVARTY. **1921 P.H.C.C. 49=A.I.R. 1921 Pat. 379.**

—S. 90—Secondary evidence.

———Where a party relies upon the certified copy of a document, before any presumption as to genuineness of the original can be made under S. 90, it is incumbent on the party to lay the foundation by leading secondary evidence under S. 65·

EVIDENCE ACT (1872), S. 90—Secondary evidence.

22 All. 294; 41 All. 592; 6 Cal. 720 and 14 Cal. 486 (P.C.), *Foll.* (*Sulaiman and Kendall, JJ.*). GAYA-PRASAD *v.* JASWANT RAI. **A.I.R. 1930 All. 550.**

———Court may presume genuineness of signature authenticating a copy. (*Lord Atkin*). V. SEETHAYA *v.* P. SUBRAMANYA. **117 I.C. 507=33 C.W.N. 578=52 Mad. 453=29 M.L.W. 804=31 Bom. L.R. 756=49 C.L.J. 566=56 I.A. 146=1929 M.W.N. 553=A.I.R. 1929 P.C. 115=56 M.L.J. 730 (P.C.).**

———*Genuineness of even unregistered document can be presumed from its copy after careful consideration of circumstances.*

The Court can presume the genuineness even of an unregistered document thirty years old from a copy of such document, if the original is proved to have been duly executed, and further it is also proved that the original is since lost. But such a presumption can only be made after a careful consideration of all the circumstances of the case.

A document which purported to be the Will was produced in Court in 1897, was referred to in the registered deed of gift in 1902, was made the basis of the public adoption in 1903 and was referred to in the deed of adoption. It was admitted to be genuine in litigation in 1901 and in other litigations from 1903 to 1909, and mutation of names was made in the revenue Court on the basis of the adoption in 1910. Yet since 1879 when testator died until 1923 when this suit was filed, no suggestion was made by any one that a will had been forged or that the will produced in 1897 was a forged document. It was only when 44 speculators combined to take 192 shares of half the estate that the suit was launched,

Held, that after a careful consideration of the whole of the evidence it ought to be accepted as proved that a will was executed and that the genuineness of that will would be presumed from the copy of it: 16 Cal. 753 (P. C.), *Foll.*; 22 All. 294 and 5 Cal. 886, *Ref.* (*Sulaiman and Kendall, JJ.*). BRIJ RAJ SARAN SINGH *v.* BASANT SINGH. **118 I.C. 154=A.I.R. 1929 All. 561.**

———*Section 90 is not confined only to cases where original is produced.*

The words "where any document...is produced," as they stand, do not confine the application of S. 90 to cases in which the original document is actually produced before the Court. There is nothing in S. 90 to prevent the Court making a presumption of the genuineness of the original when a certified copy of a plaint is produced to show acknowledgment for the purposes of limitation: A.I.R. 1923 Mad. 1 (F.B.), *Rel. on.* (*Srivastava, J.*). BRIJ KISHORE *v.* BENI PERSHAD. **121 I.C. 273=6 O.W.N. 880=A.I.R. 1929 Oudh 483.**

———Where documents are filed, as being copies of documents more than thirty years old which came from proper custody, the presumption, arising under S. 90, as to their genuineness might be made by the Court. 2 L. W. 509, *Foll.* (*Spencer and Devadoss, JJ.*). SESHADRI REDDI *v.* SUBRAMANIA AIYAR. **74 I.C. 35=16 M.L.W. 839=32 M.L.T. 89=A.I.R. 1923 Mad. 163.**

———The presumption under S. 90 applies to copies as well as to originals. If the copy is proved to be a true copy a presumption in favour of the genuineness of the original can be made. (*Schwabe, C. J., Oldfield and Coutts Trotter, JJ.*). P. SUBRAHMANYA *v.* T. SEETHAYYA. **70 I.C. 729=16 M.L.W. 462=31 M.L.T. 347=1922 M.W.N. 614=46 Mad. 92=A.I.R. 1923 Mad. 1 (F. B.).**

EVIDENCE ACT (1872), S. 91—Admissibility of external evidence.

———Original document could not be produced—Secondary evidence produced — Presumption applies. RAM SUNDER RAI *v.* MT. KALI KUER. **44 All. 683=A.I.R. 1922 All. 321.**

———Section 90 may apply even to a case where the original document is not produced. (*Woodroffe and Walmsley, JJ.*). KHAGESWAR SARMA *v.* SOMESWAR BHATTACHARYA. **63 I.C. 518=33 C.L.J. 382=A.I.R. 1921 Cal. 334.**

—S. 90—Unimpeachable document.

———*Ownership of property in ancient period—Evidence in unimpeachable old documents is conclusive.*

When the question arises as regards the ownership of property in some ancient period the evidence afforded by some unimpeachable ancient documents should be accepted beyond question. (*Venkatasubba Rao and Shrinivas Ayyangar, JJ.*). SECY. OF STATE *v.* RAJA PARTHASARTHY. **96 I.C. 1011=49 Mad. 349=1926 M.W.N. 897=A.I.R. 1926 Mad. 706=50 M.L.J. 699.**

—S. 91.

Admissibility of external evidence.
Applicability.
Exception.
Hundi.
Lease.
Mortgage.
Partition.
Pronote.
Sale.
Statements of witness.
Miscellaneous.

—S. 91—Admissibility of external evidence.

———*Document embodying only some terms—Evidence of other terms admissible.*

Where there is a document which does not contain the entire agreement between the parties but embodies only some of the conditions, oral evidence to prove certain other terms which had been agreed upon and which are not inconsistent with the written instrument is clearly admissible. (*Sen and Niamatullah, JJ.*). CO-OPERATIVE COMPANY, LTD., SAHARANPUR *v.* BHAGWAN DAS AND CO. **A.I.R. 1930 All. 615.**

———*Family settlement—Oral evidence admissible to prove it.*

There is no provision of law requiring that a partition of family settlement must be reduced to writing and the writing registered, though of course, when they are reduced to writing, the point of registration may arise.

Where by family arrangement it was settled that *A*, father of *B*, was to pay the family debts and *B* was to pay nothing, and Rs. 1,000 from the joint property were to be paid to *B* as his share and a house was to fall to the share of *A*,

Held, that the alleged arrangement amounted to family settlement and not to a release of his share by *B*. It was not therefore necessary to get the settlement reduced into writing and get the writing registered. Oral evidence on the point of the alleged settlement was therefore admissible. (*Shingne, J.*). RANGU NYAHALCHAND SHET VANI *v.* LAKSHMAN MARTAND KULKARNI. **A.I.R. 1930 Bom. 438.**

———*Resumption of* saranjam *not required to be reduced to writing.*

There is no law which requires a resumption of *saranjam* to be reduced to writing. The actual order of resumption therefore need not be produced in evidence. Such resumption can be proved under S. 114, Evidence Act, and S. 91 will not govern

EVIDENCE ACT (1872), S. 91—Admissibility of external evidence.

such cases. (*Fawcett, Ag.C.J. and Murphy, J.*). SAYOJI RAO GAIKWAR *v.* MADHO RAO RAGHUNATH RAO. **115 I.C. 369=53 Bom. 12=30 Bom. L.R. 1463=A.I.R. 1929 Bom. 14.**

———*Agreement to lease—Inadmissibility owing to non-registration—Prior oral agreement—Proof—Permissibility.*

Where the tenant wrote to the landlord to grant a lease in pursuance of an oral conversation and the landlord sent a reply which in law amounted to an agreement to lease but which was rendered inadmissible for want of registration and the tenant thereupon sought to fall back on the prior oral agreement,

Held, that if there was a prior oral agreement, it was either the same as that in the letters or it was modified by the letters and that in neither case did S. 91 of the Evidence Act admit oral evidence of the alleged oral agreement. (*Hilton, J.*). MT. RAJ RANI *v.* HAKAM CHAND JAGDHAR MAL. **31 Punj. L.R. 299=12 L. L. J. 77.**

———*Grant reduced to form of document—Secondary evidence inadmissible where document not shown to have been lost.*

Under S. 91 the only evidence as to a grant when it has been reduced to the form of a document is the document itself unless secondary evidence as to its contents is admissible. Only Cl. (c), S. 65, which makes secondary evidence of lost originals admissible can be applied to such a case; but where there is no evidence on record that the document has been lost Cl. (c) is inapplicable and a finding of Court based on existence of an *ijazatnama* which is said to be lost is erroneous in law. (*Pullan, J.*). MAHOMED KHAN *v.* SHEO BHIKH. **6 O.W.N. 859=10 L.R.A. Rev. 358=A.I.R. 1929 Oudh 447.**

———Where a document, embodying a contract between parties, should have been, but was not registered, the document itself is inadmissible in evidence and further no evidence can be given of its terms under S. 91. (*Pratt, Offg. C.J. and Ormistone, J.*). OFFICIAL ASSIGNEE, RANGOON *v.* L. ROOPJEE. **115 I.C. 903=6 Rang. 676=A.I.R. 1929 Rang. 60.**

———Oral evidence is admissible to prove a condition reduced to writing in a document, where the opposite party is in possession of the document and denies the existence of such a condition. (*Zafar Ali, J.*). INDIAN MERCHANTS, LTD. *v.* ANRUP CHAND. **107 I.C. 492=A.I.R. 1928 Lah. 236.**

———*Terms of contract, originally made by parol, reduced to writing—Oral evidence is not admissible.*

The moment an oral contract is reduced to writing it is not open to any of the parties thereafter to seek to prove the terms of the contract referring to the original oral agreement and S. 91, Evidence Act, applies not only to cases where the contract is brought about or concluded by the writing, but also where the contract having been originally made by parol is subsequently reduced to writing. When the parties reduce the terms of a contract to writing, it clearly indicates the contemplation of the parties that the terms would be reduced to a form where there could be no question at all as to what the terms were and the undoubted policy of the law is that whenever parties have taken such precaution it is the document itself that must be produced and proved as evidence of the contract subject of course to any rules as to secondary evidence. (*Srinivasa Aiyangar and Ananthakrishna Ayyar, JJ.*). KUPPUSWAMI *v.* CHINNASWAMI. **111 I. C. 677=28 M.L.W. 234=A.I.R. 1928 Mad. 546.**

———Secondary evidence of a mere note that a mortgage had taken place and oral evidence of a transaction of mortgage, which is itself oral, is admissible. (*Pratt, J.*). MA SAW *v.* MAUNG BA. **106 I.C. 476=5 Rang. 650=A.I.R. 1928 Rang. 32.**

———*Contract—Construction—Mercantile contract—Evidence of usage in particular locality is admissible only if necessary to explain ambiguous terms—If such usage is repugnant to the terms of written contract it is inadmissible.*

Where ambiguous terms or phrases are found in a mercantile contract evidence of usage is admissible to explain the meaning of the expressions in the particular trade or locality and where a contract is silent in respect of some incidental term or condition which, according to the course of business established in a particular trade it is customary to find included in such a contract, evidence of the custom is admissible to prove that such term or condition formed part of the contract, unless the incorporation of the term or condition in the contract will have the effect of introducing something repugnant to or inconsistent with the tenor of the written agreement. But where the parties to a contract have expressed the agreement at which they have arrived in a written document the terms of which are capable of a reasonable interpretation, according to the natural meaning of the words that are used, a trade usage which, if it regulated the rights and obligation of the parties, would alter fundamentally the nature and character of the contract as expressed in the written agreement, can neither determine nor affect the rights and obligations of the parties engaged in the transaction; and, as it is inconsistent with the terms of the written agreement evidence of such an usage is inadmissible: *Humprey* v. *Dale*, (1857) 7 E. and B. 266 and *Mollet* v. *Robinson*, L.R. 5 C.P. 646, *Relied on.*

Where plaintiff contracted to supply certain goods to the defendants and the indent provided: "I the undersigned, request you to purchase yourselves or through your agent on my account and risk the whole or any part of the undermentioned goods on the terms and conditions stated below",

Held, under the indent the relationship of principal and agent was created between the defendant and the plaintiff; and unless the defendant assented to some other mode of performance, it was the duty of the plaintiff under the indent to create privity of contract between the defendant and the foreign supplier for the purchase of the indent,

Held, further, that the usage that a merchant who under an indent agrees to purchase goods from abroad for and on account of a dealer, "C.I.F. no commission," is entitled to purchase the goods from the supplier as a principal on any terms that he may arrange, and to resell the goods to the dealer upon the terms of the indent, the difference between the price at which the merchant buys from the supplier and the price at which he sells to the dealer being his remuneration for obtaining the goods for the dealer, would be wholly inconsistent with the terms of the indent and would be inadmissible in evidence whether defendant was aware or ignorant of it: *Mollet* v. *Robinson*, (1870) L.R. 5 C.P. 646 and *May & Hart* v. *Angele*, (1898) 14 T.

EVIDENCE ACT (1872), S. 91—Admissibility of external evidence.

L. R. 551, *Rel. on.* (*Page, J.*). HOLMES WILSON LTD. *v.* S. BATA KRISTO DE. **104 I.C. 268= 54 Cal. 549=A.I.R. 1927 Cal. 668.**

———There is nothing in the Transfer of Property Act to suggest that no transfer of an interest in immovable property can be effected without a writing duly registered or that non-registration of every document which effects a transfer of such interest renders it inadmissible in evidence. (*Rupchand Bilaram and Lobo, A.J.Cs.*). BHAGWATI BAI *v.* BHAGWANDER. **102 I.C. 277= A. I. R. 1927 Sind 206.**

———*Terms of contract reduced into form of an unsigned draft—Document or other evidence is admissible to prove the terms proposed but not entered into.*

When terms of contract in respect of immovable property are reduced into the form of an unsigned draft or memorandum of the terms which the parties had agreed should be embodied in a proper document, there would be nothing in S. 91 of the Evidence Act or S. 49 of the Registration Act to exclude the document or other evidence of the terms of the contract: the parties proposed to make but never did make. (*Hallifax and Kotval, A. J. Cs.*). SETH GOCULDAS NATHANI *v.* LAL ARTATRAM. **95 I.C. 824=A.I.R. 1926 Nag. 466.**

———*Area of demised land—Antecedent documents may be consulted only for identifying land.*

Where the question is as to the extent or area of the Mahal settled with the defendants it is not the duty of the Court and it would be contrary to its duty to admit any antecedent documents for the purpose of contradicting the terms of the settlement made. Any antecedent documents and maps can be used solely for the purpose of identifying the thing demised. (*Lord Shaw*). TILAKDHARI SINGH *v.* KESHEO PRASAD SINGH. **88 I.C. 103= 26 P.L.R. 257=2 O.W.N. 403=41 C.L.J. 386= 3 Pat. L.R. Civ. 114=6 P.L.T. 349= 6 L.R. P.C. 109=27 Bom. L.R. 819= 1925 M.W.N. 403=A.I.R. 1925 P.C. 122= 48 M. L. J. 611 (P.C.).**

———Where the plaintiff alleged a mortgage and the defendant alleged a sale but no registered document was produced,

Held, oral evidence was admissible to prove the nature of the transaction. (*Carl, J.*). MAUNG PO TOK *v.* ME LE WAR. **84 I.C. 468= 3 Bur. L. J. 238=A.I.R. 1925 Rang. 102.**

———Agreement not required by law to be in writing or to be registered need not be proved by production of written document but one, the terms of which are reduced into writing should be proved only by the written document and not by oral evidence. (*Mukerjee, J.*). BISHUNATH OJHA *v.* SHEO PRAGASH. **78 I.C. 1043=A.I.R. 1924 All. 842.**

———Verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not even admissible in evidence. (*Newbould and Rankin, JJ.*). DULA MEAH *v.* MOULAVI ABDUL RAHAMAN. **81 I.C. 641= 28 C.W.N. 70=A.I.R. 1924 Cal. 452.**

———*Party in possession of document cannot let in secondary evidence.*

Where documents of title were in existence and defendants, upon whom the *onus* lay had them in their possession and failed to produce them.

Held, that secondary evidence of the terms and contents of the documents cannot be adduced. (*Dawson-Miller, C.J. and Mullick, J.*). BUDHAN TELI *v.* MADAN MOHAN LAL. **68 I.C. 653= 3 P.L.T. 485=A.I.R. 1923 Pat. 111**

EVIDENCE ACT (1872), S. 91—Applicability.

———It is settled law that a relationship such as partnership, landlord and tenant and so forth may be proved apart from the documents which embody the terms of that relationship. (*Duckworth and Pratt, JJ.*). MG PO LUN *v.* MA E. MAE. **74 I.C. 47=1 Bur.L.J. 111= A.I.R. 1923 Rang. 57.**

———External evidence is admissible to show that an unstamped acknowledgment was not signed, to supply evidence of the debt connected with it. 21 Bom. 201 (F.B.) and 30 Cal. 687, *Ref.* (*Oldfield, J.*). VENKATACHALAPATHI CHETTIAR *v.* LAKSHMANAN CHETTIAR. **13 M.L.W. 140= A.I.R. 1921 Mad. 71.**

———*Document containing terms of loan inadmissible—Lender can sue when loan is provable by other evidence.*

The question whether a loan was given and taken, can in certain cases, such as those of collateral security, be distinguished from the question of the terms of the loan and its repayment. Where it can be so distinguished, even if the document embodying the terms is inadmissible, the lender may fall back and sue upon the loan itself and prove it by other evidence. An implied contract to repay money lent always arises from the fact that the money is lent. (*Case-law discussed*). (*Kennedy, J.C. and Madgavkar, A.J.C.*). NARAINDAS *v.* JASSOMAL. **65 I.C. 37=15 S.L.R. 135= A.I.R. 1921 Sind 80.**

—S. 91—Applicability.

———The provisions of S. 91 are not applicable to permission granted by Municipality under S. 114 for connecting the private drain with the Municipal drain. (*Subhedar, A. J. C.*). ABDULLA *v.* AMBADAS. **120 I.C. 221=A.I.R. 1930 Nag. 130.**

———*Arbitration—Agreement.*

The agreement to refer to arbitration is not a contract, grant or other disposition of property and so S. 91 does not apply to it. (*Ashworth, J.*). BABU RAM *v.* LALA RAM. **116 I.C. 853= A.I.R. 1929 All. 415.**

———*Pyatpaing.*

The pyatpaing is signed not for the purpose of recording a contract but for the purpose of reporting to the revenue authorities for revenue purposes what has been done. Such documents are referred to as evidence of what actually has taken place. But they do not purport to record in a formal manner the terms of the contract. It is not, therefore, a document within S. 91. (*Rutledge, C. J. and Brown, J.*). MAUNG KIN LAY *v.* MAUNG TUN THANG. **106 I.C. 503=5 Rang. 679= A.I.R. 1928 Rang. 53.**

———Section does not apply if a party does not attempt to prove the terms of the document (per *Venkatasubba Rao, J.*). (*Kumaraswami Sastri and Venkatasubba Rao, JJ.*). RAMU CHETTY *v.* PANCHAMMAL. **92 I.C. 1028=1926 M.W.N. 45= A.I.R. 1926 Mad. 402.**

———*A receipt for money.*

A receipt acknowledging payment of money is not a contract or a grant, nor in the ordinary sense of the terms is it a disposition of property within the meaning of S. 91 and so oral evidence is admissible where the receipt is found to be suspicious or is unregistered. 23 Mad. 92, *Foll.* (*Pullan, A. J. C.*). SARDAR SINGH *v.* IQBAL NARAIN. **80 I.C. 57=27 O.C. 380=A.I.R. 1925 Oudh 257.**

———*Deed not produced—Proof of transaction by other evidence is not barred.*

Where it was contended that the plaintiff, not having produced *Bainukasha* deed, was not entitled

EVIDENCE ACT (1872), S. 91—Exception.

to adduce evidence of the transaction and therefore failed to establish his title.

Held, all that S. 91 provides is that when the terms of a contract or of a grant or any other disposition of property have been reduced to the form of a document, no evidence shall be given in proof of the terms of such a contract, grant or disposition of property except the document itself. This, however, refers only to the method of proof of the terms of contract grant or disposition of property: it does not exclude other proof of the transaction itself and this being so the Courts are entitled to consider the other evidence adduced in proof of *Bainukasha* transaction. (*Coutts and Ross, JJ.*). MUSAMMAT MAKHDUMAN *v.* SAIYED ALTAF HUSSAIN. **80 I.C. 187=A.I.R. 1922 Pat. 222.**

—S. 91—Exception.

———*Dekkhan Agriculturists' Relief Act, S. 10-A overrides Ss.* 91, 92, *Evidence Act.*

The object of S. 10-A of the Dekkhan Agriculturists' Relief Act, namely, the decision as to the real nature of the transaction by admission of the oral evidence which otherwise would be excluded by the ordinary law, whether S. 92 or the like of the Evidence Act, is to override not merely Evidence Act, S. 92, but also where necessary S. 91. A.I.R. 1919 P.C. 44, *Ref.*; 15 Bom. L.R. 555, *Dist.* (*Madgavkar, J.*). BASAPPA GURUBASAPPA *v.* TAYAWA VIRUPAXAPPA. **31 Bom. L.R. 1266=54 Bom. 30=A.I.R. 1930 Bom. 79.**

—S. 91—Hundi.

———*Hundi embodying only part of contract inadmissible—Evidence of terms of whole contract not excluded.*

If a hundi is an embodiment of the whole of the contract between the parties and it is not admissible in evidence and cannot be looked at for the purpose of finding out the terms of the contract, other evidence to prove the terms of such contract cannot be allowed. But where the hundi embodies only a part of the contract between the parties, it cannot be said that the whole contract is reduced to the form of a hundi and S. 91 does not exclude evidence showing the terms of the whole contract which cannot be determined from the hundi alone. 7 Cal. 256; 28 All. 298; 34 All. 158; 7 A.L.J. 459; 16 I.C. 33, *Disc.*; 38 Mad. 660; A.I.R. 1921 Lah. 217 and 23 Cal. 851, *Ref.* (*Sulaiman and Kendall, JJ.*). KUNDAN LAL *v.* SAHU BHIKHARI DAS ISHWAR DAS. **116 I.C. 293=51 All. 530=1929 A.L.J. 333=A.I.R. 1929 All. 254.**

———Bill of exchange or hundi does not necessarily embody whole contract between parties. (*Sulaiman and Kendall, JJ.*). KUNDAN LAL *v.* SAHU BHIKHARI DAS ISHAR DAS. **116 I. C. 293=51 All. 530=1929 A. L. J. 333=A. I. R. 1929 All. 254.**

———*Insufficiently stamped Hundi—Secondary evidence of loan.*

Where the money, even though advanced a short time before the actual execution of the hundi which was insufficiently stamped, was advanced on the security of the hundi and the agreement between the parties was that the loan should be made in consideration of the hundi,

Held, the plaintiffs have no cause of action independent of the hundi and as the hundi, insufficiently stamped is inadmissible in evidence and as S. 91 of the Evidence Act forbids secondary evidence, the plaintiffs must fail. (*Chevis and Harrison, JJ.*). CHANDA SINGH *v*, AMRITSAR BANKING COMPANY. **66 I. C 201=2 Lah. 330=A. I. R. 1922 Lah. 307.**

EVIDENCE ACT (1872), S. 91—Mortgage.

———*Hundi inadmissible—Oral contract cannot be proved.*

Where the terms of any contract have been reduced to writing and that writing is, for any reason, inadmissible, the promisee must lose his money. Therefore, where advancing of a loan and the execution of the hundi are simultaneous transactions, and the contract for repayment is embodied in the hundi, but the hundi is inadmissible in evidence due to insufficient stamp, the creditor cannot rely on the original consideration. 16 I.C. 33, *Dissented from. Case-law Ref.* (*Le Rossignol and Wilberforce, JJ.*). GURDAS MAL SINGH *v.* ISHER DAS. **60 I. C. 107=3 L. L. J. 157=A. I. R. 1921 Lah. 217.**

—S. 91—Lease.

———*Deed invalid—Proof* aliunde.

Even if the registration of a lease deed be invalid, the tenancy can be proved otherwise without proving the written lease which may be inadmissible for want of registration. 41 Cal. 347, *Foll.*

The tenancy can also be proved by the doctrine of part performance. (*Das and Kulwant Sahay, JJ.*). DAMODHAR PRASAD *v.* MASOODAN SINGH. **105 I. C. 172=8 P. L. T. 829=A. I. R. 1928 Pat. 89.**

———Where an *amalnamah* evidencing a settlement of land is inadmissible in evidence for want of registration no evidence is admissible on the question as to the persons for whom the settlement was made or as to the extent of their shares settled. (*N. R. Chatterjee and Newbould, JJ*). HEMCHANDRA ROY *v.* SASHI BHUSAN SIL. **63 I.C. 863 (Cal.).**

—S. 91—Mortgage.

———*Interest in a mortgage-deed—Oral evidence.*

Where a mortgage deed contains a stipulation for compound interest, all evidence of an alleged oral agreement to the effect that only simple interest was agreed upon will be wholly inadmissible. Because if the mortgagor alleges that the parties never agreed to compound interest but only to simple interest, all evidence in support of the allegation will be excluded by S. 91, and if his case is that he agreed in writing to pay compound interest, but the parties entered into a simultaneous oral agreement that only simple interest should be paid, then evidence of such oral agreement will be excluded by S. 92. (*Banerji and King, JJ.*). BEHARI LAL *v.* ABDUL AZIZ. **119 I.C. 92=1929 A. L. J. 866.**

———The mortgage sought to be redeemed was passed in 1866. Plaintiff gave sufficient details of the alleged mortgage. It was not proved that there was ever an unregistered instrument of mortgage. The mortgage was proved by circumstantial evidence, *viz.*, recitals in deeds referring to the property as having been so mortgaged and extracts from account books which mentioned the fact of the mortgage, as well as a transaction by which a half-share in the mortgage was transferred to the defendant's father,

Held, that because the terms of the contract had not been reduced to the form of a document and as at the time of the alleged mortgage an oral agreement with transfer of possession sufficed to create a mortgage, S. 91 would not apply,

Held, further, that S. 49, Registration Act, would also not apply, because there was in fact no document tendered in evidence which ought to have been, but was not in fact, registered. (*Fawcett, Ag. C.J. and Murphy, J.*). NARSI *v.* PARSHOTTAM. **115 I.C. 379=52 Bom. 875=30 Bom.L.R. 1277=A.I.R. 1928 Bom. 484.**

EVIDENCE ACT (1872), S. 91—Mortgage.

———*Mortgage requiring registration—Oral evidence inadmissible.*

A mortgage was executed before applicability of Transfer of Property Act for Rs. 80. Further advance of Rs. 80 was taken on the same land after the application of the Act to Burma. The mortgage deed was not registered. The mortgagor brought a suit for redemption on payment of Rs. 160 and tried to prove the mortgage by oral evidence,

Held, that the mortgagor could not get out of the registration by taking money in instalments. Oral evidence was, therefore, inadmissible. (*Das, J.*). MAUNG MIN LWIN *v.* MG. THA BAW.
117 I.C. 59=A.I.R. 1928 Rang. 242.

———Where an earlier mortgage is substituted by a subsequent mortgage but the subsequent mortgage is invalid for want of legal attestation, the mortgagee can fall back on the earlier mortgage as there is no valid substitution of the old security by the new one, provided his rights under the earlier mortgage are not otherwise barred. 6 N.L.R. 164 and 39 All. 178 (P.C.), *Rel. on.* (*Kinkhede, A.J.C.*). VENKATRAO *v.* GANPAT. **98 I.C. 695= A.I.R. 1927 Nag. 83.**

———All the terms of the contract are conveyed by the word "Mortgage", so the fact of mortgage apart from its terms cannot be proved but only the fact of transfer of possession where there is such transfer, can be proved. (*Godfrey, J.*). MAUNG TUN *v.* MAUNG KHAN. **84 I.C. 987=3 Bur.L.J. 231= 2 Rang. 441=A.I.R. 1925 Rang. 61.**

———Authorised maps and entries made in authorised revenue registers corroborative of oral testimony as to documentary transactions can only be admitted where evidence other than the documents themselves is admissible at all. So, a mortgage which ought to have been by registered instrument cannot be proved by authorised maps and entries made in authorised revenue registers : A.I.R. 1923 Rang. 196, *Overruled.* (*Godfrey, J.*). MAUNG TUN *v.* MAUNG KHAN. **84 I.C. 987=3 Bur. L.J. 231= 2 Rang. 441=A.I.R. 1925 Rang. 61.**

———*Suit on mortgage—Original mortgage deed not produced—Defendant pleading payment and discharge—Non-production of mortgage-deed is not fatal —Question of payment must be gone into on merits.*

If the mortgage is totally denied, the plaintiff cannot prove the *factum* of the mortgage without producing the original mortgage deed, but if the defendants do not deny the *factum* of the mortgage but what they allege is that the mortgage has been discharged by payment, it is necessary for the Judge to find whether the mortgage had in fact been discharged or not. The non-production of the original mortgage might be an important factor in considering whether the mortgage had been discharged or not, but that is no ground in itself for dismissing the suit on the mortgage in such a case. (*Banerji and Gokul Prasad, JJ.*). HIKMATULLAH KHAN *v.* ABDUL AZIM KHAN. **61 I.C. 412= 19 A.L.J. 185=A.I.R. 1921 All. 218.**

—S. 91—Partition.

———Fact of partition may be proved by oral evidence although deed embodying terms of partition cannot be proved for want of registration. 41 Bom. 466 and A.I.R. 1926 Mad. 402, *Foll.* (*Beasley, C. J. and Curgenven, J.*). SUBBARAO *v.* MAHALASHMAMMA. **A.I.R. 1930 Mad. 883.**

———An unregistered partition deed is admissible to prove the factum of partition, but its terms cannot be proved : A.I.R. 1924 Mad. 292; A.I.R. 1924 Pat. 341 ; 43 Mad. 244, *Rel. on.*

EVIDENCE ACT (1872), S. 91—Partition.

Where a deed of partition is unregistered, the combined operation of S. 49, Registration Act, and of S. 91, Evidence Act, would be to shut out all evidence to prove the terms of the deed; still separate status and separate possession are provable by other independent evidence : 41 Bom. 466; 44 Bom. 881, *Rel. on.*

Though a deed of partition is unregistered, the fact of partition and the fact of separate status and separate possession are provable, the reason being that these facts are not part of the "transaction" as contemplated by S. 49 of the Registration Act or of the "disposition" as contemplated in S. 91 of the Evidence Act. (*Hallifax and Mitchell, A.J.Cs.*). JIJI BAI *v.* CHOWDHARY RATAN SINGH.
99 I.C. 448=A.I.R. 1927 Nag. 113.

———*Registration Act. Ss.* 17 *and* 49*—Document evidencing partition—Oral evidence not allowed.*

Where a document is intended to be the evidence of a partition effected between the parties thereto it requires registration under S. 17 and if unregistered is inadmissible in evidence according to the provisions of S. 49. Oral evidence as to the terms of such a document is shut out by S. 91 of the Evidence Act. (*Abdul Raoof, J.*). CHANDU LAL *v.* DAULAT RAM. **69 I.C. 859= A.I.R. 1924 Lah. 286.**

———*Oral evidence should not be given to prove unregistered partition agreement.*

Where a partition is made by an unregistered document, oral evidence is inadmissible to prove it. But if the partition has been acted upon by the parties to the other's knowledge, part performance may be proved. But this is limited to cases in which specific performance can be claimed. As the Court cannot entertain a suit for partial partition specific performance of an agreement to partially partition cannot be claimed. Hence part performance cannot be proved where there has been only an agreement of partial partition, but can be proved where the agreement has been one of entire partition. 12 C.L.J. 25, *partly followed and partly distinguished* ; 21 Ch. D. 9 and 8 A. C. 467, *Foll.* (*Das and Macpherson, JJ.*). NAND LAL MAHTON *v.* DHANUKDHARI MAHTON. **76 I.C. 42= 4 P.L.T. 657=2 Pat. L.R. 37= A.I.R. 1924 Pat. 244.**

———Where the defendants alleged that the plaintiff had executed certain unregistered deeds by which the inheritance of a common ancestor was partitioned, and the plaintiff in his pleadings by necessary implication admitted the said allegation.

Held, that oral partition being permissible S. 58 of the Evidence Act made evidence on this point unnecessary and therefore the provisions of Ss. 91 and 92 of the Evidence Act would not prevent defendants from relying on the partition. (*Heald and Lentaigne, JJ.*). MAUNG PO KIN *v.* MAUNG SHWE BYA. **76 I.C. 855=1 Rang. 405= A.I.R. 1924 Rang. 155.**

———Partition deed inadmissible—Oral evidence is admissible to prove fact of partition but not contents. 41 Bom. 466, *Foll.* (*Campbell, J.*). NARSINGH DAS *v.* UTTAM CHAND. **76 I.C. 852= A.I.R. 1923 Lah. 392.**

———Unregistered partition deed—Evidence as to fact of partition cannot be let in *aliunde.* (*Duckworth and Pratt, JJ.*). MG. PO LUN *v.* MA E. MAE. **74 I.C. 47=1 Bur. L.J. 111= A.I.R. 1923 Rang. 57.**

———Where the deed of partition was unregistered.

Held, it was competent for the plaintiff to say that there was in such and such a year a partition

EVIDENCE ACT (1872), S. 91—Partition.

between himself and his brothers but he could not go further and say what benefit he took under that partition or what share he had in a given property by reason of that partition.

It is of the very highest importance, specially in the interests of a community that is growing commercially, that it should be thoroughly understood that, if parties enter into agreements in writing, they are thereby protected from having their opponents giving evidence of what, they say, were oral arrangements. These rules ought to be rigidly enforced for that very purpose. (S. 91 explained). 41 Bom. 466, *Dist.* (*Mears, C. J. and Piggott, J.*). JAIRAM DAS *v.* RAJ NARAIN. **70 I.C 953= 45 All. 21=20 A.L.J. 777=A.I.R. 1922 All. 493.**

———A partition may be proved by oral evidence though the partition-deed cannot be proved for want of registration. (*Abdul Raoof, J.*). BISHAN DAS *v.* RAM SINGH. **61 I. C. 399= 3 U. P. L. R. (Lah.) 43.**

—S. 91—Pro-note.

———*Debt evidenced by pro-note—Debt proved independently of the pro-note.*

Where a person has contracted a debt and has also executed a pro-note in favour of his creditor, the creditor can bring a suit for the money lent and evidenced by a pro-note and can prove the debt independently of the pro-note, S. 91 does not stand in his way. 6 O. C. 16; A.I.R. 1924 Oudh 249; 34 All. 158; A.I.R. 1928 All. 371 (F.B.), *Rel. on.* (*Raza, J.*). NANKHU SINGH *v.* GIRJA BUX SINGH. **119 I.C. 865=6 O.W.N. 649= A.I.R. 1929 Oudh 399.**

———Even if a chit produced is a promissory note and as such inadmissible is evidence for want of stamp, it is open to a creditor to prove his original debt. *Brown* v. *Watts*, (1808) 1 Taunt 353, *Rel. on.* (*Rupchand, A.J.C.*). ASSARAM MOTIRAM, INSOLVENT, *In re.* **116 I. C. 111= A. I. R. 1929 Sind 164.**

———*Pro-note payable to bearer—Admissibility in suit on original obligation.*

A promissory note made payable to bearer on demand offends against the provisions of S. 25, Paper Currency Act, and is therefore void and cannot be the basis of a claim in any Court of law. But the creditor can sue on the basis of any obligation independently of the execution of the promissory note. (1914) 2 U.B.R. 13; 40 Mad. 727; 40 Mad. 585; 6 M. L. W. 630 and A. I. R. 1922 Mad. 181, *Rel. on* and if there is other evidence outside the promissory note of the obligation sued upon, the promissory note in question is admissible as evidence to be read in conjunction with that other evidence to arrive at a decision as to whether the independent obligation is proved. Where there is no other evidence, while the promissory note is still admissible in evidence, there can be no decree on the basis of it alone. 6 M.L.W. 630 and A.I.R. 1922 Mad. 181, *Rel. on.* (*Boys, Kendall and Sen, JJ.*). *In the matter of* S. 25 PAPER CURRENCY. **115 I.C. 630=50 All. 839=26 A.L.J. 729= A.I.R.1928 All. 371 (S. B.).**

———*Promissory note—Debt provable independently.*

Where a debt may be proved independently of the promissory note, that is, without the assistance of the promissory note in evidence, the plaintiff may be given an opportunity to produce such proof and on his satisfying the Court as to the loan he will be entitled to a decree. 34 All. 158, *Rel. on.* (*Dalal, J.*). CHEDU SINGH *v.* JAGAN NATH PRASAD. **108 I.C. 912=26 A.L.J. 416= A. I. R. 1928 All. 297.**

EVIDENCE ACT (1872), S. 91—Pro-note.

———*Pro-note by several persons jointly—Subsequent oral agreement making the executants severally liable can be proved.*

A subsequent oral agreement, by which the joint and several liability of the executants under the promissory note for the balance due on it is split up with the consent of all parties into a several liability on the part of each of the executants, is not obnoxious to S. 91. (*Thiruvenkatachariar, J.*). RANGASAMI AIYANGAR *v.* SOMASUNDARAM CHETTIAR. **107 I.C. 646=27 M.L.W. 820= A.I.R. 1928 Mad. 173=54 M.L.J. 150.**

———*Pro-note inadmissible—Other evidence of loan is admissible.*

A suit by a creditor for recovery of money paid as a loan on a promissory note does not necessarily fail if the instrument upon which it is based is found to be inadmissible in evidence on account of its being insufficiently stamped or not stamped at all, if he can prove the loan by some other evidence. A.I.R. 1921 Pat. 318; 1 P.L.T. 203; 7 Cal. 256; 3 Cal. 314; 9 All. 351 and A.I.R. 1927 Bom. 437, *Foll.*; A.I.R. 1926 Pat. 432 and 9 M.L.T. 281, *Dist. from.*

Kulwant Sahay, J.—Even in cases where the lending of the money and the execution of the promissory note are contemporaneous, the plaintiff is entitled to maintain a suit for recovery of the money lent and to adduce evidence other than the instrument or the promissory note itself, in order to prove the loan. He cannot, however, give any other evidence as regards, the rate of interest, but he may be entitled to a reasonable amount as compensation by way of interest apart from the contract contained in the hand-note. (*Kulwant Sahay and Macpherson, JJ.*). DHANESHWAR SAHU *v.* RAMRUP GIR. **111 I.C. 482=7 Pat. 845= 9 P.L.T. 471=A.I.R. 1928 Pat. 426.**

———*Pro-note inadmissible—Suit on original loan.*

Where the contract may be considered as contained wholly in the promissory note or bill of exchange as in Ill. (b) to S. 91, if the plaintiff cannot sue on the promissory note he cannot sue at all; but secondly if the promissory note may be regarded as a conditional payment of the amount of the loan in which case if the promissory note is insufficiently stamped, it is only a worthless piece of paper and the plaintiff can sue on the loan and thirdly, the promissory note may be passed as security for the loan in which case there is no necessity for the plaintiff to sue on the promissory note at all and whether it is properly stamped or not he can bring a suit on the loan. (*Kemp, J.*). JACOB AND CO. *v.* A.P. VICUMSEY. **102 I.C. 138= 29 Bom. L.R. 432=A.I.R. 1927 Bom. 437.**

———When a loan has been granted on the security of a negotiable instrument, there is no cause of action independent of the negotiable instrument itself, and when that negotiable instrument is inadmissible in evidence the suit must fail: 63 P. R. 1917 and A.I.R. 1922 Lah. 307, *Foll.* (*Broadway and Fforde, JJ.*). RAM JAS *v.* SAHABUDDIN. **95 I.C. 704=A.I.R. 1927 Lah. 89.**

———*Pro-note ineffective—Suit lies on original transaction.*

A creditor can fall back on the original transaction and recover his money on its basis when it is found or conceded that the document or instrument which he had obtained from the debtor was ineffective to establish any contractual relation of debtor and creditor between them so as to serve as a basis for a suit in a Court of law: 6 N.L.R. 125, *Foll.*

EVIDENCE ACT (1872), S. 91—Pro-note.

Although Ss. 91 and 92 prohibit any secondary evidence of the terms of a written contract, they do not exclude proof of a statement of a fact recited therein. Where, therefore, an insufficiently stamped pro-note is not admissible to prove the specific term of the contract embodied therein, namely, the unconditional undertaking or promise to pay the sum with its interest, it could be used as a mere acknowledgment or statement containing defendant's admission of receipt of money and of his own liability therefor to the person from whom he took it. The pronote failing to take effect as such, the creditor could also treat the contract as non-existent and ask for refund of consideration on the ground that it failed. (*Kinhede, A. J. C.*). UDARAM MANGNIRAM *v.* LAXMAN MARWARI.
104 I. C. 470=10 N. L. J. 45=
A.I.R. 1927 Nag. 241.

———Where a suit is brought on a promissory note and the plaintiff cannot have recourse to it as a piece of evidence, S. 91 is not a bar to the plaintiff succeeding in his suit if he can prove his claim by other evidence: 24 Bom. 360, *Foll.* (*Macleod, C.J. and Coyajee, J.*). RANCHHOD *v.* RAVJIBHAI.
95 I.C. 847=28 Bom. L.R. 631=
A.I.R. 1926 Bom. 357.

———Debt covered by pro-note cannot be proved by independent prior agreement where pro-note is inadmissible for want of stamp: 38 Mad. 660, *Foll.*; 40 Mad. 727, *Cons.*; A.I.R. 1922 Lah. 307, *Ref.* (*Madhavan Nair, J.*). P. SOMARJU *v.* M. SUBBARAYUDU. **85 I.C. 389=20 M.L.W. 943=**
A.I.R. 1925 Mad. 351.

———*Pro-note inadmissible—Independent evidence of loan allowed.*

Where a suit was based on the promissory note but it was not stated in the plaint that the promissory note was the only evidence of the loan and the main allegation in the plaint was that the defendant borrowed Rs. 110 in cash from the plaintiff and it was stated that the loan was evidenced by a promissory note,

Held, that there were two distinct actions though contemporaneous, one of the loan and the other of a promissory note and if the promissory note was found to be inadmissible for want of proper stamp the plaintiff should be allowed an opportunity to prove the loan independently of the promissory note: 6 O.C. 16; 34 A. 158, *Foll.* (*Dalal, A.J.C.*). DWARKA *v.* IDU. **74 I.C. 813=26 O.C. 361=**
A.I.R. 1924 Oudh 249.

———*Promissory note—Loss not proved—Secondary evidence of note is inadmissible.*

Where a promissory note, upon which a suit is based is lost but the loss is not proved secondary evidence of the note is inadmissible. The language of S. 91 is uncompromising and whenever the terms of a contract are reduced to writing and that writing is, for any reason, inadmissible in evidence, the promisee must lose his remedy. The test is "has the creditor a complete cause of action independently of the document which is inadmissible?" (*Broadway and Campbell, JJ.*). RAM SARAN DAS *v.* TULSI RAM. **67 I.C. 565=A.I.R. 1922 Lah. 417.**

———Where the hand-note was executed and was sought to be used only with a view to bind the defendant in order to afford evidence of the loan having been given, it is open to the plaintiff to prove his case by other evidence if the hand-note be held to be inadmissible in evidence, for want of stamp. (*Jwala Prasad, J.*). BRAHMA DEO RAI *v.* RAM KISHUN MAHTON. **60 I.C. 652=**
2 P.L.T. 184=A.I.R. 1921 Pat. 318.

EVIDENCE ACT (1872), S. 91—Sale.

—S. 91—Sale.

———*Unregistered sale-deed—Evidential value.*

Where contract of the sale of the immovable property has been reduced to writing and is followed by delivery of possession, S. 91 does not debar in any way the proof of delivery of possession as the means of conveying the property. The party can use the unregistered document in proof of the terms of the contract or the transaction between himself and the vendor. Only he cannot use the unregistered document to prove that the title passed to him by means of that document. (*Jwala Prasad and James, JJ.*). KISHWAR *v.* SHEONANDAN.
10 P.L.T. 449=A.I.R. 1929 Pat. 620.

———The document that was executed was not a document recording the terms of the contract for sale, but it merely recited that the land had been sold for a certain amount and recorded an agreement as to repurchase by the heirs of the vendor,

Held, that oral evidence as to the contract for sale was not rendered inadmissible by the document. (*Rutledge, C. J. and Brown, J.*). MAUNG TUN PE *v.* MAUNG SEIN MYI. **120 I.C. 232=**
7 Rang. 414=A.I.R. 1929 Rang. 293.

———S. 49, Registration Act, must be read together with S. 17 of that Act and S. 91, Evidence Act, and a fair interpretation of S. 49 does not preclude an unregistered document which is required by law to be registered from being given in evidence as to the terms of the contract for sale: A.I.R. 1923 Mad. 297, *Appr.*; A.I.R. 1923 Lah. 495, *Rel. on*; 35 Mad. 63 (F.B.), *Not foll.*; 9 Cal. 520 (F.B.) and A. I. R. 1919 P. C. 44, *Ref.* (*Rutledge, C. J. and Brown, J.*). MAUNG TUN PE *v.* MAUNG SEIN MYI. **120 I.C. 232=7 Rang. 414=**
A.I.R. 1929 Rang. 293.

———Registration Act, S. 49—Unregistered sale-deed cannot be admitted in evidence nor can oral evidence be allowed. (*Brown, J.*). MAUNG BA *v.* MAUNG KYWE. **110 I.C. 735=6 Rang. 125=**
A.I.R. 1928 Rang. 124.

———A deed of sale conveying immovable property worth less than Rs. 100, although it does not confer any title for want of registration, still having regard to S. 91 of the Evidence Act it may be used as evidence of nature and terms of transaction. (*Suhrawardy and Mukerji, JJ.*). BRAJABALLAV GHOSE *v.* AKHOY BAGDI. **93 I.C. 115=**
30 C.W.N. 254=A.I.R. 1926 Cal. 705.

———When the existence of a sale is in question and not its terms, oral evidence is admissible.

The word "terms" in S. 91 is applicable to both classes of documents, *i. e.*, documents which are reduced to writing and which are required by law to be written. (*Phillips, J.*). VIRARAGHAVULU *v.* YELLAMANDA. **95 I.C. 584=1926 M.W.N 384=**
A.I.R. 1926 Mad. 812.

———An agreement to sell may be an oral agreement, and such agreements are not required by law to be reduced to the form of a document, within S. 91. By Explanation 3 to the section even if a statement was made in a document of sale, which was not registered, of the prior oral agreement to sell, evidence as to the prior oral agreement is excluded from the provisions of the section.

Per *Carr, J.*—Where the transaction has gone beyond a mere contract for sale and amounts to an abortive sale, S. 91 of the Evidence Act is applicable, and oral evidence to prove the contract is not admissible. 10 L.B.R. 241, *Foll.* (*Robinson, C.J., Heald, May Oung, Lentaigne and Carr, JJ.*). MA MYAT THA ZAN *v.* MA DUN. **81 I.C. 857=3 Bur. L.J. 78=**
2 Rang. 285=A.I.R. 1924 Rang. 214 (F.B.).

EVIDENCE ACT (1872), S. 91—Sale.

———*Sale-deed to X and 'others'—Evidence to show who the 'others' are is admissible.*

Where a vendor agrees to sell land to several named persons and in drawing up agreement of sale, the name of one person is mentioned and without naming the rest the word "others" is used, the Evidence Act does not prevent evidence from being let in, as to the persons who are meant by the word "others". Provisions of Ss. 91 or 92 are not contravened thereby nor does the case fall within Ss. 93 to 97. (*Kumaraswami Sastri and Devadoss, JJ.*). A. VEDA MURTHI MUDALIAR *v.* RAGHAVACHARLU.

65 I.C. 973=15 M.L.W. 371=1922 M. W. N. 185= 30 M.L.T. 177=A.I.R. 1922 Mad. 100= 42 M.L.J. 475.

———Unregistered sale deed for Rs. 20—Proof of title by delivery is admissible. 8 C. P. L. R. 1, *Foll.* (*Mittra, A. J. C.*). HARLALSA *v.* BAPU.

18 N. L. R. 8=A. I. R. 1922 Nag. 58.

———S. 91 applies to an agreement to sell. When such agreement has been reduced to writing and the document is not produced, oral evidence of what took place when the agreement was made, is not admissible to prove the agreement. (*Macnair, A. J. C.*). VYANKATESH *v.* GANESH.

61 I. C. 896=A. I. R. 1921 Nag. 166.

—S. 91—Statements of witnesses.

———*Oral contents of documents only are excluded.*

S. 91, Evidence Act merely excludes the oral contents of a deposition but does not make it inadmissible in evidence. (*Prideaux, A.J.C.*). MIRABUX *v.* EMPEROR. **68 I. C. 36=18 N. L. R. 192= 23 Cr. L. J. 500=A. I. R. 1923 Nag. 39.**

———S. 91 even if it covers a deposition, merely excludes oral evidence of its contents but does not make the document itself inadmissible nor prevent its being otherwise proved. (*Daniels, A.J.C.*). MT. FEROZA JAN *v.* MIRZA AMIR ALI.

74 I.C. 445=9 O.L.J. 593=24 Cr. L.J. 781= A.I.R. 1923 Oudh 119.

———*Non-compliance with S. 360, Cr. P. C. does not make record entirely inadmissible in evidence.*

The provisions of S. 360 are mandatory. But non-compliance does not legally result in the total inadmissibility of the record of evidence and in the absence of any definite provision of law entailing inadmissibility, each case of non-compliance must be considered by the Court on its own merits and the document which purports to be the record can be admitted, but without the presumption laid down in S. 80 of the Evidence Act, and, therefore, open to question by the defence and appraisal by the Court.

The law itself does not expressly lay down that the least failure to comply with the provisions of S. 360 renders the whole document inadmissible. Where, therefore, there has been an attempt by the presiding officer to comply with its provisions and to secure the accuracy of the record of evidence, the provisions of S. 80 do not lead to complete exclusion of the document, and the Court is bound to admit under S. 5, but it is open to each side to adduce evidence as to its faithfulness or otherwise and as to the degree of presumption under S. 80 and the weight to be attached to it. 46 Cal. 895, *Foll.* (*Madgavkar, A.J.C.*). PITOOMAL *v.* EMPEROR.

86 I.C. 33=16 S.L.R. 255=26 Cr. L.J. 657= A.I.R. 1921 Sind 151.

———It is not necessary under S. 162 that statements made in the course of the investigation should be reduced to writing. S. 91 of the Evidence Act therefore has no application and it is quite open to the prosecution to prove by the oral statements of the police officer what the contents of the statements made to the police by the witnesses were. (*Kennedy, J.C. and Aston, A.J.C.*). PITUMAL *v.* EMPEROR. **88 I.C. 449=18 S.L.R. 342= A.I.R. 1921 Sind 16.**

EVIDENCE ACT (1872), S. 92—Ambiguity.

—S. 91—Miscellaneous.

———*Even third party can prove a contract reduced to writing only by such writing.*

Whereas in S. 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract, no such limitations are imposed under S. 91. Having regard to the juxtaposition from Ss. 91 and 92 and the deliberate omission from S. 91 of such words of limitation it must be taken that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing. A.I.R. 1917 P.C. 207, *Dist.* (*Srinivasa Aiyangar, J.*). MEENAKSHISUNDARAM PILLAI *v.* CHENCHU MUDALIAR. **109 I.C. 18= A.I.R. 1928 Mad. 459.**

———*Admission of external evidence.*

The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. (*Lord Carson.*) SUBRAMANIAN *v.* LUTCHMAN. **71 I.C. 650=50 I.A. 77= 32 M.L.T. 184=2 Bur. L.J. 25= 25 Bom. L.R. 582=1 Rang. 16=50 Cal. 338= 38 C.L.J. 41=18 M.L.W. 446= 28 C.W.N. 1=1923 M W.N. 762= A.I.R. 1923 P.C. 50=44 M.L.J. 602 (P.C.).**

—S. 92.

Ambiguity.
Consideration.
Contract.
Decree of Court.
Discharge.
Document silent as to interest.
Documents requiring registration.
Evidence of conduct.
Fraud.
Gift.
Intention of parties.
Interest.
Interpretation.
Landlord and tenant.
Mistake.
Mortgage.
Negotiations.
Oral agreement.
Parties and representatives.
Partition deed.
Promissory note.
Sale.
Scope and applicability.
Substitution.
Surrounding circumstances.
Terms of the contract.
Third parties.
Usage.
Variation of terms.
Miscellaneous.

—S. 92—Ambiguity.

———*Suhrawardy, J.*—Where the wording of the contract is capable of different interpretations the

EVIDENCE ACT (1872), S. 92—Ambiguity.

Court is not only justified, but it is its duty, to put a proper construction upon the terms of the contract and is justified in finding with what intention a particular expressi on was used as a matter of pure construction. (*Suhrawardy and Graham, JJ.*). JIVAN MANDUL *v.* RAM MANDUL. **113 I.C. 37=55 Cal. 808=A.I.R. 1928 Cal. 737.**

———Where the document of a grant is produced in evidence and contains no latent ambiguity extrinsic evidence of intention can hardly be admissible. (*Dawson Miller, C. J. and Kulwant Sahay, J.*). UDAI PRATAP *v.* JAGAT MOHAN. **106 I.C. 399=6 Pat. 638=9 P.L.T. 25= A.I.R. 1928 Pat. 66.**

———Where the terms of the deed are ambiguous, the subsequent conduct of the parties is admissible for the purpose of interpretation. (*N. R. Chatterjee and Chotzner, JJ.*). SANKER ROY CHOUDHURY *v.* SECRETARY OF STATE. **84 I.C. 478= 40 C.L.J. 322=29 C.W.N. 166= A.I.R. 1925 Cal. 346.**

———Where the words used in an award are perfectly clear, oral evidence as to their meaning is not admissible; it would only be admissible in case those words are ambiguous or are capable of more than one interpretation. (*Harrison, J.*). KESHO RAM *v.* THAKUR DAS. **78 I.C.80= A.I.R. 1925 Lah. 180.**

———*Former transactions admissible only to explain ambiguous terms in a contract.*

Evidence of former transactions between the same parties can be received for the purpose of explaining the meaning of the terms used in their written contract, where such meaning is doubtful, but not where the meaning is plain; nor is it admissible to enlarge or vary the terms of the contract. To admit it in the latter case would be to contravene the provisions of S. 92. Incidents which are impliedly contained in a written oontract, whether by construction of the terms or by implication of law, cannot be varied by extrinsic evidence. (*Mullah, J.*). STEEL BROS. & CO., LTD. *v.* DAYAL KHATAV & CO. **87 I.C. 67=47 Bom. 924= 25 Bom. L.R. 1063=A.I.R. 1924 Bom. 247.**

———*Deed silent as to yearly or monthly rate of interest—Evidence cannot be given.*

A document provided "I shall pay the principal with interest at the rate of 1-8-0 per cent." but it was not mentioned whether the rate of interest aforesaid would be per mensem or per annum.

Held, that the document is ambiguous and under clause 6 of S. 92 no evidence could be given to clear up that ambiguity. 18 C. W. N. 592, *Foll.* (*Jwala Prasad and Ross, JJ.*). SARJU SAHU *v.* SUKHI LAL. **79 I. C. 420=4 P.L.T. 577= A. I. R. 1924 Pat. 96.**

———Where the contract clearly provides that the goods were to arrive by the steamer *Frauenfels*,

Held, that parties cannot be allowed to adduce parol evidence to contradict the written document which is perfectly plain and explicit. (*Raymond, and Rupchand Bilaram, A.J.Cs.*). FIRM OF JIWANJI *v.* FIRM OF MEHTABRAI CHOOHAMAL. **76 I.C. 286=A.I.R. 1924 Sind 127.**

———A surety bond which was executed on a specific occasion must be taken to have been executed for the purpose of the occasion, and it cannot be assumed that it had reference to any other circumstances of a different date. On the face of it there is no difficulty in giving it an intelligible meaning as constituting a personal pledge. Extrinsic evidence is not admissible in these circumstances to affect its meaning. (*Viscount Haldane.*) PANNALAL *v.* NIHAI CHAND. **67 I. C. 423= 26 C. W.N. 737=1922 M.W.N. 376= 36 C.L.J. 5=16 M.L.W. 80= 24 Bom.L.R. 971=31 M.L.T. 129= 30 P.W.R. 1922=A.I.R. 1922 P. C. 46= 43 M.L.J. 66 (P.C.).**

EVIDENCE ACT (1872), S. 92—Consideration.

———The construction of grants must depend upon the interpretation of all the terms of each instrument and except in a case of ambiguity, extrinsic evidence would not be admissible. Each case must be considered on its own facts in order to ascertain the effect of the grant, resort must be had to the terms of the grant itself and to the whole circumstances so far as they can be ascertained. (*Mookerjee and Chotzner, JJ.*). ABINAS CHANDRA DAS *v.* MAJUB ALI CHOWDHURY. **70 I.C. 273= 27 C.W.N. 328=36 C.L.J. 196= A.I.R. 1922 Cal. 461.**

———If the meaning of a term in the original agreement is doubtful assistance might be sought from the conduct of parties. Apart from ambiguity, the mere fact that the parties have acted on an erroneous construction of an instrument furnishes in itself no reason why the Courts should not follow the general rule that an instrument should be construed according to its natural meaning in the light of the circumstances in which it was executed. (*Richardson and Suhrawardy, JJ.*). BHUPENDRA NARAYAN SINHA *v.* MIDNAPORE ZEMINDARY CO., LTD. **68 I.C. 937=37 C.L.J. 556= A.I.R. 1922 Cal. 300.**

—S. 92—Consideration.

———*Want of consideration or failure of consideration may be proved—But party cannot prove that amount of consideration agreed upon was more or less than that stated in document.*

It is open to a party to prove want of consideration or failure of consideration or a difference in kind of consideration, but it is not open to him to prove a variation in the amount of consideration. The difference in kind, that is the consideration mentioned, must be wholly absolute; a mere omission to mention some portion of the consideration will not come within the proviso, since such an omission is clearly a variation in the terms of the contract. Recitals then as to the kind of consideration or as to the actual payment of consideration may be shown to be false. Recitals as to the amount of consideration cannot be shown to be false, since the amount of consideration is clearly a term of the contract. It is therefore not open to parties to the documeut to give evidence that the amount of consideration agreed upon was more or less than what is stated in the document. 22 All. 370 (P.C.); 33 All. 340; A. I. R. 1926 Mad. 35 and 10 L.N. 1, *Rel. on*; 38 Mad. 514, *Held, not affected by* 33 All. 340. (*Wallace, J.*). MOTHEY KRISHNAYYA *v.* MOHAMMAD GALEB SAHIB. **124 I.C. 508= 1930 M.W.N. 156=31 M.L.W. 446= A.I.R. 1930 Mad. 659=58 M.L.J. 240.**

———In the case of consideration mentioned in a written document, it is open to the party contesting to show that there was no consideration, or that the consideration was different: A.I.R. 1925 P.C. 75, *Appl.* (*Findlay, J. C.*). MUNNASINGA RAJAPUTA *v.* NARAINSINGH. **107 I.C. 658= A.I.R. 1929 Nag. 91.**

———Section 92 does not debar a party from showing by oral evidence the real character of the consideration fixed between the parties. What is not allowed is to contradict the terms of the document: 11 Cal. 519; 5 Mad. 6; 11 Mad. 213; 33

EVIDENCE ACT (1872), S. 92—Consideration.

Mad. 159, *Ref.* (*Otter, J.*). ABDULLAKIN *a.* MAUNG NE DUN. **119 I.C. 738=7 Rang. 292= A.I.R. 1929 Rang. 240.**

———S. 92, Evidence Act, permits a party to a contract reduced into writing to establish, among other matters, want or failure of consideration." A.I.R. 1927 All. 292, *Foll.*; A I.R. 1922 All. 213, *Diss. from.* (*Mukerji, J.*). CHAMAN LAL *v.* HIRA-LAL. **108 I.C. 158=26 A.L.J. 183.**

———Where the deed in suit recited the debt as a cash loan,

Held, that defendant should be allowed to prove by oral evidence that the document in suit was not for a cash loan, but for the rent partly overdue and partly falling due later, and that the payment of the rent was made: 22 All. 149 (P. C.) and 22 All. 370 (P.C.), *Ref.*: First Appeal No. 71 of 1906, *Dist.* (*Maung Ba, J.*). HAJEE LIN *v.* MAUNG BA. **109 I.C. 189=5 Rang. 822= A.I.R. 1928 Rang. 79.**

———*Oral evidence on a matter on which deed is silent is admissible.*

A purchaser of property at an auction sale agreed to sell back the land to the owner on condition that he paid the interest on purchase money paid by him at the auction for 16 months at 4 per cent. per mensem; the owner paid the sum of interest and the purchaser gave him the conveyance; the purchase money was not paid at the time of registration but the document was registered under S. 75, Registration Act. The document was silent as to any payment as purchase money or otherwise and there was no recital of receipt of consideration,

Held, that oral evidence can be adduced to show that no consideration passed: 17 Mad. 146 and 30 All. 125, *Dist.* (*Pratt and Otter, JJ.*). MAUNG MON *v.* MAKIN OH. **106 I.C. 358=5 Rang. 636= A.I.R. 1928 Rang. 47.**

———*Suit for money—Sarkhat with unobliterated stamp produced—Loan can be proved by other oral evidence.*

Where plaintiff sued defendant for a certain amount for which the defendant had executed a sarkhat bearing an unobliterated one-anna stamp and there was no promise to pay contained in the sarkhat, but there was only an acknowledgment that a certain amount had been borrowed,

Held, that if the plaintiff was able to prove *aliunde* by oral evidence that the defendant had the money, then he was entitled to a decree. (*Lindsay, J.*). LAUNJARI CHANHE *v.* PARSOTAM CHANHE. **103 I.C. 634=25 A.L.J. 567= A.I.R. 1927 All. 503.**

———*Suit on pro-note—Plea of forgery of figures.*

Plaintiff sued defendant for a certain sum due on the promissory note. The defendant denied taking the principal sum mentioned in the promissory note, *viz.*, Rs. 1,300, and denied signing the promissory note in the form it had assumed when the case was brought. He admitted that his signature appeared on the note, but said that when he signed it, the only entries were the figures Rs. 300, at the top of the paper, and signature at the bottom.

The case was decreed in favour of the plaintiff not because the trial Court was satisfied that the loan alleged had been made, but because the defendant had not succeeded in proving affirmatively that the note as produced was a forgery,

Held, that all the defendant admitted was that his signature appeared on the document filed and

EVIDENCE ACT (1872), S. 92—Consideration.

the case to be decided was not whether the plaintiff had been proved to have committed forgery but whether the plaintiff had proved that he lent the Rs. 1,300, to the defendant as he alleged and the burden of proving this loan rested on the plaintiff. (*Rutledge, C.J. and Brown, J.*). HOE MOH *v.* SEEDAT. **105 I.C. 361=5 Rang. 527= A.I.R. 1927 Rang. 319.**

———An unregistered letter is inadmissible in evidence to show that a deed of mortgage and a deed of sale executed previously were not to be acted on and no money was due under the former and no property passed under the latter: 26 M.L.J, 151, *Foll.*; A.I.R. 1926 Mad. 362, *Diss. from.* (*Broadway and Kemp, JJ.*). RATTIRAM *v.* NAND LAL. **103 I.C. 421=A.I.R. 1927 Lah. 626.**

———*Deed—Recital of consideration—Oral evidence to show it incorrect being admissible, opposite party can let in oral evidence to prove the contrary.*

Where there is a recital in a document of the payment of a certain sum of money as consideration, oral evidence is admissible to prove that the recital is incorrect as a matter of fact. Such a recital being only an averment of fact, if one party is allowed to show by oral evidence that a recital in a document is incorrect in fact, the other party must certainly be allowed to show by similar evidence that it is not incorrect and that the recital was deliberately put in, and for the purpose of showing it he must be allowed to prove what the real consideration for the document was. S. 92 does not bar such proof, for such proof is adduced not for the purpose of varying or altering any term of the written contract but only to show that the recital in it is correct. To shut out oral evidence for the purpose will be to allow a gross fraud to be perpetrated: 36 All. 537, *Foll.*; 38 Mad. 514, *Dist.*; 22 All. 370 (P.C.) and 33 All. 340 (P.C.), *Foll.* (*Kumaraswami Sastri and Krishnan, JJ.*). RAMASWAMI CHETTIAR *v.* LODD GOVINDOSS. **91 I. C. 612=22 M.L.W. 848= A I.R. 1926 Mad. 35=49 M.L.J. 414.**

———*Variation from recited consideration cannot be proved.*

Where the consideration entered in the sale-deed was Rs. 16,000 and the defendant pleaded that the real consideration was Rs. 18,000 and that by an oral agreement between the parties Rs. 2,000 had been left with the plaintiff for payment of his expenses in the event of any litigation arising over the transfer,

Held, that such an oral agreement is inadmissible in evidence under S. 92. (*Ashworth and Neave, A.J.Cs.*). KETTU MAL *v.* PARTAP SINGH. **92 I.C. 787=A.I.R. 1926 Oudh 301.**

———By proviso of S. 92, it is open to a party or his representative to show that there is no consideration for the agreement which may have been reduced into writing and which may have been even registered. 22 All. 370, *Foll.* (*Mukerji and Dalal, JJ.*). BALDEO PRASAD *v.* RAM AUTAR. **82 I.C. 347=22 A.L.J. 850=5 L.R.A. Civ. 731= 47 All. 7=A. I. R. 1924 All. 865.**

———*Want of consideration for pro-note could be proved.*

It is open to defendant who admitted the execution of the promissory note to plead want of consideration. A. I. R. 1922 All. 213, *Dist.* (*Reyes, J.*). LALLUMAL *v.* REOTI RAM. **74 I. C. 353= 45 All. 679=21 A.L.J. 669=4 L.R.A. Civ. 315= A.I.R. 1924 All. 70.**

EVIDENCE ACT (1872), S. 92—Consideration.

———*Pro-note passed to safeguard the plaintiff against a probable claim—Evidence is admissible.*

In a suit on a pronote the defence was that the promissory note in suit was passed to secure plaintiff mortgagee against any claim that might be made by the prior mortgagees, who had been paid off and from whom the defendant had failed to obtain a re-conveyance and that the note was to be returned when the re-conveyance was executed,

Held, that the plea was as to the existence of a condition precedent and the same should be allowed to be proved according to S. 92, Proviso (3). A.I.R. 1921 Bom. 449, *Dist.* (*Shah, Ag. C. J. and Kemp, J.*). AHMAD SAHEB BAPUSAHEB *v.* UBHAIYA HARSI. **87 I.C. 37=25 Bom. L.R. 867=A.I.R. 1924 Bom. 44.**

———*Pro-note proved void—Other consideration may be proved.*

If a pronote is void or is inadmissible, *e.g.*, for want of stamp, plaintiff can fall back on independent consideration if there be any. (*Dalal, J. C.*). BHOLA NATH *v.* RASOOL BAKSH. **77 I. C. 78=26 O.C. 378=A. I. R. 1924 Oudh 243.**

———*Oral evidence to vary consideration in registered sale-deed is not admissible.*

While want or failure or difference in kind of the consideration may be proved, evidence to vary the amount of consideration in a registered sale-deed is inadmissible, though it is open to the parties to prove by oral evidence that the actual consideration was different from what was mentioned in the deed or that there was no consideration for the deed. If such a course were permissible the protection intended by the legislature to be afforded by the adoption of the rule embodied in S. 92 of the Evidence Act would be completely nullified. 32 I. A. 113; 33 All. 340 (P. C.) *Foll.* (*Mookerjee and Chotzner, JJ.*). ANNALA CHARAN SIL *v.* HARGOBINDA SIL. **75 I. C. 557=27 C.W.N. 496=37 C.L.J. 552=A.I.R. 1923 Cal. 570.**

———Parol evidence is admissible to prove a debt, acknowledged in writing by the debtor, when such acknowledgment being unstamped is inadmissible in evidence. (*Le Rossignol, J.*). ZIKKAN RAM *v.* LAL. **74 I.C. 939=A.I.R. 1923 Lah. 301.**

———*Registered deed of relinquishment—Contemporaneous oral agreemint for payment of a certain sum—Evidence of such agreement is admissible.*

The plaintiff by registered deed relinquished certain portion of the land leased and agreed to pay a reduced rent for the remaining land. The plaintiff alleged that at that time there was an oral agreement between him and the landlord that the latter would pay Rs. 200 for the recovery of which the suit was brought,

Held, that the question of existence or otherwise of the consideration can always be inquired into irrespective of what is entered in the deed. An agreement to pay as a condition precedent to the enforcement of a deed of relinquishment can also be proved under S. 92, proviso (3) and matters not referred to in the registered document but about which there was contemporaneous oral agreement could be admitted : *Ram Bakhsh* v. *Durjan*, (1887) 9 All. 392 and *Motabhoy Mulla Essabhoy* v. *Mulji Haridas*, (1915) 39 Bom. 399, *Ref. to.* (*Kanhaiya Lal, J.*). BADAL RAM *v.* JHULAI. **63 I. C. 861=44 All. 53=19 A.L.J.816=A. I. R. 1922 All. 165.**

—S. 92—Contract.

———Where a bond providing for labour by the maker in lieu of interest is silent as to payment

EVIDENCE ACT (1872), S. 92—Decree of Court.

of wages and there is no negative covenant precluding the maker from claiming wages for work done-S. 92 does not bar evidence as regards wages paid for work done by the executant. (*Devadoss and Sundaram Chetty, JJ.*). KARUPPANNA *v.* PAMBAYAN. **101 I. C. 39=25 M.L.W. 601=A. I. R. 1927 Mad. 531.**

———Oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing : A.I.R. 1923 P.C. 50, *Foll.* (*Newbould and Graham, JJ.*). DHANA MOHAMMED *v.* NASTULLA MOLLA. **92 I. C. 943=A.I.R. 1926 Cal. 637.**

———Where the contract was made in writing and the terms were not varied either by a contract in writing or by oral agreement,

Held, the rights and liabilities of the parties must be determined according to the true construction to be placed on the contract. When a reference to that showed that payment was to be made against the tender of documents and not against delivery of goods, and when none of the relative documents were tendered at the time of demanding payment but only the goods were tendered, the purchasers committed no breach of their contract by not taking up the goods. It was not open to the vendors to show that notwithstanding the form of the contract the parties intended payment to be against delivery of goods and not against tende r of documents. (*Broadway and Fforde, JJ.*). HIRA LAL PRABHU DIAL *v.* GOWARDHAN DAS RAM GOPAL. **86 I.C. 399=A.I.R. 1925 Lah. 74.**

———Where all the terms of a contract have not been reduced to writing, the terms so left unwritten can be proved by oral evidence. (*Young and Carr, JJ.*). COALFIELDS OF BURMA, LIMITED *v.* H.H. JOHNSON. **84 I.C. 1021=3 Bur. L. J. 326=2 Rang. 575=A.I.R. 1925 Rang. 128.**

———A contract of guarantee by a person signing on the back of a negotiable instrument can be established by oral evidence as the whole contract between the parties i not reduced to writing. (*Rupchand Bilaram, A.J.C.*). THAKURSEY HANSRAJ *v.* KISHENDAS REWACHAND. **76 I. C. 282=A.I.R. 1925 Sind 9.**

———Where the documentary evidence showed a contract between plaintiffs and defendants as between principals,

Held, the mere mention of commission in the contract as signed was not in any way inconsistent with the relation being between principal and principal and a mere statement of the defendants contradicted by the plaintiffs, that it was made a condition that there was to be no liability on their part, cannot be allowed to displace the ordinary results which a contract between principals entails. (*Lord Dunedin*). BALTHAZAR AND SON *v.* FIRM E. M. ABOWATH. **63 I. C. 521=5 Rang. 1=13 M. L. W. 537=A. I. R. 1921 P. C. 129 (P. C.).**

—S. 92—Decree of Court.

———Oral evidence is not admissible to prove an agreement prior or subsequent to a decree contradicting or varying the terms of the decree. A. I. R. 1927 Mad. 911 and 35 All. 48, *Rel on.* (*Jackson, C. J.*). GOPALA KRISHNA IYER *v.* SANKARA IYER. **1930 M.W.N. 240=A.I.R. 1930 Mad. 673.**

———Oral evidence to prove a subsequent adjustment under which part of a decree was paid and the rest agreed not to be executed against the judgment debtors is not inadmissible by reason of S. 92. A. I. R. 1922 All. 13, *Dist.*, *Walsh J.*, in

EVIDENCE ACT (1872), S. 92—Decree of Court.

A. I. R. 1922 All. 13, *Diss from.* (*Sulaiman, Ag. C.J.*.) GANGA DIHAL *v.* RAM OUDH.

113 I.C. 760=A.I.R. 1929 All. 79.

———Where a judgment-debtor sues for damages for the loss of his land owing to the execution of a money-decree being allowed to proceed after a compromise between the decree-holder and himself, the alleged oral adjustment of the decree, though not certified, is not inadmissible under S. 92. There is nothing whatever to prevent the parties from entering into an oral agreement for the settlement of decrees for money. A. I. R. 1922 All. 13, *Diss. from.* (*Carr, J.*). MA SHWE PU. *v.* MAUNG SAN MYO. **114 I.C. 682=6 Rang. 573= A.I.R. 1928 Rang. 316.**

———Oral agreement not to proceed against a certain defendant beyond a certain limit modifies the decree by restricting that defendant's liability in a manner for which the decree does not provide and as an oral agreement it offends against the terms of S. 92, Indian Evidence Act. A. I. R. 1922 All. 7 and S. A. 52 of 1920, *Foll.*; 24 I. C. 391, *Diss from.* (*Odgers and Curgenven, JJ.*). RAJA OF KALAHASTI *v.* VENKATADRI RAO. **105 I.C. 248= 50 Mad. 897=26 M.L.W. 386= 1927 M.W.N. 630=A.I.R. 1927 Mad. 911= 53 M.L.J. 533.**

———*Section 92 does not apply to decrees of Courts.*

Sections 91 and 92 refer only to what are known as "dispositive documents," and the words "or any matter required by law to be reduced to the form of a document" must be read in that sense. A.I.R. 1922 All. 13, *Dissented from.* Hence a decree does not come within the purview of S. 92. (*Newbould and Graham, JJ.*)! ANANDA PRIYA *v.* BIJOY KRISHNA. **91 I. C. 705=A.I.R. 1926 Cal. 643.**

———*Oral contract in substitution of a decree is not admissible.*

Per *Walsh, J.*—Under S. 92 of the Evidence Act evidence of the alleged oral agreement substituting a new executory contract for the original decree is inadmissible. (*Piggott and Walsh, JJ.*). LACHMIN DAS *v.* BABA KALI KAMBIWALA. **64 I.C. 990= 44 All. 258=20 A. L. J. 65= A.I.R. 1922 All. 13.**

———Section 92 of the Evidence Act does not bar the oral evidence to prove an agreement by way of adjustment of a decree as the R. 2 of O. 21, C. P. Code, contemplates the taking of evidence to prove the adjustment. (*Mittra, Offg. J. C. and Hallifax, A. J. C.*). RANGLAL *v.* CHUNILAL.

60 I. C. 316=16 N.L. R. 204.

—S. 92—Discharge.

———Section 92 (4) does not touch any act of a creditor which extinguishes a debt by taking a smaller sum of money. Where the act of the creditor does not extinguish the debt but gives only better terms than before which have yet to be worked out, the principle does not help the debtor and S. 92 (4) prevents the admission of such an agreement. And what S. 63, Contract Act, permits is not an agreement to remit but an actual remission. But where there is no question of any writing being admissible or inadmissible with reference to the provisions of Registration Act, if the writing itself does not purport to extinguish the mortgage bond, it would be admissible in evidence, and a plea of discharge based on the fact that the sum shown in the endorsement was taken in full discharge and the discharge was given to the obligers orally would stand on a different footing from the admission of a writing evidencing the payment. 43 Mad. 803; A.I.R. 1925 Mad. 348, *Rel. on*; 27 I.C. 269; 34 M.L.J. 79, *Expl.*; 44 Bom. 55, *Diss. from*; A.I.R. 1926 Cal. 170 and A.I.R. 1927 Cal. 27, *Appr. Case-law referred.* (*Ramesam and Jackson, JJ.*). BALASUNDA NAICKER *v.* RANGANATHA AYYAR.

30 M.L.W. 293= A.I.R. 1929 Mad. 794.

EVIDENCE ACT (1872), S. 92—Discharge.

———*Suit on mortgage—Mortgagor alleging compromise and payment in pursuance, evidence of discharge inadmissible.*

Plaintiff brought a suit on a registered mortgage passed by defendant. The defendant contended that there was a compromise in the month of January, 1923, between the plaintiff and defendant by which it was agreed that on the defendant paying Rs. 1,500 more to the plaintiff the entire claim for interest due till the end of January, 1923, would be discharged and the balance of interest would be remitted; that accordingly on 1st February, 1923, the defendant paid Rs. 1,500 to the plaintiff in full satisfaction of the claim for interest up to the end of January, 1923.

Held, that the alleged discharge was based entirely upon the alleged oral agreement, and unless the oral agreement is proved the discharge could not be established and the evidence of the oral adjustment being inadmissible under S. 92 (4), the alleged discharge was also inadmissible. A. I. R. 1926 Cal. 170; A.I.R. 1926 Cal. 906; 26 Mad. 195; 37 Mad. 423, *Expl.* and *Dist.*; 44 Bom. 55, *Doubted.* (*Fawcett, Ag. C. J. and Murphy, J.*). SUKHLAL *v.* JETHA. **115 I. C. 382=30 Bom. L.R. 1455= A. I. R. 1928 Bom. 522.**

———*Oral evidence to prove satisfaction of claim is admissible.*

While no oral evidence can be given to contradict or modify the original contract, there is nothing to prevent oral evidence being adduced under prov. 4, S. 92 in order to prove satisfaction of the claim. (*Rutledge, C. J. and Brown, J.*). MAUNG PU *v.* MAUNG PO THANT. **110 I.C. 612= 6 Rang. 191= A.I.R. 1928 Rang. 144.**

———In a mortgage suit it is open to the mortgagor to prove that the mortgage has been satisfied not merely by payment in full of the amount due thereon but by part payment and remission of the balance. 44 Bom. 55, *Diss. from* (*Greaves and Panton, JJ.*). BHABASUNDARI *v.* RAMKAMAL DUTTA. **98 I. C. 860=44 C.L.J. 269= A.I.R. 1927 Cal. 27.**

———Although an endorsement on a mortgage deed in extinguishment of the mortgage, if unregistered, is inadmissible in evidence, other evidence as to the redemption of the mortgaged property or payment of the full amount of the mortgage money can be given. 91 P. L. R. 1904, *Foll.* (*Addison, J.*). LOBHU RAM *v.* SAZAWAR. **100 I.C. 129= A. I. R. 1927 Lah. 237.**

———An oral agreement to receive a lesser amount than is actually due on a mortgage in full discharge of it, as also its actual discharge, cannot be proved under S. 92 (4) of the Evidence Act and S. 17 (b) of the Registration Act. 42 Mad. 41 (F. B.); 27 I. C. 269; 34 M. L. J. 79 and 44 Bom. 55, *Foll.* (*Waller, J.*). MINOR YEGNANARAYANA AYYAR *v.* SUPPAN CHETTY. **100 I.C. 54= A.I.R. 1927 Mad. 1111=52 M.L.J. 224.**

———*Extinguishment of liability created by registered document can be proved.*

It is a well-established rule that a subsequent oral agreement, varying the terms of a registered lease, or suggesting that the rent payable was really less than what was stated in the registered *kabuliyat* or lease, cannot be proved. But a liability created by a registered instrument may be

EVIDENCE ACT (1872), S. 92—Discharge.

proved to have been extinguished by letting in admissible evidence (including oral evidence) of payment of that liability or by letting in admissible evidence of any other transaction which operates as a mode of payment. 37 Mad 423, *Foll.* (*Kanhaiya Lal and Boys, JJ.*). JHABBA SINGH *v.* CHHAJJU. **94 I. C. 169=24 A. L. J. 548= A.I.R. 1926 All. 445.**

———The evidence to prove a discharge of the debt but not to vary or add to the terms of the bond is not excluded by S. 92. A. I. R. 1926 Cal. 170, *Foll.* (*Walmsley and Chakravarty, JJ.*). RAM RANJAN ROY *v.* JAYANTI LAL. **96 I.C. 11=30 C.W.N.710= 44 C.L. J. 449=A.I.R. 1926 Cal. 906.**

———*Registration Act, S.* 17.

Oral evidence may be admitted to prove that a mortgage bond has been discharged partly by payment and partly by release of the debt and there is nothing in S. 92 of the Evidence Act to prevent such evidence being admitted. 44 Bom. 55, *Diss.* (*Greaves and B. B. Ghose, JJ.*). MAHINCHANDRA *v.* RAM DAYAL. **91 I.C. 757= 42 C. L. J. 582=30 C.W.N. 371= A. I. R. 1926 Cal. 170.**

———Where in a suit on a pro-note in answer to the demand the defendant pleads that he has already discharged the note according to the method agreed upon between the plaintiff and himself, there can be no bar under S. 92 to prevent proof of that agreement as it is a method of payment or discharge. (*Wallace and Madhavan Nair, JJ.*). SATHEPPA CHETTIAR *v.* MUTHUSAMI PILLAI. **92 I.C. 393=A.I.R. 1926 Mad. 537.**

———An oral agreement of satisfaction or discharge of a mortgage debt can be proved by oral evidence. 9 All. 392; 4 C.W.N. 304; 16 C.W.N. 137 and 11 C.L.J. 39, *Foll.* (*Kinkhede, A.J.C.*). KRISNAJI *v.* KASHIRAO. **90 I.C. 450=A.I.R. 1926 Nag. 220.**

———*Discharge of debts can be proved, though it conflicts with statements of fact made in a deed.*

Where the mortgagors are setting up an agreement between them and the mortgagee to the effect that the latter had agreed to allow them credit for certain items, they are not in any way contradicting, varying, adding to, or subtracting from, the terms of the registered deed of mortgage. They are merely showing an agreement relating to the payment and the consequent discharge in part of the mortgage debt. Even a statement of fact made in a written instrument could be contradicted, as the prohibition relates only to the varying, adding to, subtracting from, or contradicting the terms of a contract in writing. 14 C. L. J. 507, *Foll.* (*Stuart, C. J. and Misra, J.*). SUKH LAL *v.* MURARI LAL. **93 I.C. 1019=1 Luck. 160= 13 O.L.J. 95=3 O.W.N. 248= A. I. R. 1926 Oudh 273.**

—S. 92—Document silent as to interest.

———It is open to one of two joint transferees to prove what interest, if any, is taken by the other where the document does not specify the extent of the shares, and evidence of subsequent conduct to prove this is not barred by S. 92 between the transferees *inter se.* 10 All. 421; A. I. R. 1927 Mad. 1102, *Foll.*; *N. E. Ry.* v. *Hastings*, (1900) A. C. 260, *Ref.* (*Curgenven, J.*). RAMAYYA CHETTI *v.* MANNARU CHETTI. **A.I.R. 1930 Mad. 590.**

———*Conveyance creating joint tenancy—Parol evidence to prove severance is admissible—S.* 92 *has no application to such case.*

Where property is purchased in the name of several persons jointly, a joint tenancy is created and parol evidence is admissible to prove that the joint tenants have become tenants-in-common. The evidence is tendered not for the purpose of contradicting or varying the terms of the conveyance but of proving facts from which it may be inferred that, accepting the conveyance as creating a joint tenancy, the purchasers have subsequently so dealt with their respective interests thereunder that the joint tenancy has become a tenancy-in-common. (*Lord Warrington of Clyffe.*) TAN CHEW HOE NEO *v.* CHEE SWEE CHENG. **116 I.C. 385= 29 M.L.W. 44=56 I.A. 112=A.I.R. 1929 P.C. 72= 56 M.L.J. 643 (P. C.).**

EVIDENCE ACT (1872), S. 92—Documents requiring registration.

———Where a sale-deed is taken jointly in the name of two persons but it is silent as to the respective shares of each, S. 92 is no bar to the proof of facts which would establish their right to separate items of property conveyed to them by the deed. 10 All. 421, *Foll.* (*Devadoss, J.*). MD. SULTAN MOHIDEEN *v.* AMTHUR JALAL. **101 I.C. 653= 38 M.L.T. 247=1927 M.W.N. 168= A.I.R. 1927 Mad. 1102=52 M.L.J. 557.**

———*Joint execution of a bill—Oral evidence that one was surety is not excluded if creditor's right to demand immediate payment for either is not affected.*

Where a bill contains a joint promise by the two executants to pay to their creditors the amount of the bill jointly and severally so far as the express promise goes it may not be varied by parol evidence; but where the bill does not declare in express terms the rights of the co-obligors *inter se*, there is nothing in law to prevent one of them from proving such terms by parol evidence, provided that he does not thereby intend to affect the rights of the creditor to demand immediate payment from either or both of the co-obligors or joint promisors; A.I.R. 1924 Sind 13, *Rel. on.* (*Rupchand and Bilaram, A. J. Cs.*). MOOLJI MURARJI SUNDERJI *v.* M.C. PINTO. **92 I. C. 667=20 S. L. R. 106= A.I.R. 1926 Sind 156.**

—S. 92—Documents requiring registration.

———When an "award" is found in reality a partition deed and hence inadmissible in evidence for want of registration, no secondary evidence can be admitted to prove the partition: 10 P.R. 1917, *Foll.* (*Tek Chand and Bhide, JJ.*). KALAYAN DAS *v.* OMA DATT HANS RAJ. **113 I.C. 87=10 L.L.J. 169.**

———So a deed of gift of immovable property cannot be received in evidence if unregistered nor can the terms of the instrument be proved by oral evidence: 59 Pun. R. 1914, *Foll.* (*Shadi Lal, C.J. and Le Rossignol, J.*). MAULA BUKSH *v.* HAFIZUD-DIN. **94 I. C. 7=8 L.L.J. 156= 27 P.L.R. 256=A.I.R. 1926 Lah. 372.**

———Where the rate of interest payable on a mortgage for an amount exceeding Rs. 100 is modified by an agreement, the agreement is compulsorily registrable and oral evidence to prove its terms is not admissible under S. 92, proviso. (4) of the Evidence Act. (*Hallifax and Kotval, A.J.Cs.*). KASTURCHAND *v.* SINGHAI RETANCHAND. **93 I. C. 95=A.I.R. 1926 Nag. 321.**

———*Registered mortgage rescinded only by registered document.*

In the mortgage there was a forfeiture clause to the effect that the mortgagor was to be debarred from redeeming the property after the expiration of two years from the date of the mortgage. A year afterwards the mortgagor said, that he, by a *pyatpaing*, made over the land to the defendants who promised to allow redemption at any time,

EVIDENCE ACT (1872), S. 92—Evidence of conduct.

Held, the subsequent oral agreement could not be proved. It amounts to an agreement to rescind the mortgage and is by law required to be in writing and registered. (*Maung Kin, J.*). UKYO *v.* MG. PAN YO. **74 I.C. 154=1 Bur. L.J. 193= A.I.R. 1923 Rang. 102.**

—S. 92—Evidence of conduct.

———The evidence of the acts and conduct of parties for the purpose of showing that the main or essential terms of a registered instrument have been varied is not admissible, for an agreement is nonetheless oral, although it is to be inferred from the conduct of the parties : 6 C.W.N. 242, *Dist.*; 38 Cal. 892 (P.C.) ; 39 Cal. 284 ; 41 Cal. 493 (P.C.); 20 C.W.N. 347 and *other cases discussed* ; 20 C.W.N. 347, *Not appr.* (*Mitter and Mallik, JJ.*). LAKSHMI CHARAN *v.* MAHADEWIP CHANDRA. **116 I.C. 733=56 Cal. 201= A.I.R. 1929 Cal. 437.**

———Evidence of subsequent acts and conduct is admissible to prove the character of a deed : 72 P. R. 1901 ; 28 Cal. 256 and A.I.R. 1925 P.C. 75, *Ref.* (*Bhide, J.*). BELI RAM *v.* DEVI CHAND. **117 I. C. 907=A.I.R. 1929 Lah. 875.**

———The rule, that the conduct of the parties in respect to an instrument may be looked to in construing a document, is subject to this reservation that it can be admitted only after every other means to construe a deed have been exhausted : *Attorney-General* v. *Drummond*, (1842) 1 Dr. & War. 353, *Foll.* (*Ross and Wort, JJ.*). DEVJEE TRIKAMJEE *v.* DAYAMOY MUKHERJI. **108 I. C. 418= A.I.R. 1928 Pat. 225.**

———Where a gift has been effected by an instrument only the conduct of the parties can be considered for the purpose of showing that the transaction is not what it purports to be. (*King, J.*). KRISHNAPAL SINGH *v.* SRI RAJ KAUR. **104 I.C. 299=1 L.C. 97= A.I.R. 1927 Oudh 278.**

———A registered deed has to be cancelled by a registered deed and evidence of an oral agreement to rescind it is shut out by S. 92 (4) of the Evidence Act. So also the conduct showing that the registered transaction is at an end is equally shut out by the said section. 32 Mad. 281, *Foll.* (*Kinkhede, A.J.C.*). NARBADJI *v.* GOPAL. **87 I.C. 29= A.I.R. 1925 Nag. 459.**

———Where the conditions in a grant are clear and unambiguous, evidence of the conduct of the parties leading to a different inference is inadmissible. (*Jwala Prasad and Macpherson, JJ.*). GOPAL OJHA *v.* RAMADHAR SINGH. **82 I. C. 204= A.I.R. 1925 Pat. 228.**

———Evidence of the acts and conduct of parties is not admissible to show that the document was really not what it purported to be, that is, that it was not a mortgage but really a sale. (*Walmsley and B. B. Ghosh, JJ.*). KAMALA KANTA *v.* ANANDA CHANDRA CHAKRABURTY. **71 I.C. 1030= A.I.R. 1924 Cal. 357.**

———Evidence of subsequent acts and conduct is admissible to prove the character of a deed. (*Robinson, C.J. and May Oung, J.*). EUGENE HUGH CONARD LECUN *v.* MAY JULIA LECUN. **82 I.C. 686=2 Rang. 253=3 Bur. L.J. 85= A.I.R. 1924 Rang. 283.**

———The weight of authority so far as the Calcutta High Court is concerned is in favour of the admissibility of evidence of the acts and conduct of parties, and this Court has held upon the subsequent acts and conduct of the parties, that certain

EVIDENCE ACT (1872), S. 92—Intention of parties.

terms of a contract were never intended to be acted upon, *i.e.*, from the very beginning. 22 All. 149 (P.C.), *Dist.* (*Chatterjee and Panton, JJ.*). NARENDRA LAL KHAN *v.* BHOLA NATH BHUYA. **77 I. C. 154=27 C. W. N. 336= A. I. R. 1923 Cal. 417.**

———In order to prove evidence of a contemporaneous oral agreement, oral evidence of subsequent conduct can under no circumstances be admitted. 45 Cal. 320 (P.C.), *Foll.*, *Cass-law discussed.* (*Broadway and Harrison, JJ.*). FITZHOLMES *v.* BANK OF UPPER INDIA, LTD. **77 I.C. 523=4 Lah. 258=5 L. L. J. 438= A.I.R. 1923 Lah. 548.**

———Evidence of conduct is admissible if the contract is ambiguous in its terms. But where the terms of the contract are perfectly plain, evidence of conduct is not admissible to vary the terms of the agreement between the parties. (*Mookerjee, A.C.J. and Fletcher, J.*). BHABANI NATH *v.* PURNA CHANDRA. **61 I. C. 818=33 C.L.J. 332= 25 C. W. N. 308=A.I.R. 1921 Cal. 212.**

—S. 92—Fraud.

———*Whether includes fraud on registration law.*

The word 'fraud' used in the proviso is wide enough to include a fraud on the registration law. Thus a party can show that an item was fictitiously put in. Scope of proviso discussed. (*Sulaiman and Kendall, JJ.*). GOPI NATH *v.* RUP RAM. **1930 A.L.J. 926.**

———There is a great difference between a suit to invalidate a document on the grounds of fraud, etc., mentioned in proviso 1 and a suit for a declaration that a document is not what it purports to be according to its plain grammatical meaning. (*Macleod, C.J. and Coyajee, J.*) MARTAND TRIMBAK *v.* AMRITRAO RAGHOJIRAO. **93 I.C. 924= 27 Bom. L. R. 951=49 Bom. 662= A.I.R. 1925 Bom. 501.**

———Where a document is attacked on the ground of fraud, oral evidence for the purpose of superseding the recitals in respect of the terms of the document is admissible under proviso (1) of S. 92. (*Wazir Hasan, A.J.C.*). KUNWAR BEHARI LAL *v.* KALKA. **77 I.C. 695=25 O.C. 282= A.I.R. 1923 Oudh 45.**

———Where appellants knew that the plaintiffs were the true owners it would be a fraud on their part to insist upon their claim to the property under the proviso (1) to S. 92. Even if S. 92 did not apply, the appellants could not maintain their claim in equity. (*Macleod, C. J. and Shah, J.*). MAHADEO KRISHNA PARKER *v.* TUKARAM CHAYA KONDYA. **A.I.R. 1922 Bom. 256.**

—S. 92—Gift.

———Parol evidence is not admissible to show what was transferred under a deed of gift. (*Ashworth, A.J.C.*). MT. MUHESHA *v.* RAMESHAR. **74 I. C. 295=10 O. L. J. 24= 26 O. C. 329=A. I. R. 1923 Oudh 173.**

—S. 92—Intention of parties.

———*Purchase in the name of daughter—Intention, proof of.*

Declarations by the parent if contemporaneous with the purchase are admissible to prove such an intention, but declarations subsequent are to be rejected. A. I. R. 1921 P. C. 56, *Appl.* ; *Grabb* v. *Grabb*, 36 R. R. 362 ; *Sidmouth* v. *Sidmouth*, 50 R. R. 235 and 6 M. I. A. 53 (P. C.), *Rel. on.* (*Raza and Srivastava,, JJ.*). ALICE GEORGINA PASCHAUD *v.* EMMA BERTHA PASCHAUD NIXON. **A.I.R. 1930 Oudh 441.**

EVIDENCE ACT (1872), S. 92—Intention of parties.

———*Transactions evidenced by instrument—Evidence regarding attendant circumstances is admissible under S.* 92.

When considering the nature of evidence that could be kept adduced in cases where a defendant sets up a plea that a certain instrument exhibits only a nominal transaction and at the same time admits that a definite amount was paid in respect of the same transaction evidence by the instrument, the provisions of S. 92, Evidence Act, and S. 81, Trusts Act should be kept in view. Oral evidence of intention of parties is inadmissible. But evidence under S. 92 (b), Evidence Act, regarding the attendant circumstances is admissible: A.I.R.1924 P.C. 226 and A.I.R. 1925 P. C. 75, *Foll.*; 22 All. 149 and A. I. R. 1917 P. C. 207, *Ref.* (*Ananthakrishna Iyer, J.*). VENKATARATNAM *v.* VENKATASWAMI. **A.I.R. 1929 Mad. 807.**

———*Deed—Construction—Sale or mortgage—Two documents executed almost simultaneously—One a deed of sale and another an agreement to re-sale—Surrounding circumstances and intention must be looked to for deciding whether they constituted a mortgage.*

When the question with reference to two documents, *e.g.*, *A* and *B* executed almost simultaneously, one purporting to be a sale and the other an agreement to re-sell, is, whether the transaction is a mortgage or whether it is merely a sale with an agreement to repurchase, the case has to be decided on the instruments and the language employed in them having regard to the surrounding circumstances. No oral evidence is admissible to prove the real meaning or intention of the parties and not even the subsequent conduct of the parties can be looked at or regarded for the purpose.

Where it was found that at the time of execution of the documents *A* and *B* the property was impending sale, that it was sold under the first document *A* for comparatively low price, that the vendors under *A* were plaintiffs and one *P* a prior mortgagee while the persons who were entitled to the benefit of the contract under *B* were only the plaintiffs, that the actual possession of the property was only with the vendors even before the execution of a *muchilika* by plaintiff in favour of the defendant the opposite party, that there was no evidence of any bargaining for the price of the property, there was no reliable evidence with regard to the inspection of the property or the examination of the title deeds before concluding of the transaction, that the creditor while speaking of the amount paid always used the expression "advance the amount" and it was further found that the document *B* namely the agreement to re-sell provided "after the expiration of the said period you will claim no right or privilege whatever to this agreement or to the properties detailed below and I shall be in undisputed possession of the said properties,"

Held, that the only conclusion that would be in consonance with what may be regarded as the real intention of the parties was that the transaction was only a mortgage and that the sale was merely by way of security for the amount that was advanced. (*Srinivasa Ayyangar and Reilly, JJ.*). SUTHARSANA CHARIAR *v.* S. SAMARAPURI CHETTIAR. **110 I.C. 837=1928 M.W.N. 634=A.I.R. 1928 Mad. 690.**

———Oral evidence for the purpose of ascertaining the intention of the parties is not admissible:

EVIDENCE ACT (1872), S. 92—Interest.

22 All. 149 (P. C.), *Foll.* (*Prideaux, Ag. J. C.*). KALURAM *v.* GAJASA. **107 I.C. 201=A.I.R. 1928 Nag. 182.**

———Where a document is not one which embodies the terms of a contract between the parties, but it is merely a written admission of a fact by the plaintiff, evidence of the real meaning of the words used in it is not excluded. (*Hallifax, A. J. C.*). JUMMA *v.* ABU. **93 I.C. 193=A. I. R. 1926 Nag. 301.**

———Though evidence to vary the terms of an agreement in writing is not admissible under S. 92, yet evidence to show that there is not an agreement at all is admissible. Therefore, it is open to the Court to examine the surrounding circumstances with a view to enable it to decide whether the parties intended to arrive at any agreement in regard to the subject-matter of the suit: A. I. R. 1925 P. C. 75, *Foll.* (*Das and Adami, JJ.*). RAMDHANI SINGH *v.* KEWAL MANI BIBI. **90 I.C. 929=7 P.L.T. 145=1926 P.H.C.C. 29=A.I.R. 1926 Pat. 156.**

———Where the promisee knew that one co-executant was a surety for the other co-executant, evidence may be let in to prove that he was a surety. (*Young, J.*). MAUNG SEIN *v.* MA SAW. **82 I.C. 816=3 Bur. L.J. 112=A.I.R. 1924 Rang. 360.**

———That a gift was made subject to a condition can be proved under the provisions of S. 92. (*Robinson, C. J. and Beasley, J.*). MA THIN MAING *v.* MAING GYI. **75 I C. 166=1 Rang. 351—A.I.R. 1924 Rang. 13.**

———The oral admission of the mortgagor cannot be utilised to contradict the terms of the mortgage document. It would be dangerous to allow outside evidence to show the intention of the writer, which is not disclosed by the authorised channel namely, the words which he himself selected. (*Mookerjee and Rankin, JJ.*). MANMATHA NATH KAR *v.* PROBODHCHANDRA PATARHI. **73 I.C. 416=37 C.L.J. 52=A.I.R. 1923 Cal. 102.**

———*Language showing intention of document—Different intent cannot be proved.*

Where the language of the document is clear, no evidence is permissible to prove that the intention of the parties was one different from that appearing on the face of the document.

Where a trust deed to discharge debts as well as to benefit the son of the author of the trust, was sought to be proved to be one for the benefit of the creditors alone, under S. 92, proviso (1).

Held, that such proof cannot invalidate the document, and that the proviso does not apply. (*Ashworth and Simpson, A.J.Cs.*). SHARF-UZ-ZAMAN *v.* SIR HENRY SLENYON. **70 I.C 253=25 O.C. 291=10 O.L.J. 491=A.I.R. 1923 Oudh 80.**

———Defendants are not precluded by the provisions of S. 92 of the Evidence Act (I of 1872) from giving parol evidence for the purpose of showing that a deed, say, of gift of one kind like *heba-bil-ewaz*, was in reality intended by the executant to be a deed of gift of another kind or ordinary *heba*. (*Chatterjee and Panton, JJ.*). SERAJUDDIN HALDAR *v.* ISAB HALDAR. **70 I.C. 203=49 Cal. 161=25 C.W.N. 833=A.I.R. 1922 Cal. 258.**

—S. 92—Interest.

———A bond declared that money was to be repaid with interest at a certain rate A simultaneous oral contract declared that no interest was to be paid, but the creditor was to be in possession of certain piece of land and was to pay himself the interest out of the usufruct.

EVIDENCE ACT (1872), S. 92—Interest.

Held, that the two contracts were inconsistent with each other and so oral evidence was excluded. (*Mukerjee and Bennet, JJ.*). KALI DEEN SINGH *v.* JAGAT PATHAK. **122 I. C. 894= A. I. R. 1930 All. 440.**

———A mortgage deed was executed on 23rd March, 1920, for a certain sum payable with interest at 1¼ per cent. per mensem on 15th April, 1921, and liable in case of default to carry interest at 2 per cent. per mensem. On 24th March, 1923, certain payment was made and it was averred after that date, the mortgagee agreed to accept interest at 1½ per cent. in proof of which the mortgagor pleaded that the mortgagee calculated in his books interest at the rate of 1½ per cent. per mensem.

Held, that such calculation of interest in the mortgagee's book would not bind him to accept more than 1½ per cent. per mensem and such agreement could not be proved under proviso (4) to S. 92. A.I.R. 1914 P.C. 27 and A.I.R. 1929 Nag. 194, *Dist.* (*Jackson, A.J.C.*). NARAYAN SINGH *v.* KESHOSA. **122 I.C. 436=A.I.R. 1930 Nag. 235.**

———Where it was suggested that the creditor was in the habit of accepting 15 p.c. when a debt was repaid even though the stipulated rate was 24 p.c. and that therefore it should be held that in other cases too the intention was only to collect the lower rate.

Held, that the suggestion is manifestly untenable. The giving up a portion of interest is purely a matter of grace. It cannot be used for construing the suit arrangement as meaning 15 p.c. for that will be against S. 92, Evidence Act. (*Krishnan and Odgers, JJ.*). RAMALINGAM CHETTIAR *v.* SUBRAMANYA CHETTIAR. **103 I.C. 394= 50 Mad. 614=38 M L.T. 323=25 M.L.W 699= A.I.R. 1927 Mad. 620=52 M.L.J. 612.**

———When a bond is silent about interest evidence is permissible to prove a separate agreement to pay interest, but very satisfactory and strong evidence is essential in order to establish any such separate agreement. (*Findlay, J. C.*). RAOZARIO *v.* HARIBALLABH. **100 I.C. 794=10 N.L.J. 43= A.I.R. 1927 Nag. 195.**

———Section 92 prevents proof that though a bond stipulates for compound interest, yet that there was a contemporaneous oral agreement that notwithstanding the bond, compound interest should not be claimed. Nor can the fact that as a matter of fact only simple interest was realised, entitle a party to vary the written contract. (*Newbould and Ghose, JJ.*). ABDUL AZIZ MIA *v.* AMANMAL BATTRA. **78 I. C. 742=A. I.R. 1925 Cal. 276.**

———Evidence of subsequent oral agreement not to charge compound interest is inadmissible to vary the original contract which is a registered one. (*Chatterjea and Cuming, JJ.*). JOGENDRA NATH BANERJEE *v.* KHODA BUKSHA BISWAS. **72 I.C. 554=A.I.R. 1924 Cal. 380.**

———If a document is formally drawn up, it would not be open to the parties to adduce evidence in proof of a contemporaneous oral agreement to pay interest: where the document itself is silent as to interest. 18 C.W.N. 1260 and 9 C.L.R. 301, *Ref.* (*Cuming, J.*). MOTI BISWAS *v.* HARIPADA PAL. **70 I. C. 790=A.I.R. 1923 Cal. 402.**

———A promissory note being a formal document intended to express the whole bargain, an oral agreement for interest made "at the time of the treaty" is not only highly suspicious, but is *prima facie* inadmissible in evidence. (*Rankin, J.*). KADER BAKSH HAZIR BUKSH *v.* SHAIK SERAJUD-DIN. **70 I.C. 130=49 Cal. 716=A. I. R. 1922 Cal. 513.**

EVIDENCE ACT (1872), S. 92—Mistake.

———*Oral agreement for different rate of interest than that in the pro-note is inadmissible—Note by 2 defendants—Liability is joint and several.*

Where the plaintiffs set up an oral agreement according to which the promisor agreed to pay interest at the rate of 1 per cent. while the rate mentioned in the pro-note was 8 annas per cent.

Held, the oral agreement sought to be proved is clearly inconsistent with the terms of the document itself and is inadmissible. (*Lyle, A.J.C.*). HABIB ALI KHAN *v.* LALA RAM NARAYAN. **68 I.C. 520=9 O.L.J. 273= 26 O.C. 36=A.I.R. 1922 Oudh 270.**

—S. 92—Interpretation.

———*Word—"Collateral" means not inconsistent.*

"Collateral" means in effect not inconsistent with the terms of the agreement in question. (*Mukerjee and Ashworth, JJ.*). LACHMAN DAS *v.* RAM PRASAD. **100 I.C. 1029=25 A.L.J. 349= 49 All. 680=A.I.R. 1927 All. 422.**

—S. 92—Landlord and tenant.

———Where a tenancy is brought into existence with a view to a particular purpose, subsequently the parties may alter its character and incidents by their conduct. (*Walmsley and Mukerji, JJ.*). LAL GHOSE *v.* NILKANTHA DAS. **80 I.C. 898= A. I. R. 1925 Cal. 340.**

———A tenancy can be proved without proving any written lease that may exist. 1 N. L. R. 147; 41 C. 347, *Ref.* (*Drake Brockman, J. C.*). SURAT SINGH *v.* RANI. **59 I. C 461 (Nag.).**

—S. 92—Mistake.

———In a suit for recovery of possession based on a document which contains a mistake, the property in suit being left out through clerical mistake, although a suit for rectification may be barred by limitation, the plaintiff is entitled to succeed and mistake can be proved under S. 92. A. I. R. 1927 All. 355, *Ref.* (*Dalal, J.*). SUKHDEO RAI *v.* RAM NARAIN RAI. **A.I.R. 1930 All. 387.**

———*In case of mutual mistake either party can prove mistake in written contract.*

Where a mortgage deed stipulates that Re. 1 per month shall be paid interest and the mortgagee contends that the rate of interest agreed upon is Re. 1 per cent. per month, the words "per cent." having been omitted from the mortgage deed, through clerical mistake, it is a case of mutual mistake of the parties and not one of patent ambiguity as contemplated by S. 93. The case is similar to one in which a description of property intended to be conveyed in a particular deed has been wrongly entered. Therefore the combined effect of S. 92 (1), Evidence Act, and S. 31, Specific Relief Act, is to entitle either party to the contract to protect his rights by proving the mistake in the written contract: 39 Mad. 392 and A.I.R. 1922 All. 42, *Rel. on*; 41 Cal. 742, *Dist.* (*Stuart, C. J. and Srivastava, J.*). RAM BHAROSAY LAL *v.* JANKI PRASAD. **7 O.W.N. 14= A.I.R. 1930 Oudh 95.**

———*Surety bond.*

The wording of the surety bond did not support a person's contention that he did not sign a bond for payment of the amount but for appearance and payment of the amount only on failure to produce the person. The evidence showed that though the bond was read out to the person, he was told that he was surety for the appearance. The person had offered himself to be a surety by an application in which he stated that as the judgment-debtor would be produced he placed the properties mentioned therein as security. The order for the release of the judgment-debtor was vague,

EVIDENCE ACT (1872), S. 92—Mistake.

Held, that though ordinarily the wording of the bond could not be allowed to be contradicted there was ample ground for holding that the bond happened to be executed under a mistake as to its real purport. (*Mya Bu, J.*). PO NAW *v.* MAUNG BA CHIT. **A.I.R. 1929 Rang. 262.**

———Where the intention of the parties was to sell survey No. 181 but by mistake survey No. 161 was put in the sale-deed instead of No. 181,

Held, that extrinsic evidence was admissible as to circumstances which would show that survey No. 181 was intended to be sold and not survey No. 161. (*Kinkhede, A.J.C.*). SABHAJI *v.* NAWAL-SINGH. **104 I.C. 736=10 N.L.J. 201= A.I.R. 1928 Nag. 4.**

———*Mistake in written contract can be proved by either party—Suit for rectification of contract is not a necessary preliminary.*

When parties have come to a contract but have failed to express themselves correctly, if a mistake is a real one and mutual, and can be established by satisfactory proofs, a Court of equity will reform written instrument so as to make it conformable to the precise intent of the parties.

The combined effect of S. 92, Cl. (a), Prov. (1) and of S. 31, Specific Relief Act is to entitle either party to a contract, whether plaintiff or defendant, to protect his right by proving a mistake in contract, for example, mistake in the description of the property sold by giving wrong survey number to same: 39 Mad. 792, *Rel. on.*

What in such cases is rectified is not the agreement but the mistaken expression of it: 28 Bom. 420 and A. I. R. 1922 All. 42, *Ref.*

In such a case a party is entitled to succeed upon a construction of a conveyance itself without the necessity of having to take proceedings, by way of a separate suit for rectification of the deed, as a Court is competent to give effect to what was indisputably the real agreement between the parties without driving the plaintiff to a separate suit for rectification: 2 C.W.N. 260 and A.I.R. 1923 Cal. 53, *Foll.* (*Kinkhede, A.J.C.*). SABHAJI *v.* NAWAL-SINGH. **104 I.C. 736=10 N.L.J. 201= A.I.R. 1928 Nag. 4.**

———*Sale-deed—Certain property sold omitted in sale-deed by mutual mistake—Rectification not sought within Limitation—Oral evidence can be admitted to prove sale.*

Though a remedy by way of rectification of an instrument by a suit is open to a party, when through fraud or mutual mistake of the parties an instrument in writing does not truly express their intention; this does not mean that if, notwithstanding the mutual mistake, the property actually intended to be transferred has passed to the possession of the vendee, the vendee's title to the property can be challenged simply because the instrument has not been rectified within three years from the date of the discovery of the mistake by the vendee. It will always be open to the vendee, if his title is challenged by the vendor, to show that there was a mistake in the instrument and that, as a matter of fact, the property in his possession was intended to be transferred to him. In fact the vendee is entitled to lead oral evidence to show the mistake in the instrument. The mere failure of the vendee, to have the instrument rectified within three years from the date of the discovery of the mistake, cannot have the effect of extinguishing his title to the property intended to be conveyed to him, though not properly described in the sale-deed: 28 C.L.J. 197, *Rel. on.* (*Iqbal Ahmad, J.*). KESHO SINGH *v.* ROOPAN SINGH. **100 I.C. 568 = A.I.R. 1927 All. 355.**

EVIDENCE ACT (1872), S. 92—Mortgage.

———*Specific Relief Act, S. 31—Mis-statement in pro-note as to rate of interest owing to mutual mistake can be rectified.*

The Court can correct the terms of a document if it is proved to the satisfaction of the Court that any of such terms are inaccurate owing to a mutual mistake. It can also correct a mis-statement in a promissory note if in fact a term had been placed in the note without really representing the true bargain between the parties. *Druieff* v. *Lord Parker*, (1868) 5 Eq. 131, *Foll.*; (1885) A. W. N. 42, *Ref.* (*Costello, J.*). LADHA SINGH *v.* MUNSHI RAM AGARWALA. **104 I. C. 559=31 C W.N. 747= A. I. R. 1927 Cal. 605.**

———*Sale-deed with condition of re-purchase executed but consideration of re-purchase not entered—Evidence to prove consideration is allowed.*

A deed of sale duly executed and registered contained an agreement for re-purchase but the space intended to insert the amount of re-purchase money was left blank. The executant brought a suit for specific performance and rectification of the deed, or in the alternative for its cancellation,

Held, that the omission to enter the price was either due to the fraud of the purchaser or to a mutual mistake; that under S. 92 (1). oral evidence was admissible as to the amount agreed upon on the ground of fraud or mistake and that the document could be rectified by the Courts under S. 31, Specific Relief Act so as to bring it into accord with the real intention of the parties. (*Lentaigne and Carr, JJ.*). MAUNG PE GYI *v.* HAKIM ALLY. **80 I.C. 759= 2 Rang. 113=3 Bur. L.J. 44= A.I.R. 1924 Rang. 235.**

———A mortgage-deed was renewed and in the renewed deed a part of the mortgaged property was mis-described,

Held, that under S. 92, proviso (i) of Evidence Act it was open for the plaintiff to prove this mistake and the evidence which they produce to prove that fact was admissible. (*Lindsay and Gokul Prasad, JJ.*). ABDUL HAKIM *v.* RAM GOPAL. **64 I.C. 961=44 All. 246= 20 A.L.J. 53=A.I.R. 1922 All. 42.**

———Oral evidence of the negotiations antecedent to the execution of the instrument, which shows that what was intended to be offered and accepted was different from what was by mistake actually described in the instrument can be given: 22 All. 149 (P.C.) and 5 Bom. L.R. 853, *Foll.* (*Mookerjee and Buckland, JJ.*). BEPIN KRISHNA RAY *v.* JOGESHWAR RAY. **66 I.C. 345= 34 C.L.J. 256=26 C.W.N. 36=A.I.R. 1921 Cal. 730.**

—S. 92—Mortgage.

———Parties to a registered deed are precluded by the provisions of S. 92 from giving evidence that the property comprised in the deed is different from that which on the face of the deed appears to have been mortgaged. (*Dawson-Miller, C.J. and Macpherson, J.*). MUSI KAZIM *v.* HAJI MUTASADDI. **90 I.C. 841=7 P.L.T. 293.**

———*Scope.*

When there is a subsequent oral agreement between a mortgagor and the mortgagee relating only to the mode of payment of the mortgage money, evidence with respect to such oral agreement is admissible: 9 All. 392; 11 C.L.J. 39; 25 C.L.J. 560 and A.I.R. 1928 Mad. 233, *Foll.* But where such oral agreement purports to change the

EVIDENCE ACT (1872), S. 92—Mortgage.

character of the mortgage also, the evidence is inadmissible. (*Bhide, J.*). CHANDER HAS *v.* AKBAR. **110 I.C. 261 (Lah.).**

———*Transfer of Property Act, S.* 59—*Mortgage-deed unregistered—Mortgage is invalid but recitals in the deed are admissible to show nature of mortgagee's possession.*

Even though a mortgage not effected by a registered deed as required by S. 59 is invalid, the recitals in the unregistered mortgage-deed are admissible in evidence for the purpose of explaining the nature and character of the possession of the mortgagees over the mortgaged property: 43 Mad. 244 (P.C.), *Rel. on.* (*Iqbal Ahmad, J.*). MAHA MANGAL RAI *v.* KISHUN KUNDU. **100 I.C. 346= A.I.R. 1927 All. 311.**

———In a mortgage suit for sale the defendant pleaded that plaintiff mortgagee had subsequently orally agreed to accept in full satisfaction of the mortgage debt a conveyance of six shops valued at Rs. 95,000 and Rs. 7,000 in cash. On the date when the oral agreement was made a sum of Rs. 1,12,000 was due on the mortgage,

Held, that the oral agreement amounted to a modification of the original contract and was inadmissible under S. 92 (4): 42 Mad. 41, *Foll.* (*Banerji and King, JJ.*). MD. NIAZ AHMAD *v.* NANHE MAL. **119 I.C. 107=1929 A.L.J. 924= A.I.R. 1929 All. 615.**

———Where the mortgage-deed provided that interest should be paid at one per cent. per mensem compoundable yearly and the defendant alleged in a suit on the mortgage that the contract between the parties was that only simple interest should be paid,

Held, that the evidence in support of the alleged oral agreement was inadmissible under Ss. 91 and 92 of the Evidence Act. (*Banerji and King, JJ.*). BEHARILAL *v.* ABDUL AZIZ. **119 I.C. 92= 27 A.L.J. 866.**

———Evidence of a subsequent oral agreement purporting to vary the original registered mortgage-deed would be inadmissible under proviso 4 to S. 92. (*Lentaigne, J.*). MAUNG MIAT TUNG AUNG *v.* MAUNG PUDU. **89 I.C. 875=3 Rang. 243= A. I. R. 1925 Rang. 322.**

———*Plaintiff mortgaging land with possession but without registered deed—Oral evidence to prove mortgage is not allowed but he may sue on title for possession on condition of returning consideration money.*

Where a plaintiff alleges that possession of immovable property has been given to the defendant as security for a loan of Rs. 100 or upwards, but without any registered instrument, no oral evidence is admissible to prove the transaction. There is a marked distinction in these cases between those relating to an inchoate mortgage and an inchoate sale. In the latter it is open to the party in possession of land who has bought without obtaining a registered deed of conveyance to sue for specific performance of a contract to sell. But there is no right to sue for specific performance possessed by a mortgagor who has given his land in mortgage without securing his right of redemption by a registered deed of mortgage. 8 B.L.R. 334 (F.B.) and 2 R. 285 (F.B.), *Expl.* In such a case it is, however, open to the plaintiffs to bring a suit based solely on their title. If the defendant admits their title and if he fails to prove the contract to sell which he alleges, the plaintiff would be entitled to a decree. That decree must be made conditional on repaying the money advanced not with the intention of granting practically a decree for redemption but by ordering repayment on equitable grounds. The reason why different principles apply to the admissibility of evidence to prove a contract to mortgage and a contract to sell is that in the latter the defendant is entitled to claim specific performance and in the former case he is not. (*Robinson, C. J., Brown and Doyle, JJ.*). MAUNG SAN MIN *v.* MAUNG PO HLAING. **94 I.C. 567=4 Bur. L.J. 118=4 Rang. 1= A.I.R. 1925 Rang. 291 (F.B.).**

EVIDENCE ACT (1872), S. 92—Oral agreement.

———Where a mortgage deed provides for redemption within 2 years of the date of the mortgage, a party to the deed cannot be permitted to prove a verbal promise to allow redemption at any time. (*Lentaigne, J.*). MA HIN THA *v.* MA THET SU. **76 I. C. 624=2 Bur. L.J. 119= A.I.R. 1923 Rang. 232.**

———Mortgage deeds invalid for want of registration or by reason of defective registration are admissible in evidence to prove a personal covenant to pay. (*Robinson, C. J. and Duckworth, J.*). QUAH CHENG GWAN *v.* MAUNG PO MYI. **66 I. C. 589= 11 L.B.R. 148=A. I. R. 1921 L.B. 34.**

—S. 92—Negotiations.

———The true construction of a document cannot be varied by extraneous evidence as to the negotiations which led up to the contract. 41 Cal. 493 (P. C.), *Foll.* (*Prideaux, A. J. C.*). KALURAM *v.* GAJASA. **107 I.C. 201=A.I.R. 1928 Nag. 182.**

———*Oral evidence regarding what took place at the time of the deed is not admissible.*

Where the question was whether two documents constituted a completed contract or not.

Held, oral evidence to show what actually took place on the occasion when the parties entered into the agreement relied upon by the plaintiff is irrelevant and inadmissible. (*Mr. Ameer Ali.*) HARICHAND *v.* GOVIND. **71 I.C. 763= 17 M.L.W. 572=50 I.A. 25=37 C.L.J. 440= 32 M.L.T. 175=25 Bom. L. R. 531= 47 Bom. 335=28 C.W.N. 73=4 L.R.P.C. 84= A.I.R. 1923 P.C. 47=44 M.L.J. 608 (P. C.).**

———*Lease deed defective—Prior correspondence is admissible.*

Where the lease is defective in not giving sufficient description of the property to identify it, the parties have to fall back on extraneous evidence. The Courts can take into consideration correspondence which passed between the parties prior to the lease. (*Rafique and Stuart, JJ.*). SITAL PRASAD *v.* BADRI PRASAD. **69 I.C. 647=20 A. L.J. 907= A.I.R. 1923 All. 53.**

—S. 92—Oral agreement.

———Evidence regarding a subsequent oral agreement is excluded not only in cases in which the original contract is required by law to be in writing but also in cases where the original contract has been registered. (*Bhide, J.*). CHANDAR HAS *v.* AKBAR. **110 I.C. 261 (Lah.).**

———A vendee from the mortgagor of a part of the mortgaged property can enter into an oral agreement with the mortgagee for the redemption of that part only and proof of such an oral agreement by which money is paid, and that part is redeemed is not precluded by S. 92, prov. 4. 27 Mad. 368, *Rel. on.* (*Phillips and Madhavan Nair, JJ.*). KANDASWAMI *v.* PAKKIRISWAMY. **112 I.C. 559=1928 M.W.N. 537= A.I R. 1928 Mad. 1050.**

———An oral agreement by which a certain sum due under a sale-deed was not to be payable until

EVIDENCE ACT (1872), S. 92—Oral agreement.

the vendee got possession of the whole land cannot be proved under S. 92. (*Phillips, J.*). MUTHUSWAMI AIYER *v.* DHARMA RAJA. **94 I C. 302= 1926 M.W.N. 209=A.I.R. 1926 Mad. 495.**

———*Contemporaneous oral agreement attaching condition precedent—Evidence is admissible.*

The true construction to be placed upon S. 92, proviso (3) is that the provisions thereof are inapplicable in a case in which any obligation under the written contract has attached, and that if the effect of the alleged contemporaneous oral agreement is merely to suspend the performance of the obligations contained in the written contract, evidence of such oral agreement cannot be admitted. On the other hand, it is permissible to adduce evidence of a contemporaneous oral agreement under which the parties to the written contract agree that until the happening of a certain event no obligation whatever under the written agreement should attach, or, in other words, that until the condition precedent has been fulfilled, the written agreement should be and remain inoperative and of no effect. 2 All. 598, *Rel. on.* (*Page, J.*). WALTER MITCHELL *v.* A. K. TENNENT. **90 I.C. 59= 52 Cal. 677=A.I.R. 1925 Cal. 1007.**

———Where the deed between the parties is a informal document, evidence as regards the special agreement alleged by one of the parties is allowable under S. 92, proviso (2). (*Madhvan Nair, J.*). VAIRAVAN CHETTIAR *v.* KANNAPPA MUDALIAR. **86 I.C. 436=A.I.R. 1925 Mad. 1029.**

———Where a deed of lease does not mention the place fixed for payment of rent, it is open to the plaintiff lessee to show that it was subsequently agreed between the parties that rent was to be paid at a particular place. (*Wadegaonkar, A. J. C.*). ONKARPRASAD M. G. NANDLAL *v.* BADRI DAS. **89 I. C. 273=8 N.L J. 81=23 N.L.R. 26= A. I. R. 1925 Nag. 281.**

———Under S. 92, proviso (2) the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. This proviso applies where the document is of an informal character. (*Drake Brockman, J. C.*). JODHRAJ *v.* BYRAM. **83 I.C. 309=7 N.L.J. 25.**

———*Pro-note—Oral agreement prior to pro-note but written down subsequently that amount was not payable till a certain event—Evidence of agreement admissible.*

Respondent sued appellants on a promissory note. Appellants admitted execution of the note but pleaded, *inter alia* that under an oral agreement prior to pro-note which was embodied in a written instrument after the pro-note the amount was not payable until the accounts of a certain partnership had been settled.

Held, that the finding that the written instrument was signed some days after the promissory note did not warrant the exclusion of evidence of the oral agreement which was alleged to have been made some time before the written instrument came into existence. (*Heald and Chari, JJ.*). ZALHIA *v.* BHARADWAJA. **88 I.C. 336= 4 Bur. L.J. 38=A. I. R. 1925 Rang. 256.**

———*A* entered into an agreement with *P* for the supply of timber. *A* agreed to advance Rs. 5,000 to *P* "on such securities as thought suitable". *P* offered his brother *H* as surety and he was accepted. Rs. 2,500 was advanced to *P* who signed a promissory-note for the amount, *H* also signed this note. Some ten days later, a further Rs. 2,500 was paid to *H* on behalf of *P* who was away in the jungle. *H* alone signed a promissory-note for this sum. The contract with *P* was in writing but the evidence as to the part of *H* in the transaction was purely oral.

EVIDENCE ACT (1872), S. 92—Oral agreement.

Held, that oral evidence was rightly admitted under proviso 3 to S. 92 of the Evidence Act for the purpose of showing that *H's* liability on the second pro-note which was solely signed by him, arose only on *P's* failure to pay the amount. 10 L.B.R. 366 and 19 Mad. 368, *Foll.* (*Carr, J.*). J. M. MANICKJEE *v.* MAUNG PO HUN. **84 I.C. 1012=2 Rang. 482=A.I.R. 1925 Rang. 83.**

———*Agreement complete in itself—Oral evidence is not allowed to supplement it.*

A contract for sale of land was entered into on 15th January, 1920, by means of a writing appearing in the books of one Chanbasappa. It was signed by both parties and witnessed. The defendant said that the agreement appearing in the book did not contain the whole of the agreement arrived at between the parties but there was an oral agreement that if anybody else per chance offered more than Rs. 500 to the 1st defendant above the agreed amount before the expiry of the period in the agreement the agreement with the plaintiff was to be treated as null and void.

Held, that the evidence about the oral agreement is not admissible.

It may very well be that a writing may be an imperfect agreement of which a Court cannot decree specific performance, but if on the face of it contains all the terms which would entitle it to be considered as a perfect agreement which could be enforced, then undoubtedly no parol evidence could be adduced so as to alter or add to its terms unless they came within one of the provisos of S. 92. (*Macleod, C. J. and Crump, J.*). TUKARAM MAHADAPPA *v.* JAGANNATH SAVLARAM. **76 I. C. 215= A.I.R. 1923 Bom. 236.**

———Oral arrangement providing for repayment of the mortgage debt from the usufruct of the land does not amount to a lease, nor does it constitute a usufructuary mortgage, but only a means of discharging the debt by putting the simple mortgagee in possession of the property and such oral arrangement can be proved. 9 All. 392 and 11 C. L. J. 39, *Foll.* (*Curgenven and Ananthakrishna Iyer, JJ.*). BALAM NOOKAMMA *v.* SADIREDDI DHARMAYYA. **107 I.C. 417=A.I.R. 1928 Mad. 233= 53 M. L.J. 863.**

———Defendant leased his absolute occupancy field to the plaintiff for a term of seven years without landlord's consent: the landlord brought a suit against them to cancel the lease. As the plaintiff and defendant were bound to fail as against the landlord, the lease was given up and in its place the defendant, the tenant, executed in favour of the plaintiff, his sub-tenant, a series of six bonds, undertaking in lieu of the lease to pay off the lease money by giving an instalment of 12 khandis of wheat every year. The defendant pleaded that the real arrangement between the parties was that in order to pay off the lease money the defendant should cultivate his own tenancy land but should give half the produce every year to the plaintiff who had been his sub-tenant, and that the plaintiff should pay him half the rent every year. It was alleged that in order that the landlord should not be aware of this arrangement, the bonds were executed in the form in which they stand. The bonds are described in the defendant's pleadings as "security" for the real oral agreement.

EVIDENCE ACT (1872), S. 92—Oral agreement.

Held, that the agreement "was not a condition precedent" for the enforcement of the bonds nor can the bonds be regarded as "security" for the carrying out of the oral agreement, and that the attempt to show that the agreement was not what it purported to be but something different is directly against the provisions of S. 92 and is not covered by proviso (3). (*Batten, J.C.*). TATIA *v.* SAWANIA.

71 I.C. 477=6 N.L.J. 21=A.I.R. 1923 Nag. 135.

———*Written agreement incomplete—Supplementary oral agreement can be proved.*

Where the plaintiff's evidence proved that the written agreement about supply of consignments by defendant was incomplete and that there was a supplementary oral agreement.

Held, it would not be inconsistent with the terms, of the document that there should have been an agreement that the consignments should be sent when the plaintiff ordered or requested that they should be sent. (*Batten, J.C.*). SETH LAXMICHAND *v.* SHAIKH SHAHABUDDIN.

70 I.C. 844=A.I.R. 1923 Nag. 46.

———It is not to be thought that it is intended by the proviso (3) to permit the terms of a written contract to be varied by a contemporaneous oral agreement. Having regard to the illustrations (*b*) and (*j*) the proper meaning of proviso (3) is that a contemporaneous oral agreement, to the effect that a written contract was to be of no force or effect at all and that it was to impose no obligation at all until the happening of a certain event, may be proved. (*Ryves and Gokul Prasad, JJ.*). S. ALI JAWAD *v.* KULANJAN SINGH. **66 I. C. 131= 44 All. 421=20 A. L. J. 247= A. I. R. 1922 All. 262.**

———*Evidence of oral agreement explaining document is admissible.*

The interlineated words and figures in an *ikrarnama* were written after it had been signed by the defendant. The plaintiff's allegation was that there was an agreement made before the execution of the *ikrarnama*, which justified the additions to the document which do not alter it in the least but merely explain it.

Held, that the plaintiff would be entitled to produce oral evidence of the oral agreement.

Sonajee Mali v. *Uttamchand Bania*, 12 C. P. L. R. 33 and *Ganpat* v. *Ramakrishnapuri*, 6 N.L. R. 1, *Foll.*; *Ananda Mohan Shah* v. *Ananda Chandra Naha*, 44 Cal. 154, *Foll.* (*Hallifax, A.J.C.*). GANGA PRASAD *v.* MOTIRAM. **68 I.C. 268= A.I.R. 1922 Nag. 191.**

———Absolute promise to pay on demand—Contemporaneous agreement to excuse promisor from liability if certain event happened—Oral evidence to prove such agreement is not admissible. 39 B. 399 (P.C.), *Dist.* (*Sadasiva Aiyar and Spencer, JJ.*). DOORVAS J. SUBBIAYAR *v.* SUBBARAYULU AIYAR. **68 I.C. 758=1921 M.W.N. 636= A. I. R. 1921 Mad. 474=41 M.L.J. 541.**

—S. 92—Parties and representatives.

———*Persons not claiming through settlor can show that* waqf *was illusory.*

A person who does not claim through the settlor is entitled to challenge the validity of a *waqf* on the ground that it was merely an illusory transaction never intended to be acted upon. 31 M.L.J. 431, *Foll.*; 10 C. W. N. 449, *Dist.* and *Expl.*

Purchasers of some portion of the properties alleged to be *waqf* at a sale for arrears of Government revenue are not persons claiming under the settlor. (*Chatterjee and Panton, JJ.*). MINNAT ALI *v.* NABENDRA KISHORE ROY. **A.I.R. 1928 Cal. 253.**

EVIDENCE ACT (1872), S. 92—Partition-deed.

———*Sale by father as manager—Other members cannot dispute nature of transaction.*

If a father as one of the joint owners sells, as representing all the other members joint with him, those other members must be treated as parties to the document. The other members of the joint family cannot dispute the transaction effected by the manager of the family on the ground that the transaction was really a different one from what it appears to be on the face of the document. (*Macleod, C. J. and Crump, J.*). RAMCHANDRA HANMANT *v.* KASHINATH LAXMAN. **87 I. C. 804= 27 Bom L.R. 241=A.I.R. 1925 Bom. 288.**

———Parties cannot be allowed to adduce evidence to prove contrary to the terms of deed of gift that the transaction was in reality a *hiba-bil-iwaz*. (*Scott-Smith and Fforde, JJ.*). HAFIZ FEROZ-UD-DIN AHMAD *v.* SARDAR SHAH. **79 I.C. 81= 6 L.L.J. 221= A. I. R. 1924 Lah. 562.**

———Section 92 applies to all parties to a document whether the dispute is between the parties on the one side and the other or between the parties on the same side. Parties on one side to a transaction cannot be allowed to show that the transaction though purporting to be a sale was a mortgage. (*Pratt and Duckworth, JJ.*). MAUNG TUN GYAW *v.* MAUNG PO THWE. **77 I.C. 923= 11 L.B.R. 351=1 Bur. L. J. 160= A. I. R. 1922 L.B. 37.**

—S. 92—Partition-deed.

———Division of status can be proved by an unregistered partition deed but status of reunion cannot be proved by unregistered deed of reunion where deed of partition is registered. A.I.R. 1919 P.C. 44, *Dist.*; A.I.R. 1916 P.C. 104 and A.I.R. 1917 P.C. 12, *Rel. on.* (*Kumaraswami Sastri and Reilly, JJ.*). P. MAHALAKSHMAMMA *v.* C. SURYANARAYANA. **117 I.C. 113=51 Mad. 977= 28 M. L. W. 919=A.I.R. 1928 Mad. 1113= 55 M. L. J. 733.**

———Division of status can be proved even though there is an unregistered partition deed in evidence which may be used to determine the nature of the possession held by a party. A. I. R. 1922 P. C. 266, *Appl.* (*Kumaraswami Sastri and Venkatasubba Rao, JJ.*). RAMA CHETTY *v.* PANCHAMMAL. **92 I. C. 1028=1926 M. W. N. 45= A. I. R. 1926 Mad. 402.**

———An oral agreement that a partition deed was not to be treated as such, but that a fresh formal deed was to be executed and registered is admissible in evidence. (*Krishnan and Venkatasubba Rao, JJ.*). GOPAYYA *v.* KRISHNAYYA. **69 I. C. 562= 16 M. L. W. 784=1922 M. W. N. 833= A. I. R.1923 Mad. 160.**

———"*Document*" *means valid document—Partition-deed inadmissible for want of registration—Partition can be proved by oral evidence.*

The word "document" in Ss. 91 and 92 means a valid document.

A partition may be proved by oral evidence, although the deed embodying the terms of partition cannot be proved for want of stamp and registration: 41 Bom. 466, *Foll.*

The provisions of Chapter VI, Ss. 91 to 100, do not involve the Courts in the anomalous position of deciding that, because there is a flaw in the deed of disposition which prevents the deed being proved they are at the same time precluded from hearing the oral evidence as to the disposition. If the Courts were placed in this anomalous position the fate of a person who has obtained property under an unregistered deed of partition would be

EVIDENCE ACT (1872), S. 92—Promissory note.

a most unhappy one, for even though the property was his property, he would be unable to prove his title against any dishonest person who chooses to challenge him. (*Stuart, J.*). JAIRAM DAS *v.* RAJ NARAIN. **A.I.R. 1921 All. 405.**

—S. 92—Promissory note.

———In a suit on pro-note alleged to have been executed by two defendants one of them denied the execution and receipt of consideration and averred that he had signed as an attesting witness. Oral evidence to prove that money had been borrowed by both the defendants and that defendant having "witness" before his signature, was one of the executants and not a witness was allowed,

Held, that the evidence adduced is not at variance with the terms of the contract which is not affected by the word "witness" before defendant's signature and is admissible under S. 92. (*Sen, J.*). MUHAMMAD AHMAD KHAN *v.* JAI CHAND LAL. **A.I.R. 1930 All. 709.**

———A claim based on a promissory note payable on demand cannot be resisted on the ground that the amount would be given credit to in the final settlement of accounts between the parties: A. I. R. 1922 All. 213, *Ref.* (*Sulaiman and Kendall, JJ.*). GHANSHIAM *v.* MITHAN LAL. **124 I.C. 763=A. I. R. 1930 All. 529.**

———*Contract with firm—Note by partner in his name—Partnership liable.*

Where there is a contract with the partnership and a promissory note signed by a partner in his own name and not in the name of the partnership, as evidence of such contract, all the partners will be liable. The principle that only the maker of the promissory note can be held liable thereunder is not applicable in a case where an independent contract is alleged and therefore, the promissee can be allowed to adduce evidence as to the independent contract: A.I.R. 1914 P.C. 132 and 40 Mad 727, *Rel. on.*; 7 Cal. 256 and A. I. R. 1918 P.C. 146 *Ref.*; 25 Mad. 580, *Doubted.* (*Phillips and Reilly, JJ.*). PYNDA VENKATACHALAPATI GARU *v.* PYNDA RAMAKRISHNAYYA. **123 I.C. 358= A.I.R. 1930 Mad. 168.**

———*Promissory note can be proved to be conditional.*

In a suit on promissory note, the defendant can prove a separate oral agreement that a condition precedent to the attaching of any obligation to the contract evidenced by the promissory note was that there should not be any obligation attaching under it unless there was a final balance of account on certain transactions against the defendant which he failed to pay: A. I. R. 1927 All. 292, *Foll.* A.I.R. 1922 All. 213, *Diss. from.*

Ashworth, J.—The case is actually no exception to S. 92, Evidence Act. That section refers to documents which operate by reason merely of signature. A promissory note because it is a negosiable instrument and thus partakes of the nature to currency before it can operate must not only be signed but also delivered. (*Boys and Ashworth, JJ.*). BHOGI RAM *v.* KISHORI LAL. **115 I.C. 771= 50 All. 754=26 A.L.J. 696= A.I.R. 1928 All. 289.**

———It is open to the executant under proviso (3) to S. 92, Evidence Act and S. 46, Negotiable Instruments Act to prove that the promissory note is executed and delivered only as security for the payment of future instalments to a chit fund: A. I. R. 1924 Mad. 850, *Foll.* (*Reilly, J.*). PANCHAPAKESA AYYAR *v.* AYYASAWMI AYYAR. **107 I.C. 510 (Mad.).**

EVIDENCE ACT (1872), S. 92—Promissory note.

———In a suit upon a pro-note, a Court should not allow evidence to show that the pro-note was not really executed in the plaintiff's favour or evidence that the note had been discharged by payment to the person really interested: 30 Mad. 88 (F.B.), *Foll.* (*Ashworth, J.*). L. MADAN LAL *v.* LAL CHAND. **100 I.C. 703=25 A.L.J. 402=49 All. 457= A. I. R. 1927 All. 463.**

———*Evidence to vary terms of pro-note is not permissible.*

The execution of a pro-note was admitted, but the defence was that the money was advanced to defendant for the purchase of paddy in pursuance of a partnership agreement and that there was really no loan at all,

Held, that such a defence was not permissible. A.I.R. 1925 Rang. 83, *Dist.*; 31 Mad. 343, *Rel. on.* (*Brown, J.*). (MAUNG) KYAN NAGA *v.* M.A.R.T.A.R. ARUNACHALAM PILLAY. **105 I.C. 476= 5 Rang. 520=A.I.R. 1927 Rang. 327.**

———A subsequent oral agreement varying the terms of a promissory note as regards its exigibility on demand cannot be legally proved. (*Kinkhede, A.J.C.*). SK. JAMU *v.* MOHAMED EBRAHIM. **90 I.C. 378=A.I.R. 1926 Nag. 194.**

———*Suit on promissory note—Defendant cannot prove contemporaneous oral agreement exempting him from liability.*

Where a contract is founded on consideration, and the party who received the consideration wrote down and signed the terms on which he received it, it is not open to him to raise the plea that he did not agree to those terms. Therefore if in a suit on a promissory note to pay on demand, consideration is proved, defendant cannot prove a contemporaneous oral agreement according to which he did not incur any personal liability, and was not bound to pay on demand: A.I.R. 1922 All. 213; 45 Bom. 1155, and 45 Bom. 1242, *Foll.* (*Martineau and Zafar Ali, JJ.*). HIRA LAL *v.* BENARSI DAS. **90 I.C. 982=6 Lah. 411=7 L.L.J. 453= 26 P.L.R. 612=A.I.R. 1925 Lah. 576.**

———*Agreement to postpone the obligation cannot be proved orally.*

An oral agreement purporting to provide that the promise to pay on demand in a promissory note, though absolute in its terms, was not to be enforceable by suit till the happening of a particular event, *i.e.*, that the legal obligation to perform the promise was to be postponed, is not such an agreement as falls within Prov. 3 to S. 92. A. I. R. 1924 Bom. 44, *Dissented.* (*Odgers, J.*). SUBRAMANIA AIYAR *v.* NARAYANASAMI AIYAR. **90 I.C. 1020= 22 M.L.W. 445=1925 M.W.N. 601= A.I.R. 1925 Mad. 1240.**

———*Failure of condition precedent to written agreement as fixed by oral agreement can be proved.*

When it is expressly provided in a promissory note that the amount due thereunder is payable on demand with interest at a particular rate an oral agreement between the parties that the said amount was to be set off against the amount due to the executant of the promissory note on some other account is not a condition precedent to the enforcement of the liability under the pro-note and such agreement is not admissible in evidence. But an oral agreement between parties to a written contract, to the effect that the latter shall not be of any force until some condition precedent has been performed can be proved by means of oral evidence, and it can be shown that the condition has not been performed and that therefore the written agreement has not acquired any validity or

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force. (*Raymond and Rupchand Bilaram, A J. Cs.*). RAM SINGH *v.* IBRAHIM. **78 I C. 418= 18 S.L.R. 39=A.I.R. 1925 Sind 136.**

———In a suit on a promissory note, it is open to the defendant to plead that the note was not executed for cash or other consideration but was executed only as a security to cover the advances to be made by the payees and that they (the defendants) are liable only for such sums as may be found due on taking accounts between the parties. (*Ramesam, J.*). SUNDARAM CHETTY *v.* DAMODARAM CHETTY. **84 I. C. 146=1924 M.W.N. 529= A. I. R. 1924 Mad. 850.**

———In a suit on a joint and several promissory note payable on demand executed by *A* and *B*, *A*, can give oral evidence to prove that he joined in the loan only as security for *B*. But he cannot give oral evidence to prove contemporaneous oral agreement with plaintiffs, whereby plaintiffs agreed to recover the amount under the note in the first instance from *B*. (*Rupchand Bilaram, A. J. C.*). THE CENTRAL BANK OF INDIA, LTD. BY ITS ATTORNEY N. C. NAVATY *v.* NADIR SHAH R. MEHTA. **79 I.C. 445=A.I.R. 1924 Sind 13.**

———Unconditional promise to pay—Plea of condition to pay only on settlement of accounts is not allowable. (*Lindsay and Stuart, JJ.*). SRI RAM *v.* FIRM SOBHA RAM GOPAL RAI. **67 I.C. 513= 44 All. 521=20 A. L. J. 315= A.I.R. 1922 All. 213.**

———*Oral evidence is admissible to prove purpose of loan.*

The making of a pro-note by way of security for a sum of money advanced or given to the maker does not shut out oral evidence as to the purpose for which the money is given. Proviso 2 to S. 92 of the Evidence Act allows proof of any separate oral agreement about any matter on which a document is silent and which is not inconsistent with its terms. (*Rigg, J.*). BA. SHEIN *v.* EMPEROR. **64 I.C. 33=A.I R. 1922 L.B. 10.**

———In a suit on a promissory note payable on demand, it is not open to the defendant to prove a contemporaneous oral agreement by which plaintiff is not to present the promissory note for payment, although payable on demand, until he has discharged certain encumbrances on the property he has sold to a stranger: 25 Cal. 402, *Foll.* (*Macleod, C. J. and Shah, J.*). VISHNU RAMCHANDRA *v.* GANESH KRISHNA. **63 I.C. 673=45 Bom. 1155= 23 Bom. L.R. 488=A. I. R. 1921 Bom. 449.**

———*Suit on—Pro-note given not to plaintiff but to firm having plaintiff's name and belonging to plaintiff's father—Plaintiff cannot succeed.*

If the promissory notes had been executed in favour of the plaintiff, an allegation that he was not the beneficial owner of the money would not afford a defence to the suit. But where the defendants urge that the notes were given, not to the plaintiff but to a firm which happens to possess the same name as the plaintiff and is the property of his father, this raises a question, not of benami, but of identity of the person to whom the note was given, and the plaintiff cannot succeed till the matter has been determined in his favour. (*Mukerjee and Fletcher, JJ.*). ABDUL HAKIM EAR MAMOMED *v.* EBRAHIM SOLAIMAN SALEHJEE & CO. **62 I.C. 210=33 C.L.J. 132= A. I. R. 1921 Cal. 480.**

———An oral agreement providing a different mode of satisfaction of a promissory note payable on demand is inadmissible in evidence. (*Martineau and*

EVIDENCE ACT (1872), S. 92—Sale.

Abdul Qadir, JJ.). BHARAT NATIONAL BANK, DELHI *v.* MOHAN LAL BHAGWAN DOSS. **63 I.C. 748=A.I.R. 1921 Lah. 74.**

—S. 92—Sale.

———It is not open to a party to a registered sale-deed to prove an oral agreement by evidence either oral or documentary contemporaneous with the sale deed, that in spite of a certain property, belonging to the vendor, being entered in the sale-deed, title to it would not pass to the vendee: 43 Mad. 436, *Dist.* (*Mukerjee, J.*). RAM KRISHNA *v.* ANAND KRISHNA. **118 I.C. 589= A.I.R. 1929 All. 578.**

———Where the contemporaneous agreement though in writing is not registered, it is not open to the party to show that what is apparently a sale was really a mortgage: 27 Mad. 348, *Rel. on.* (*Srinivasa Aiyangar, J.*). MEENAKSHISUNDRAM PILLAI *v.* CHENCHU MUDALIAR. **109 I.C. 18= A.I.R. 1928 Mad. 459.**

———*Possession as a mortgagee turned into possession as a vendee without a registered instrument—*
—Oral evidence was admissible to prove facts referable to the contract of sale.

A brought a suit for a declaration that certain land was liable to be attached in execution of his decree against *P*. At the trial it transpired that *P* had at first mortgaged the land with possession to *N* and her husband, by a registered deed and had later sold it outright to the mortgagees by a *pyatpaing* and without any registered instrument. It was contended on behalf of *A* that no oral evidence was admissible to prove the sale,

Held, that oral evidence could be offered of facts which were referable to the contract of sale and productive of a change in the nature of possession. It is not correct to say that to apply the doctrine of part performance, possession must have been given under the contract of sale and could be referred to no other title. A. I. R. 1924 Rang. 214 (F. B.); A. I. R. 1927 Rang. 33 (F. B.); A. I. R. 1925 Rang. 119; A. I. R. 1923 Rang. 125; A. I. R. 1922 Bom. 9; S. A. No. 89 of 1923; A. I. R. 1914 P. C. 27; A. I. R. 1926 Rang. 182 *Special Second Appeal* No. 104 of 1927 and A. I. R. 1927 Rang. 33 (F. B.) *Discussed* and *Rel. on*, and Rang. S. A. 308 of 1923, *Diss. from.* (*Heald and Maung Ba, JJ.*). C. A. M. K. R. CHETTIAR *v.* MA KYAW. **110 I.C.616=6 Rang. 270= A.I.R. 1928 Rang. 321.**

———Where the terms of a contract are unambiguous, oral evidence of surrounding circumstances and conduct of the parties in contradiction to the terms of a written contract is not admissible.

Where the terms of the deed are clear express an outright sale, the evidence to prove that the transaction is a mortgage or that there is contemporaneous oral agreement to re-sell, is excluded by S. 92: A.I.R. 1924 Rang. 57; 3 L.B.R. 100 (F.B.); 22 All. 149; A.I.R. 1924 P.C 88, *Rel. on*; A.I.R. 1925 P.C. 75, *Dist* (*Heald and Mya Bu, JJ.*). MAUNG SHIVE PHOO *v.* MAUNG TUN SHIN. **105 I.C. 293=5 Rang. 644=6 Bur. L.J. 195= A.I.R. 1928 Rang. 58.**

———Evidence in any shape cannot on behalf of any party to sale-deed be admitted for showing that there was no agreement at all, or in other words, that a deed was meant to be inoperative; *Harris* v. *Rickett*, (1859) 118 R.R. 294 and *Pym* v. *Campbell*, (1856) 119 E. R. 903, *Dist.* (*Mukerji and Ashworth, JJ.*). LACHMAN DAS *v.* RAM PRASAD. **100 I.C. 1029=49 All. 680=25 A.L.J. 349= A.I.R. 1927 All. 422.**

EVIDENCE ACT (1872), S. 92—Sale.

———*Independent subsequent contract to re-purchase can be proved.*

In the case of an outright sale, by registered deed, an independent contract to re-sell, either oral or by unregistered deed can be proved ; but, where the contract is not an independent transaction, but forms part and parcel of the original transaction and together constitutes a mortgage, such contract cannot be proved : A I.R. 1926 Bom. 497, *Rel. on* ; 5 B.L.T. 99 and A. I. R. 1923 Rang. 52, *Expl.* (*Maung Ba, J.*). MA NAN SHEIN *v.* U. YAING.
**105 I.C 482=6 Bur L.J. 210=
A.I.R. 1927 Rang. 314.**

———*Simple mortgagor subsequently transferring possession to mortgagee—No document—Latter asserting it to be under invalid sale can plead it as bar in redemption.*

Where there is a registered simple mortgage of land a subsequent transfer of possession of the land to the mortgagee without a document by the mortgagors, and the latter assert that this was under the original mortgage, whilst the former plead that it was a fresh transaction amounting to an outright, but invalid, sale to them, the mortgagee can, in a suit by the mortgagors for redemption of the mortgage, plead and prove this invalid sale in equity and as a shield : Civ. App. 299 of 1924 and A.I.R. 1924 Rang. 214 (F.B.), *Affirmed* ; A.I.R. 1923 Rang. 125, *Rel. on* ; A.I.R. 1925 Rang. 291 (F.B.), *Foll.* ; A.I.R. 1924 Rang. 214 (F.B.), *Appr.* 89 I.C. 875 ; A.I.R. 1925 Rang. 322 ; 3 Rang. 243, *Overruled.* (*Rutledge, C. J., Heald, Carr and Duckworth, JJ.*). MAUNG OK KYI *v.* MA PU. **99 I.C. 519=
4 Rang. 368=5 Bur. L.J. 145=
A.I.R. 1927 Rang. 33 (F.B.).**

———*Government lands, auction of—Claim to accretions.*

Where at the time of the sale by the Government of a certain estate some portions of it were submerged under water and where in the sale notification the area of the estate was specified as certain number of bighas,

Held, that the latter fact did not preclude the purchaser or his successor-in-interest from claiming any accretion to the estate : 2 C. L. R. 39 ; 19 W.R. 89 and 24 W.R. 91, *Dist.* ; 32 C.L.J. 402 ; 21 W.R. 115, *Foll.* (*N.R. Chatterjee and Chotzner, JJ.*). SANKER ROY CHOWDHURY *v.* SECRETARY OF STATE. **84 I.C. 478=29 C.W.N. 166=
40 C.L.J. 322=A.I.R. 1925 Cal. 346.**

———*Encumbrance known to buyer.*

The evidence to prove the knowledge on the part of the buyer of the existence of an encumbrance not disclosed in the sale-deed by the vendor does not offend against S. 92, for such evidence does not contradict, vary, add to or subtract from its terms. (*Devadoss, J.*). RAMASUBBA IYER *v.* MUTHIAH KONE. **85 I.C. 999=A.I.R. 1925 Mad. 968.**

———*Evidence of collateral warranty admissible.*

Where the plaintiff purchaser of a motor car alleged in his plaint that there was an express warranty that the car was a new car and in perfect working order, but there was no such warranty in the written agreement,

Held, that evidence of such an express collateral warranty would be admissible under. S. 92, proviso (2). (*Pratt, J.*). HARBAT JOHN *v.* JAL P. VIRJI. **77 I.C. 150=25 Bom.L.R. 778=
A. I. R. 1924 Bom. 41.**

———An attempt to prove that a sale really took place for Rs. 2,500 when the deed says it took place for Rs. 3,000 is not allowed by S. 92 (2).

EVIDENCE ACT (1872), S. 92—Scope and applicability.

38 Mad. 514, *Foll.*; 36 A. 537, *Dist.* (*Walsh, J.*). LALA SINGH *v.* BASDEO SINGH. **71 I.C. 768=
A. I. R. 1923 All. 429.**

———*Oral evidence to vary terms of the deed is not admissible.*

When the document in question is in terms a sale-deed, no evidence to vary the term of the deed can be admitted unless the case can be brought within any of the provisos to S. 92 of the Indian Evidence Act. (*Macleod, C.J. and Shah, J.*). BAI ADHAR *v.* LALBHAI HIRACHAND. **66 I.C. 865=
24 Bom.L.R. 239=A.I.R. 1922 Bom. 41.**

———*Agreement to sell—Part performance of agreement—Specific performance of the rest was ordered.*

Defendant agreed to sell to the plaintiff two pieces of lands and a house. The agreement was reduced to writing on a plain paper. Plaintiff was put in possession of the lands, the house was conveyed by the defendant's passing a deed of sale on stamped paper but the sale-deed was not registered nor any sale-deed of the lands was ever passed. Agreement to sell also was not brought on record. In a suit by plaintiff for specific performance of the agreement,

Held, that as the agreement had been partly performed by placing the plaintiff in possession of two pieces of lands the plaintiff was entitled to succeed inasmuch as the written agreement of sale was not on a stamped paper it was not open to the plaintiff to adduce secondary evidence of it even upon payment of penalty. 23 Mad. 49 (P.C.), *Foll.* (*Macleod, C.J. and Shah, J.*). HIRALAL RAMNARAYAN *v.* SHANKAR HIRACHAND. **62 I.C. 637=
45 Bom. 1170=23 Bom.L.R. 506=
A.I.R. 1921 Bom. 401.**

—S. 92—Scope and applicability.

———Though S. 92 contemplates that no party to an instrument or his representative should be allowed to uphold the written contract and yet try to establish a contemporaneous oral agreement so as to vary the terms of it, does not prevent even a party to such an instrument from establishing any fact which would make the document itself invalid or establish any fraud or show the transaction to be illegal for the effect of such a plea is not to vary the terms of the document, but to nullify it: (*Case law referred*). (*Sulaiman and Kendall, JJ.*). GOPAL NATH *v.* RUP RAM. **A.I.R. 1930 All. 786.**

———In a suit instituted for recovery of a certain sum due on a hundi, the defendants pleaded that they had compounded with the plaintiffs' creditors by agreeing to pay them 12 annas in the rupee in full settlement of their claims of which they had to pay 4 annas in the rupee in cash and to execute hundis on the balance payable at a future date. The defendants said that the plaintiffs had agreed to the terms and in pursuance thereof received 4 annas in cash but declined to receive the hundis tendered to them,

Held, that the evidence of the defendants could not be excluded and S. 92 did not apply as the defendants did not attempt to contradict, add to or subtract from the terms of the contract as contained in the hundi. (*Wild, J. C. and Rupchand, A.J.C.*). KALUMAL *v.* KESSUMAL. **114 I. C. 97=
23 S. L. R. 294=A.I.R. 1929 Sind 153.**

———The provisions are to be read independently of English decisions. (*Mukerji and Ashworth, JJ.*). LACHMAN DAS *v.* RAM PRASAD.
**100 I.C. 1029=49 All. 680=25 A.L.J. 349=
A.I.R. 1927 All. 422.**

EVIDENCE ACT (1872), S. 92—Scope and applicability.

———The liability in relation to a promissory note or negotiable instrument, attaches by or from delivery, and S. 46 of the Negotiable Instruments Act provides that as between the parties to an instrument (that means to say the immediate parties) it may be shown that the instrument was delivered conditionally or for a sp cial purpose only, and not for the purpose of transferring absolutely the property therein. Similarly it may be shown that the instrument was delivered conditionally, that is to say, as a collateral undertaking, given to the creditor, to be enforced only in the event of the debtor failing to discharge some contemporaneous undertaking. There is no difference in substance but only in illustration and application between the provision in S. 46 of the Negotiable Instruments Act, and proviso 3 to S. 92 of the Evidence Act. (*Walsh, A.C.J. and Banerji, J.*). SHEO PRASAD RAM PRASAD *v.* GOBIND PRASAD. **100 I. C. 332= 49 All. 464=25 A.L.J. 305.= A.I.R. 1927 All. 292.**

———*Companies Act—Company must be deemed a separate entity from share-holders—Though presumption is that all transactions are true, they can be proved to be otherwise.*

Where a company is duly incorporated under the Indian Companies Act, the Court should start with the presumption that it is a separate entity from any individual although that individual may practically hold all the shares, but it would not necessarily follow that every alleged transaction between such individual and the company would be valid or that it would represent a real transaction, and S. 92 of the Evidence Act would not prevent Court from enquiring into the truth of the transactions but the *onus* will be on the Crown. (*Marten, C. J. and Kemp, J.*). SIR DINSHAW MANECKJEE PETIT, BART, *In re.* **102 I.C. 49=29 Bom. L.R. 447= 51 Bom. 372=A.I.R. 1927 Bom. 371.**

———*Contract reduced to writing—Rule excluding any other evidence does not apply when there is complete oral contract before writing.*

The rule of evidence that where the terms of a contract have been reduced to writing, you cannot give any other evidence of the contract than the written document itself, applies only if the document was intended to be the embodiment in writing of the transaction and not if there was a complete oral contract before the writing was given and the document does not express and was never intended to express the whole agreement between the parties. 20 W.R. 150; A.I.R. 1923 P.C. 50 and 43 Cal. 895, *Rel. on.* (*B. B. Ghose and Panton, JJ.*). KHESTRA NATTSIKDAS *v.* HARASUKHDAS BALKISSEN DAS. **102 I. C. 871= 45 C. L. J. 233=31 C. W. N. 703= A. I. R. 1927 Cal. 538.**

———*Sections do not conflict with each other—In S. 92 subsequent representation is relied upon as true; in S. 115 it is relied upon as binding upon the party making it.*

Where a party seeks to give evidence of a subsequent oral agreement modifying the terms of the written grant, he puts forward that agreement as true and relies upon the truth of that agreement. In the case of an estoppel, the party who pleads it does not profess to show that the representation made is true. On the contrary his case very probably is that the representation is false but that the person who made it should not be allowed to show that it is false. Sections 92 and 115 deal with

two entirely different topics and there is no conflict between the two. (*Venkatasubba Rao, J.*). MD. BATCHA SAHIB *v.* ARUNACHALAM CHETTIAR. **90 I. C. 875=1925 M. W. N. 596= A. I. R. 1926 Mad. 39=49 M.L.J. 396.**

———*Fact of lease-deed in suit being part of* benami *transaction of transfer by sale can be proved.*

Where the defendant denied the alleged agreement to take the land on lease, but admitted the execution of the lease-deed, but alleged that to protect his property from creditors he had transferred his land *benami* to the name of the plaintiff and that the document was made in furtherance of this *benami* transaction.

Held, that in effect his case is that there was no agreement of lease at all and that the deed is merely a fiction. He is therefore not debarred from producing oral evidence of this allegation. Evidence may be given—firstly to show that there was no disposition at all. The rule operates only when there has been in fact a disposition, the whole of which was meant by the intention of parties to be embodied in the form of a document. 7 M. H. C. 189, *Foll.* (*Carr, J.*). ABDUL *v.* ARLIN. **95 I.C. 512=5 Bur. L.J. 2=A. I. R. 1926 Rang. 94.**

———S. 92 merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. (*Sir Lawrence Jenkins.*) BAIJNATH *v.* VALLY MAHOMED. **86 I. C. 332=27 Bom. L.R. 787= 3 Rang. 106=3 P. L. R. 227=30 C. W. N. 242= 6 L. R. P. C. 57=2 O. W. N. 279= A. I. R. 1925 P.C. 75=48 M. L. J. 339 (P. C.).**

———When the evidence was not of an oral agreement varying the terms of a written contract between the parties to the instrument, but of a different contract:

Held, S. 92 has no application and the evidence is admissible. (*Newbould and B. B. Ghose, JJ.*). SHAILESH. CHANDRA GUHA *v.* BECHAI GOPE. **84 I. C. 124= 40 C. L. J. 67= A.I.R. 1925 Cal. 94.**

———*No estoppel against statute.*

Where the transaction is expressly forbidden by statute, the rule that the grantor cannot derogate from his grant does not operate, for on a point of law there can be no estoppel and there is no rule of law standing in the way of a party asking the Court to hold that a particular transaction which as a matter of fact is void should be declared to be of no effect. In such a case the Court is bound as soon as the invalidity of the transaction is pointed out to it, to set aside the transaction provided that the Court holds that the alleged invalidity really exists. 12 N. L. R. 100 and 44 Bom. 488, *Foll.* (*Baker, J. C.*). KESARBAI *v.* JAMADAR. **82 I. C. 126=20 N.L.R. 162= A.I.R. 1925 Nag. 125.**

———The view that there has been introduced into the law of India such a radical change in the laws of evidence as would have the effect of excluding from the class of mortgages many transactions which before the Evidence Act would have been held to be within that clause is not correct. (*Lord Blanesburgh.*) NARSINGERJI GYANAGERJI *v.* PANUGANTI PARTHASARADHI. **82 I.C. 993=47 Mad. 729=51 I.A. 305= 27 Bom. L.R. 4= 40 C.L.J. 481=29 C.W.N. 246= 20 M. L. W. 701=1924 M. W. N. 915= 23 A.L.J. 161=6 L,R.P.C. 41=26 P.L.R. 18= A.I.R. 1924 P.C. 226=47 M.L.J. 809 (P.C.).**

EVIDENCE ACT (1872), S. 92—Scope and applicability.

———*Deccan Agriculturists' Relief Act, S. 10-A—Sale or mortgage—Court can determine real nature of transaction.*

Defendant executed a sale-deed in favour of plaintiff, at the same time there was an oral agreement to re-convey on payment of purchase money, and an unregistered *kabuliyat* was executed subsequently embodying the terms of the agreement. In plaintiff's suit for possession, defendants pleaded that the transaction was only a mortgage,

Held, S. 10-A of the Deccan Agriculturists' Relief Act empowers a Court notwithstanding the provision of S. 92 of the Evidence Act, to inquire into and determine the real nature of such a transaction. The plaintiff whose title is based on the sale-deed, cannot succeed, if defendants prove the transaction to be only a mortgage. (*Kennedy, J.C. and Raymond, A.J.C.*). HAMBIRKHAN *v.* MURIJMAL. **65 I.C. 356=15 S. L. R. 160=A.I.R. 1922 Sind 39.**

———*Oral agreement about payment, modifying written agreement—Payment accordingly—Oral agreement or payment can be proved but not such agreement as to future payments.*

Where an oral agreement is made, which in respect of the manner of payment rescinds or modifies a contract, grant or disposition of property required by law to be in writing or actually written and registered, and any payment is made in accordance with that oral agreement, whether in complete or partial satisfaction of the contract, S. 92 does not exclude evidence of that payment or of the oral agreement that explains it. It does exclude evidence of the agreement in respect of future payments not in accordance with the terms of the instrument. (*Hallifax, A. J. C.*). SAMBHU *v.* TIKARAM. **59 I. C. 240=17 N. L. R. 111=A.I.R. 1921 Nag. 51.**

—S. 92—Substitution.

———Oral evidence is not admissible to show that a person who has signed a contract personally was contracting only as an agent for his principal, for the purpose of exonerating the contracting party from liability for that would be substituting a different agreement from that evidenced by the writing. *Higgins* v. *Senior*, (1841) 58 R. R. 884, *Foll.*; 46 Cal. 663 (P.C.), *Ref.* (*Pratt, J.*). EBRAHIMBHOY PABANEY MILLS CO., LTD. *v.* HASAN MAMOOJI. **63 I.C. 482=45 Bom. 1242=23 Bom. L. R. 767=A.I.R. 1921 Bom. 81.**

———*Substituted oral agreement—Party setting up must prove that the other party had the understanding that both parties were proceeding on a new agreement.*

When parties, who have bound themselves by a written agreement, depart from what has been so agreed on in writing and adopt some other line of conduct, it is incumbent on the party endeavouring to enforce a substituted verbal agreement, to show, not merely what he understood to be the new terms on which the parties were proceeding but also that the other party had the same understanding that both parties were proceeding on a new agreement, the terms of which they both understood. (*Mookerjee and Fletcher, JJ.*). DINA NATH *v.* NETHARAM. **64 I.C. 785=33 C. L.J. 577=A.I.R. 1921 Cal. 852.**

—S. 92—Surrounding circumstances.

———*Oral agreement showing nature of document is not admissible but Court can look into circumstances if document is of doubtful tenor.*

EVIDENCE ACT (1872), S. 92—Surrounding circumstances.

Proof of an oral agreement to show the nature of a document is excluded by S. 92. Such proof cannot be admitted under proviso 6. All that Court has to do is that if the document is of doubtful tenor, it should, in construing it look into surrounding circumstances. A contemporaneous oral agreement contradicting the terms of a document cannot be admitted under the proviso: A. I. R. 1924 P.C. 226; A. I. R. 1924 P.C. 75; A. I. R. 1929 Mad. 807, *Ref.*; 22 All. 149 and 28 Cal. 256, *Dist.*; 25 Mad. 7, *Foll.* (*Curgenven, J.*). LAKSHMIAYYA *v.* MURAHARI. **31 M L.W. 516=1930 M.W.N. 129=A.I.R. 1930 Mad. 547.**

———*Evidence as to circumstances themselves is inadmissible.*

In construing a document evidence so far as it relates to prove how the language of the document is related to the existing facts and surrounding circumstances is only admissible and not the circumstances themselves as elucidating the document: 22 All. 149 and A.I.R. 1917 P.C. 207, *Ref.* (*Suhrawardy and Garlick, JJ.*). SISIR KUMAR MALLIK *v.* NARAN CHANDRA MALLIK. **119 I. C. 803=33 C.W.N. 591=A.I.R. 1929 Cal. 548.**

———*Surrounding circumstances can be taken into consideration to find true meaning and effect of the transaction.*

S. 92 merely prescribes rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances: A.I.R. 1925 P.C. 75, *Foll.* (*Findlay, J.C.*). MUMMASING RAJAPUTA *v.* NARAINSING. **107 I. C. 658=A. I. R. 1929 Nag. 91.**

———*Evidence of circumstances led only to throw light on the meaning and not to change the nature of the document.*

Under proviso 6 to S. 92, evidence of circumstances surrounding a document is admissible only for the purpose of throwing light on its meaning and it would not be permissible to consider the surrounding circumstances with a view to holding that a document, which on the face of it was a sale-deed, was intended to operate as a mortgage: A.I.R. 1925 Bom. 501, *Foll.* (*Prideaux, A.J.C.*). KALURAM *v.* GAJASA. **107 I. C. 201=A.I.R. 1928 Nag. 182.**

———Oral evidence for the purpose of ascertaining the intention of the parties to the deeds is not admissible, being excluded by the enactment in S. 92, yet it does not enact that no statement of fact written instrument is to be contradicted by oral evidence. Extrinsic evidence of circumstances is admissible to show the relation of the written language to existing facts. (*Maung Ba, J.*). HAJEE LIN *v.* MAUNG BA. **109 I.C. 189=5 Rang. 822=A.I.R. 1928 Rang. 79.**

———*Circumstances surrounding a document may be proved only to make its meaning clear and not to prove it to be something else than what it purports to be.*

The language of the proviso is rather vague. It is true that evidence of the circumstances, surrounding a document is admissible; but it is admissible only for the purpose of throwing light on its meaning. It would not be permissible to consider the surrounding circumstances with a view to holding that a document which on the face of it is a sale-deed was intended to operate as a mortgage. There must be some limit to the suggestion that the surrounding circumstances can always be scrutinised so as to enable the Court to alter or change

EVIDENCE ACT (1872), S. 92—Surrounding circumstances.

the nature of the document to something different from what it appears to be. Otherwise there could be no certainty as to the proper construction to be placed on a document which to all appearance is unambiguous. (*Macleod, C.J. and Coyajee, J.*). MARTAND TRIMBAK *v.* AMRITRAO RAGHOJIRAO. **93 I.C. 924=27 Bom. L.R. 951=49 Bom. 662=A.I.R. 1925 Bom. 501.**

———Surrounding circumstances such as are clearly required to show in what manner the language of the documents was related to existing facts are to be taken into consideration. 27 I.A. 58, *Foll.* (*Lord Blanesburgh.*) NARSINGERJI GYANAGIRJI *v.* PANUGANTI PARTHASARADHI. **82 I.C. 993=47 Mad. 729=51 I.A. 305=27 Bom. L.R. 4=40 C.L.J. 481=29 C.W.N. 246=20 M.L.W. 701=1924 M.W.N. 915=23 A.L.J. 161=6 L.R.P.C. 41=26 P.L.R. 18=A.I.R. 1924 P.C. 226=47 M.L.J. 803 (P.C.).**

———*Evidence of surrounding circumstances is not admissible to contradict terms of a document.*

The surrounding circumstances referred to in the proviso are circumstances which enable the Court to ascertain and give effect to the full intention of the parties as expressed in the document itself, and evidence of surrounding circumstances is not admissible under the proviso for the purpose of contradicting the terms of the document. (*Wallis, C. J. and Oldfield, J.*). NARASINGERJI GYANAGIRJI *v.* PARTHASARADHI RAYANIM GARU. **1921 M.W.N. 519=A.I.R. 1921 Mad. 498.**

—S. 92—Terms of the contract.

———*Oral agreement varying terms—Admissibility.*

Where the terms of a contract have been reduced to writing no evidence of any oral agreement or statement is admissible as between the parties to show that the document was not to take effect forthwith as mentioned in the document but after the expiry of a certain period. (*Sen and Niamatullah, JJ.*). PHARMESHWARI DAS *v.* LACHMAN PRASAD. **1930 A.L.J. 1066.**

———*Promissory note—Endorsee can prove his limited liability by oral evidence.*

Lobo, A. J. C.—It is open to the endorser of a negotiable instrument to prove that the endorsee orally agreed to recover the amount of the pro-note from the estate of the drawer only.

Rupchand Bilaram, A. J. C.—A bill or note is required by law to be in writing and so the supervening contracts thereon such as acceptance or endorsement. It, therefore, follows that the contracts of the immediate parties to them are subject to the ordinary rule as to written contracts. The contract, by an endorser of a bill or note, however, stands on a different footing. It is not fully expressed in writing on the document itself, and certain terms are said to be affixed to it either by the Law Merchant or by statute. There is, therefore, more room for admission of parol evidence as to what is the contract represented by the transaction. Where the endorsement is silent, it undoubtedly raises a *prima facie* presumption of law that the liabilities, *inter se*, of successive endorsers are that every prior endorser must indemnify a subsequent one. But this is only a presumption and not an express term of the contract reduced to writing. And, therefore, the rules as to exclusion of parol evidence crystallized in S. 92, Indian Evidence Act, do not apply. As between immediate endorsers such presumption may, in the absence of any other well-recognized rule of law or statutory provision

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in that behalf, be rebutted by parol evidence: *MacDonald* v. *Whitfield*, (1883) 8 A. C. 733, *Rel. on.* (*Rupchand Bilaram and Lobo, A.J.Cs.*). SUNDERJI GOURISHANKER *v.* ABIGAIL. **105 I.C. 747=22 S.L.R. 249=A.I.R. 1928 Sind 50.**

———In the case of an elaborate conveyance prepared after much discussion in the offices of the solicitors for the parties, oral evidence as to the terms of the contract is inadmissible. (*Walmsley and Mukerji, JJ.*). EASTERN MORTGAGE AND AGENCY CO. *v.* MD. FAZUL KARIM. **90 I. C. 851=52 Cal. 914=41 C.L.J. 571=A.I.R. 1926 Cal. 385.**

———*Assignment of decree—Oral evidence is inadmissible to vary term as to consideration payable but is admissible to contradict recital as to amount paid actually.*

The law allows the parties to a deed to show by oral evidence that a recital of fact in a deed is not true. But a recital which is a term of the contract between the parties cannot be contradicted in that manner.

A deed of assignment of a portion of a mortgage decree recited that the consideration for the assignment was a certain amount and that out of that a certain sum was paid in advance on the day of the execution of the deed of assignment,

Held, that evidence was admissible for the purpose of showing that out of the sum stated to have been paid only a portion had been actually paid,

Held, further, that oral evidence to show that the consideration for the assignment was less than that recited in the deed, was not admissible. (*Srinivasa Aiyangar, J.*). LODD GOVINDOSS KRISHNADOSS *v.* MUTHIAH CHETTY. **A.I.R. 1925 Mad. 660=48 M.L.J. 721.**

———*Parties need not appear on face of document—Receipt for rent.*

For the purposes of S. 92 it is immaterial whether the parties to a document appear as executants on the face thereof. Where a landlord gives a receipt for rent received from the tenant, the tenant is a party to the receipt though his name does not appear on the face of the receipt.

Recitals in receipts as to the period for which the payments were made do clearly evidence one of the terms of the contract and cannot be contradicted by oral evidence. (*Wazir Hasan, A.J.C.*). KUNWAR BEHARI LAL *v.* KALKA. **77 I.C. 695=25 O.C. 282=A.I.R. 1923 Oudh 45.**

—S. 92—Third parties.

———S. 92, which excludes evidence of any oral agreement modifying the written contract applies only as between the parties to the instrument and their representatives-in-interest. It does not preclude a person who is not a party to the instrument, from giving evidence, challenging the nature of the transfer: A. I. R. 1929 All. 659 and 43 Mad. 436, *Ref.*; A.I.R. 1925 Bom. 514 and A.I.R. 1926 Pat. 582, *Dist.* (*Sulaiman and Kendall, JJ.*). RAM SUNDAR MAL *v.* COLLECTOR OF GORAKPUR. **A.I.R. 1930 All. 798.**

———*Scope—Objection raised by third party—Court whether go into the same.*

S. 92 of the Evidence Act applies only to transactions *inter partes* and would not bar an enquiry at the instance of a third person whether the parties intended certain item to be transferred by the sale deed. (*Sulaiman and Kendall, JJ.*). GOPI NATH *v.* RUP RAM. **1930 A.L.J. 926.**

———S. 92 does not prevent proof of a fraudulent dealing with a third person's property, or

EVIDENCE ACT (1872), S. 92—Third parties.

proof of notice that the property purporting to be absolutely conveyed belonged to a third person, who was not a party to the conveyance.

Where a person conveys property to another but continues in possession under an oral agreement of repurchase such person can prove against his vendee's purchaser that the sale by the vendee was in fraud of his agreement of repurchase: A.I.R. 1917 P. C. 207, *Foll.*; 3 L.B.R. 100 (F.B.), *Not foll.* (*Pratt, Offg. C. J. and Ormistone, J.*). A MALAKYI *v.* KO PO NYEIN. **114 I.C. 676=6 Rang. 741=A.I.R. 1929 Rang 86.**

———What the section says is not between the parties to the contract but between the parties to the instrument, and therefore the section is no bar to the admission of evidence to show what the true nature of the written transaction was, at the instance of a third party, and evidence as to the third party's right cannot only be admissible but is most relevant: 4 N.L.R. 115; 27 Mad. 329; 28 All. 473 and A.I.R. 1917 P.C. 207, *Rel. on.* (*Kinkhede, A.J.C.*). SABHAJI *v.* NAWAL SINGH. **104 I. C. 736=10 N. L. J. 201=A. I. R. 1928 Nag. 4.**

———*Pre-emptor not debarred from showing the intention of the parties or the real nature of the transactions.*

As between the parties to the instrument, oral evidence of intention is not admissible for the purpose of construing the deeds or ascertaining the intention of the parties. But in a suit for pre-emption, a pre-emptor not being a party to the instrument cannot be debarred from adducing evidence to show the intention of the parties or the real nature of the transaction. 22 All. 149 (P.C.), *Rel. on.* (*Stuart, C. J. and Srivastava, J.*). MAHOMED ISHAK *v.* FAHI-UN-NISSA. **113 I C. 263=5 O W.N. 825=4 Luck. 68=A.I.R. 1928 Oudh 472.**

———*Transaction with a third party is not governed by the section.*

Plaintiff sold his land to *A* in satisfaction of a debt of Rs. 450. *A* was alleged to have agreed that he would at any time re-sell the land to the plaintiff at the same price. Later, *A* sold the land to the defendant who agreed with the plaintiff to be bound by the same terms as *A* and to reconvey the land to him at any time for Rs. 450. Plaintiff sued the defendants on the agreement to reconvey the land. The lower Court held that the plaintiff was barred by S. 92 from giving evidence to prove the agreement.

Held, that if the question related to the conveyance to *A*, then evidence was not admissible under S. 92. But as the plaintiff was not a party to the sale-deed executed by *A* in favour of the defendants, S. 92 did not apply and did not debar him from proving the agreement that he set up. A.I.R. 1917 P. C. 207, *Foll.* (*Carr, J.*). MAUNG THAN GYAUNG *v.* MAUNG PYU. **108 I.C. 734=5 Rang. 836=A.I.R. 1928 Rang. 61.**

———Subsequent oral agreement between *A* and *C* varying terms of deed between *A* and *B* is provable by *C* against *A*. (*Daniels, J.*). SURAJ PRASAD *v.* MAHESHWARI PRASAD. **96 I.C. 276 (All.).**

———*Vendee can give oral evidence in a pre-emption suit to explain the character of the sale-deed.*

In a suit for pre-emption against the vendee, the vendee can adduce evidence showing that a document which on its face purported to be a deed of sale was in reality a deed of relinquishment. Section 92 excludes the admission of any oral agreement or statement as between the parties to an instrument

EVIDENCE ACT (1872), S. 92—Usage.

or their representatives-in-interest, but the plaintiff in a pre-emption suit is not such a party. (*Lindsay and Sulaiman, JJ.*). BHULLEN SINGH *v.* KUSHI RAM. **79 I.C. 320=21 A.L.J. 932=5 L.R.A. Civ. 41=A.I.R. 1924 All. 229.**

———*Transaction with a third party—Evidence as to, is admissible.*

Whenever evidence is tendered as to a transaction with a third party it is not governed by S. 92 or by the rule of evidence which it contains, and in such a case the ordinary rules of evidence of equity and good conscience come into play unhampered by the statutory restrictions. (*Macleod, C. J. and Crump, J.*). TALAKCHAND BHERAJI *v.* ATMARAM KESHAV. **77 I.C. 342=25 Bom. L.R. 818=A.I.R. 1924 Bom. 58.**

———Evidence is admissible to show that a sale-deed is not in fact a sale-deed but only a mortgage-deed. Section 92 prohibits only parties. 44 I. A. 236, *Foll.* (*Macleod, C. J. and Crump, J.*). HIRAJI *v.* VISHULL. **79 I.C. 186=A.I.R. 1923 Bom. 429.**

———*Stranger to deed cannot plead condition precedent.*

Per *Das, J.*—A separate oral agreement constituting a condition precedent to the attaching of any obligation under the document could be proved only by the vendor or his representative-in-interest. 27 All. 271, *Foll.* (*Dawson-Miller, C. J., Das and Adami, JJ.*). BHONU LAL CHOUDHURY *v.* W. A. VINCENT. **65 I.C. 882=3 Pat. L.T. 653=A.I.R. 1922 Pat. 619.**

—S. 92—Usage.

———Evidence of an usage inconsistent with the terms of the contract is inadmissible though evidence of an usage increasing liability of a broker is admissible as consistent with the contract. (*Buckland, J.*). NANDA LAL ROY *v.* GURUPADA HALDAR. **81 I.C. 721=51 Cal. 588=A.I.R. 1924 Cal. 733.**

———*Custom that when due date falls on a holiday contract may be performed on the next working day can be proved.*

In the absence of statutory provision or trade custom or usage to that effect, the fact that the performance of a contract falls due on a holiday does not alter the rights of the parties. *Richardson* v. *Godard*, (1859) 23 Howard 28; 15 Bom. 338, *Foll.* Such mercantile usage, though it needs not either the antiquity, the uniformity or the notoriety of custom, must be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract. 7 M.I.A. 263 (P.C.) and *Gibson* v. *Small*, (1853) 4 H.L.C. 353, *Foll.* Consequently the usage of which evidence is received must not be repugnant to or inconsistent with the written contract. *Brown* v. *Byrne*, (1854) 3 El. and Bl. 703 and *Ross* v. *Shaw*, (1917) 2 Ir. Rule 367, *Foll.*

But in order that the material incidence which it is sought to annex should fall within the exception of repugnancy, the incident must be such as if expressed in the written contract, would make it insensible or inconsistent or thoroughly unreasonable. (English cases referred).

The mere fact that the usage varies the apparent contract is not of itself sufficient to exclude the evidence, for it is manifestly impossible to add any material incident to the written terms of a contract without altering its effect, more or less. The test is whether the incident, if expressed in the written contract, would make it insensible or inconsistent or unreasonable. (*Mookerjee, A.C.J. and Fletcher, J.*). KASIRAM PANIA *v.* HURNUNDROY FULCHAND. **26 C.W.N. 354=A.I.R. 1921 Cal. 809.**

EVIDENCE ACT (1872), S. 92—Usage.

———*Dowls expressly excluding transferability—Custom of transferability cannot be proved.*

Any evidence designed to show customary incidents of tenure as attaching to the jotes must be rejected if and so far as it conflicts with what is contained in the dowls themselves.

Where the dowls contain an express statement that there is no right of sale, gift or transfer without the landlord's consent in face of this, it is impossible to admit evidence of a custom of transferability in the jotes. (*Greaves and Newbould, JJ.*). MAHOMED AYEJUDDIN MEA *v.* PRODYOT KUMAR TAGORE. **61 I.C. 503=48 Cal. 359=25 C.W.N. 13=A. I. R. 1921 Cal. 741.**

—S. 92—Variation of terms.

———*By proviso 4, oral evidence, varying or modifying terms of a written contract, is entirely inadmissible.*

Under proviso 4, in certain cases, a subsequent oral agreement to modify any previous contract may be proved, but this is not permitted where the law requires that the terms of the contract should be reduced into writing, as in the case of a mortgage or where the terms of the contract have been registered. By proviso 4 oral evidence is entirely inadmissible to vary or modify the terms of such a contract.

Where the defendants pleaded that some time before any payment was made, an oral agreement with the plaintiffs was reached by which they (plaintiffs) were to receive, in full satisfaction of the mortgage deed, less money than was due to them under the mortgage bond.

Held, that the oral agreement set up on behalf of the defendant is calculated te vary the terms of the written instrument by trying to establish that although the plaintiffs were entitled to something under the terms of the mortgage, they were not entitled to it by virtue of a subsequent oral agreement, and that S. 92 was a bar to the plea. 42 Mad. 41 and 119 I.C. 92, *Rel. on.* (*Mukerji, Banerji and Young, JJ.*). COLLECTOR OF ETAH *v* KISHORI LAL. **A. I. R. 1930 All. 721 (F.B.).**

———*Interpretation—Oral evidence to prove satisfaction of debt by part payment and remission of reminder is admissible.*

Section 63, Contract Act, has nothing to do with the interpretation of S. 92, Evidence Act. In some cases, where the promisee exercises any of his privileges given him under S. 63, Contract Act with the consent of the promisor the act may amount to a variance, etc., of the terms of the original contract and in that case, unless the variance is made by a document in writing, evidence would not be admissible to prove the fact. For example, where the mortgagee agrees to extend the time for payment, if the promise is merely oral and if the mortgage is by a registered document, the promise cannot be proved by oral evidence. But in the case of a satisfaction of the debt or remission of a part of the debt there is no contradicting, or varying, or adding to, or subtracting from the terms of the contract, and oral evidence may be adduced to prove the payment of a part of the debt and remission of the balance. For in that case, it would not be the plea of the mortgagor that the mortgagee is not entitled to the whole of his money. On the other hand his plea would amount to this, that although the mortgagee was entitled to the whole of his money he, in consideration of prompt payment of a certain amount (and for other possible considerations) agreed to accept a part in satisfaction of the full promise. 44 Bom.55, *Diss.from*; A.I.R. 1926 All. 445, *Expl.*: A.I.R. 1928 Bom. 522; A.I.R. 1928 Mad. 233 and A.I.R. 1926 All. 693, *Discussed.* (*Mukerji, Banerji and Young, JJ.*). COLLECTOR OF ETAH *v.* KISHORI LAL. **A.I.R. 1930 All. 721 (F.B.).**

EVIDENCE ACT (1872), S. 92—Variation of terms.

———*Subsequent oral agreement modifying written contract cannot be proved by oral evidence.*

A subsequent oral agreement to take less than is due under a registered mortgage-bond is an agreement modifying the terms of a written contract, and if it has to be proved, oral evidence is inadmissible under S. 92, prov. 4. 42 Mad. 41 and 44 Bom. 55, *Foll.* (*Zafar Ali and Jai Lal, JJ.*). GHANAYALAL *v.* RALLIA RAM. **110 I.C. 424=9 Lah. 597=30 P.L.R. 46=A.I.R. 1928 Lah. 873.**

———*A document which cannot be said to be a variation of a mortgage bond is admissible.*

A leased certain property to *B* and also executed a mortgage of the same property to him. The mortgage bond contained a covenant that unless credit entry was made therein in respect of payments of amounts which might be made on account of the bond, a statement that they had been made otherwise would not be sustainable. On the same date *B* executed a varthamanam to *A* agreeing to pay a certain sum out of rents for charity, to pay the kist, and to credit the balance of the rents towards the bond. *A* alleged that *B* failed to pay the amount for charity and assessment due in respect of the land and that by crediting the rents as provided for in the varthamanam towards the mortgage-bond, the bond was fully discharged and therefore he instituted the suit for taking accounts in respect of the lease and the mortgage bond, for the recovery of the land and some other reliefs. The Trial Court dismissed the suit, holding that the varthamanam was inadmissible in evidence,

Held, that the varthamanam was admissible in evidence as it cannot be said to be a variation of the mortgage bond.

If the parties had intended actual cash payments to be the only method of discharge, then they would not have with the provision in mind, executed on the same date the varthamanam which provides for a different method of discharge. (*Madhavan Nair and Curgenven, JJ.*). RAMANATHAN CHETTIAR *v.* V. Ry. SETHURAMA MADIGE. **107 I.C. 808=27 M.L.W. 47=A.I.R. 1928 Mad. 382.**

———Evidence of statements made at the time of execution of will cannot be admitted for the purpose of varying the terms of the will. (*Macnair, A.J.C.*). GOVIND *v.* CHINTAMAN. **105 I.C. 840=A.I.R. 1928 Nag. 55.**

———*Two separate sale-deeds by both parties—Evidence to show the transaction to be exchange is admissible.*

Extrinsic evidence is admissiblo for the purpose of showing that two documents, though purporting to be separate sale-deeds, are in reality part and parcel of the same transaction, which, was one of an exchange. Such evidence which shows that two documents executed and registered on the same date are part and parcel of one transaction and in fact represent only one transaction, does not amount to leading evidence so as to vary the terms of a document. (*Sulaiman and Banerji, JJ.*). KISHEN LAL *v.* RAM LAL. **103 I.C. 399=25 A.L.J. 723=A.I.R. 1927 All. 696.**

———Oral evidence is not admissible to show that one of the executants of a money bond signed only

EVIDENCE ACT (1872), S. 92—Variation of terms.

as surety : 8 C.W.N. 101 and 2 U.B.R. 13, *Foll.* (*Doyle, J.*). MAUNG KO GYI *v.* U. KYAW.
103 I.C. 79=5 Rang. 168=
A.I.R. 1927 Rang. 199.

———Executant cannot plead that a different rate from that contained in the deed was agreed to. (*Stuart, C. J. and Misra, J.*). SUKU LAL *v.* MURARI LAL.
95 I.C. 1019=1 Luck. 160=
13 O.L.J. 95=3 O.W.N. 248=
A.I.R. 1926 Oudh 273.

———There is no reason in S. 92 of the Act why the fact whether in case of a joint contract both or either of the workmen have actually, or constructively received all or part of the advance should not be proved, since the fact that one of two joint contracting parties actually receives the consideration does not necessarily involve that he does not receive it as regards part or whole as the agent of the other and a finding to that effect will not necessarily involve any variaion of the terms of the contract. (*Oldfield and Devadoss, JJ.*). KANDASWAMI MUDALI *v.* GURUSWAMI PILLAI.
71 I.C. 61=16 M.L.W. 883=
31 M.L.T. 475=24 Cr. L.J. 13=
A.I.R. 1923 Mad. 184=44 M. L.J. 53.

———Where a bond is executed by 3 persons, one cannot show by oral evidence that he is only a guarantor for the other debtors. (*Maung Kin, J.*). MAUNG KYA *v.* A. P. R. PERIA KURPON CHETTY.
70 I. C. 872=1 Bur. L.J. 157=
A.I.R. 1923 Rang. 15.

—S. 92—Miscellaneous.

———The question whether a specification of a prior invention describes the invention claimed by the subsequent inventor is a question of construction and parol evidence is only admissible for the purpose of explaining words or symbols of art and other such like technical matters, and of informing the Court of relevant surrounding circumstances. (*Lord Warrington of Clyffe*). CANADIAN GENERAL ELECTRIC CO., LTD. *v.* FADA RADIO, LTD.
124 I.C. 569=31 M.L.W. 126=
A.I.R. 1930 P.C. 1 (P.C.).

———Covenant for title under S. 55 (2), T. P. Act—Contract to the contrary—Whether can take shape of oral agreement. (*Sulaiman, J.*). MAHOMED SIDDIQ *v.* MUHAMMAD NUH.
124 I.C. 185=
1930 A.L.J. 653.

—S. 93—Conflict.

———*Conflict between recitals and diagram forming part of description of property—Rule that recitals will prevail does not apply.*

Where, in a grant of land there is a repugnancy between the terms of the grant and any plan or diagram, the general rule is that the former will prevail. But where the plan of boundary is a part and parcel of the description itself the general rule ceases to apply.

Where a deed of conveyance contained an ambiguity as to the description of the property conveyed one portion of it referring to the entire house and another portion, only to a portion of the house but both read together did apply correctly either to the whole house or to a portion of it,

Held, the case is within Section 97 of the Act and extrinsic evidence is admissible for the purpose of solving the question whether by the description of the property taken as a whole the intention is to convey the house in its entirety or only a portion of it. The principle that when an instrument contains an ambiguity, evidence of user under it may be given to show the sense in which the parties

EVIDENCE ACT (1872), S. 93—Vakalatnama.

used the language employed, applies to a modern as well as to an ancient instrument, and where the ambiguity is patent as well as where it is latent. (*Wazir Hasan, A.J.C.*). ABDUL GHANI *v.* ASHIQ HUSAIN.
66 I.C. 442=8 O.L.J. 521=
A.I.R. 1922 Oudh 162

—S. 93—Conflicting statements.

———Extrinsic evidence is admissible for explaining apparently conflicting statements in the body of a document and in the Schedule thereto. (*Mr. Ameer Ali.*) HUSSONALLY SULLEMANJI *v.* TRIBHOWANDAS MONGALDAS NATHUBHAI.
61 I.C. 361=25 C.W N. 385=
1920 M.W.N. 726=A.I.R. 1921 P.C. 40 (P.C.).

—S. 93—Construction.

———Deed—Construction—Ambiguous deed may be construed in the light of parties' conduct, but unambiguous deed should not be so construed. (*Mookerjee, A. C. J. and Fletcher, J.*). MIDNAPUR ZEMINDARI CO., LTD. *v.* JOGENDRA KUMAR BHAUMIK.
62 I. C. 491=33 C. L. J. 186=
A. I. R. 1921 Cal. 750.

—S. 93—Defective language.

———Where the language of a document is defective, oral evidence is inadmissible under S. 93 to supply such defects. (*Wallis, C. J. and Oldfield, J.*). NARASINGIRJI GYANAGIRJI *v.* PARTHASARADHI RAYANIM GARU.
1921 M. W. N. 519=
A.I.R. 1921 Mad. 498.

—S. 93—Elucidation.

———Where the instrument is plain and unequivocal, evidence of conduct cannot be received for elucidating its terms : 30 Cal. 738 (P. C), *Foll.* (*Venkatasubba Rao, J.*). BABU *v.* GOKULDOSS GOVARDHANDOSS.
112 I. C. 184=
28 M.L.W. 824=A.I.R. 1928 Mad. 1064=
55 M. L J. 132.

—S. 93—Meaning not clear.

———Contract—Construction—Meaning of words in document not clear—Court may consider prior negotiations for determining meaning : 3 Bom. 186, *Foll.* (*Devadoss and Mackay, JJ.*). SECRETARY OF STATE *v.* ABDUL RAHIM.
114 I. C. 626=
1928 M. W. N. 763=A. I. R. 1928 Mad. 1246.

—S. 93—Patent ambiguity.

———*When other evidence is not admissible.*

Where a mortgage deed was admittedly ungrammatical and could not be read literally so as to give any clear meaning and in order to arrive at the construction both the parties had to supply or remove some words from the document as it stood,

Held, there was a patent ambiguity in the deed and under S. 93 of the Evidence Act no evidence was admissible to supply the defect. (*Daniels and Neave, JJ.*). RAM GANESH *v.* B. RUP NARAIN RAI.
80 I. C. 944=5 L. R. A. Civ. 542=
A. I. R. 1925 All. 34.

—S. 93—Sale certificate.

———Where the sale certificate is ambiguous, the Court is entitled to look into the surrounding facts and its conclusion upon those facts would be binding in second appeal. (*Das and Ross, JJ.*). LACHMI PRASAD TEWARI *v.* BALUNANDAN SINGH.
88 I. C. 399=1924 P.H.C.C. 271=
3 Pat.L.R. Civ. 107=A.I.R. 1924 Pat. 805.

—S. 93—Vakalatnama.

———Vakalatnama *without pleader's name but bearing his signature.*

Where a *vakalatnama* did not contain the name of the pleader after the word ' Mr. ' in the printed form but bore the signature of the party as well as that of the pleader,

EVIDENCE ACT (1872), S. 94—Misdescription.

Held, that the ambiguity in the document was not a patent ambiguity such that S. 93 would exclude evidence to explain it, but the ambiguity may be cleared up by extrinsic evidence under S. 96 of the Act. (*Hallifax, A.J.C.*). MAHARASHTRA JNAN KOSH MANDAL LTD. *v.* BIJJULAL.
71 I.C. 436=19 N.L.R. 36=6 N.L.J. 100= A.I.R. 1923 Nag. 182.

—S. 94—Misdescription.

——In cases of misdescription S. 94, Evidence Act, can have no application. (*Kinkhede, A.J.C.*). SABHAJI *v.* NAWALSINGH. **104 I.C. 736= 10 N.L.J. 201=A.I.R. 1928 Nag. 4.**

—S. 94—Mutual mistake.

——Where the dispute is not as to existing facts but is as to what is intended by the parties to be done by them in future, S. 94 does not apply and mutual mistake of fact can be proved. (*Jai Lal, J.*). DALIP SINGH *v.* DALIP SINGH. **122 I.C. 493= A.I.R. 1930 Lah. 446.**

—S. 95—Latent ambiguity.

——Where a mortgagee transferred the mortgaged property and there was no mention in the deed that only mortgage rights were intended, to be transferred, the mere fact that it is mentioned in the deed that the property stood in the *khata* of the mortgagor and that there is an indemnity clause cannot justify the contention that only mortgage rights were intended; and if the absence of any assertion in the deed of absolute ownership on the part of the vendor mortgagee makes it possible to hold that mortgagee's rights were sold, there is a latent ambiguity to remove which evidence can be given: 14 M.I.A. 1 (P.C.), *Rel. on.* (*Jackson, A.J.C.*). DAULAT *v.* BALIRAM. **118 I.C. 682= A.I.R. 1929 Nag. 267.**

——*Evidence to clear it admissible.*

When a description is partly correct and partly incorrect and the former part is sufficient to identify the subject-matter intended while the latter does not apply to any subject, the erroneous part will be rejected on the maxim that a false description will not hurt when it can exist with the subject itself. Where the language of a will, though plain in itself, had no meaning with reference to existing facts, evidence can be let in to show how the error arose. (*Raymond and Madgavkar, A.J.Cs.*). NARAINDAS *v.* TEKCHAND. **84 I.C. 137= A.I.R. 1923 Sind 42.**

—S. 95—Misdescription.

——*Evidence is allowed to correct misdescription.*

Where property mortgaged was wrongly written in the bond as Touzi No. 1 in place of Touzi No. Y.

Held, that the plaintiff in a suit to enforce the mortgage can adduce evidence to show that there was a misdescription. (*Jwala Prasad and Ross, JJ.*). MT. WAJIHANNISSA BEGUM *v.* VALMIKI SAHAY. **71 I.C. 589=1 Pat L.R. 80= A.I.R. 1924 Pat. 359.**

—S. 95—Payment of interest.

——*Evidence can be allowed to show that interest is payable monthly when document is silent.*

Under the provisions of S. 95 or S. 98 evidence can be allowed to show that the rate of interest specified in certain deeds is payable monthly, when the deeds are silent. (*Shadi Lal, C. J. and Tapp, J.*). TEJA SINGH *v.* SANT SINGH. **121 I.C. 75=30 P.L.R. 741= A.I.R. 1930 Lah. 144.**

——Where a compromise decree provides for interest at 2 per cent. but it is ambiguous whether it is monthly or annually, the Court may hear evidence as to the ordinary meaning of those expressions in documents of that nature. (*Walmsley and Greaves, JJ.*). MOHAMED MASER MAHOMED MEA *v.* ZAFUR MAHOMED. **62 I.C. 702 (Cal.).**

EVIDENCE ACT (1872), S. 98—Dispute about meaning.

—S. 96—Latent ambiguity.

——*Extrinsic evidence is admissible.*

When an instrument appears on its face to be free from ambiguity but upon the endeavour being made to apply it to the persons or things indicated, it transpires that the words are equally applicable to two or more persons or to two or more things there is a latent ambiguity. In such a case extrinsic evidence has created the ambiguity and extrinsic evidence is admissible to resolve it and direct evidence of intention may be given for the purpose of ascertaining which of the several persons or things to whom the words are applicable was intended to be connoted. (*Mookerjee and Chotzner, JJ.*). CHAIRMAN SERIAGANJ MUNICIPALITY *v.* CHITTAGONG COMPANY, LTD. **72 I.C. 696= 36 C.L.J. 242=A.I.R. 1923 Cal. 32.**

—S. 96—Vakalatnama.

——*Vakalatnama without pleader's name but bearing his signature—Extrinsic evidence admissible.*

Where a vakalatnama did not contain the name of the pleader after the word Mr. in the printed form but bore the signature of the party as well as that of the pleader,

Held, that the ambiguity in the document was not a patent ambiguity such that S. 93 would exclude evidence to explain it, but the ambiguity may be cleared up by extrinsic evidence under S. 96 of the Act. (*Hallifax, A.J.C.*). MAHARASHTRA JNAN KOSH MANDAL LTD. *v.* BIJJULAL.
71 I.C. 436=19 N.L.R. 36=6 N.L.J. 100= A.I.R. 1923 Nag. 182.

—S. 97—Applicability.

——*Conflict between recitals and diagram forming part of description of property—Rule that recitals will prevail does not apply—Ambiguity—Evidence to solve it is admissible whether it is patent or latent.*

Where, in a grant of land there is a repugnancy between the terms of the grant and any plan or diagram, the general rule is that the former will prevail. But where the plan of boundary is a part and parcel of the description itself, the general rule ceases to apply

Where a deed of conveyance contained an ambiguity as to the description of the property conveyed one portion of it referring to the entire house and another portion, only to a portion of the house but both read together did apply correctly either to the whole house or to a portion of it,

Held, the case is within S. 97 of the Act and extrinsic evidence is admissible for the purpose of solving the question whether by the description of the property taken as a whole the intention is to convey the house in its entirety or only a portion of it. The principle that when an instrument contains an ambiguity, evidence of user under it may be given to show the sense in which the parties used the language employed, applies to a modern as well as to an ancient instrument, and where the ambiguity is patent as well as where it is latent. (*Wazir Hasan, A.J.C.*). ABDUL GHANI *v.* ASHIQ HUSAIN. **66 I.C. 442=8 O.L.J. 521= A. I. R. 1922 Oudh 162.**

—S. 98—Dispute about meaning.

——Where the point in dispute, is as to the meaning of a particular word in the document oral evidence may be admitted under S. 98. (*Newbould and Cuming, JJ.*). DINANATH DAS *v.* GOPAL CHANDRA DAS. **67 I.C. 90=A.I.R. 1923 Cal. 309.**

EVIDENCE ACT (1872), S. 98—Special usage.

—S. 98—Special usage.

———*Oral evidence—Meaning of words used in a particular locality.*

Where in a deed words in use in particular locality in a peculiar sense are employed, oral evidence is admissible under S. 98 of the Evidence Act to explain the meaning of the words in question. (*Rafique and Stewart, JJ.*). CHIDDU *v.* MESSRS. CAREW & CO., LTD. **63 I.C. 138= 3 U.P.L.R. (All.) 199.**

———*Words not ambiguous—Evidence of special usage giving them a peculiar meaning is admissible.*

Various words in written documents which *prima facie* present no ambiguity may be interpreted by extrinsic evidence of usage; and their peculiar meaning, when found in connection with the subject-matter of the transaction, may be fixed by parol testimony.

Evidence is admissible to show that the term (San) does not signify the Bengali year which commences on the first day of Baisakh and ends on the last day of Chaitra but a different period specially applicable to jalkar tenancies. (*Mookerjee and Panton, JJ.*). JYOT KUMAR *v.* JADU NATH. **64 I.C. 693=34 C.L.J. 160=26 C.W.N. 1022= A. I. R. 1921 Cal. 122.**

—S. 99—Deed of conveyance.

———*Conveyance—Contemporaneous oral agreement proved by person not actual party to the deed.*

As between the actual parties to an outright conveyance a contemporaneous oral agreement to allow re-purchase cannot be proved, but if the party who alleges the contemporaneous oral agreement was not actually a party to the conveyance (although the conveyance was given on his behalf) he can prove that there was such an agreement. A. I. R. 1928 Rang. 58, *Dist.*; A. I. R. 1917 P. C. 207, *Rel. on.* (*Heald and Maung Ba, JJ.*). MA MI *v.* MAUNG AUNG DUN. **111 I.C. 832= 6 Rang. 376=A.I.R. 1928 Rang. 244.**

—S. 99—Mortgage.

———In a suit on a mortgage the mortgagors are estopped from disputing that they have not got the interest which they said they had and which the mortgagees bargained for. But it is open to third parties to state and prove what that interest is and to say that the mortgagors have no interests or have lesser interests than those prescribed for in the mortgage. (*Kumaraswami Sastri and Venkatasubba Rao, JJ.*). RUKMANI AMMAL *v.* ANKAMA NAIDU. **96 I.C. 26=23 M.L.W. 664= 1926 M.W N. 938=A.I.R. 1926 Mad. 744.**

———*Mortgage—Stranger can prove subsequent oral agreement between mortgagee and himself.*

Where properties were mortgaged by the defendant to the plaintiff and subsequently certain items of the mortgaged property were bought by another and there was an oral agreement between the purchaser and the plaintiff by which the plaintiff agreed to release the items sold to the purchaser,

Held, that in a suit by the plaintiff on the mortgage the purchaser would not be precluded from proving the oral agreement. 27 Mad. 368, *Ref. to.* (*Venkatasubba Rao, J.*). SRI SAILAM *v.* BHUSHAYYA. **87 I.C. 246=1925 M.W.N. 214= A.I.R. 1925 Mad. 775=48 M.L.J. 280.**

—S. 99—Pre-emption.

———It is open to the plaintiff in a pre-emption suit to show from circumstantial or oral evidence that the real transaction was one of a sale and not a mortgage; S. A. No. 485 of 1925, *Rel. on.* (*Sulaiman and Mukerji, JJ.*). SHEIK USMAN *v.* MOHAMMAD SHAFI KHAN. **98 I. C. 989= A.I.R. 1927 All. 204.**

—S. 99—Waqf.

———*Persons not claiming through settlor can show that waqf was illusory.*

A person who does not claim through the settlor is entitled to challenge the validity of a waqf on the ground that it was merely an illusory transaction never intended to be acted upon. 31 M. L. J. 431, *Foll.*; 10 C W.N. 449, *Dist.* and *Expl.*

Purchasers of some portion of the properties alleged to waqf at a sale for arrears of Government revenue are not persons claiming under the settlor. (*Chatterjee and Panton, JJ.*). HAMMAT ALI *v.* NOBENDRA KISHORE. **A.I.R. 1928 Cal. 233.**

—Ss. 101 to 103.

EVIDENCE ACT (1872), Ss. 101 to 103.

Admission.
Adoption.
Adverse possession.
Affirmation of fact.
Alluvion and Diluvion.
Ancestral Property.
Appeal.
Assets
Bailment.
Benami.
Carrier.
Compromise.
Condition.
Consideration.
Contract.
Criminal Trial.
Custom.
Declaration.
Duty of Court.
Ejectment.
Execution of decree.
Execution of document.
Exception to rule.
Fraud.
Genuineness.
Grant.
Jurisdiction.
Landlord and tenant.
Legal necessity.
Limitation.
Material alteration.
Minority.
Mortgage.
Negligence.
Negotiable instruments.
Notice.
Objection to onus.
Omission to discharge onus.
Onus immaterial.
Pardanashin Lady —*See* PARDANASHIN LADY.
Partition.
Possession.
Presumption.
Recitals.
Record-of-Rights.
Scope of.
Shifting of onus.
Special agreement.
Special plea.
Suit for profits.
Title.
Under influence.
Vendor and Purchaser.
Will.

EVIDENCE ACT (1872), Ss. 101 to 103—Admission—Execution.

—Ss. 101 to 103—Admission—Execution.

———*Admission by one defendant—Not conclusive against others.*

Where one of the defendants admits the execution of the bond alleged to be executed by all the defendants jointly, in respect of a partnership, such an admission is not conclusive, but it amounts to presumptive proof of the allegation of the plaintiff, and, therefore, the burden should be placed on the defendants to prove the non-existence of a partnership. (*Jai Lal, J.*). GULAB RAM *v.* GANGA SARUP. **93 I. C. 309=27 P. L. R. 160= A. I. R. 1926 Lah. 299.**

———*Execution admitted—Onus of proving it fictitious.*

The execution and registration of the document being admitted if the defendant makes the allegation that the document had been executed merely for show and was purely fictitious the burden of proof rests upon him. (*Lindsay and Kanhaiya Lal, JJ.*). CHAIDDU *v.* DESRAJ. **77 I. C. 753= 21 A. L. J. 793=5 L. R. A. Civ. 55= A. I. R. 1924 All 294.**

———*Thumb impression admitted — Knowledge of contents cannot be presumed.*

When a party admits his subscription or thumb impression borne on any document he ought not to be presumed necessarily to have put it upon that document with full knowledge of its contents and the burden still lies on the party relying on the document to prove the execution and passing of the consideration. 13 N. L. R. 121; A.I.R. 1922 All. 401 (1), *Foll.* (*Kinkhede, A.J.C.*). DEVIDAS *v.* MAMOOJI. **78 I. C.104=20 N.L.R. 7= A.I.R. 1924 Nag. 103.**

—Ss. 101 to 103—Admission—Gift.

———*Plea of* benami *onus.*

Where a party had admitted the gift by *A* to *B* and the transaction is undisputed for several years even after the death of *A*.

Held, that the burden of proving the transaction was fictitious lies heavily on the party and is not discharged by proving that the donor managed the property especially where the donee was almost illiterate. (*Daniels and Lyle, A. J. Cs.*). MT. ANJUMAN-UN-NISA *v.* SHAIK ASHIG ALI. **66 I. C. 222=8 O. L. J. 439= A.I.R. 1922 Oudh 178.**

—Ss. 101 to 103—Admission—Lost bond.

———*Execution denied—Alternative plea of payment does not amount to admission.*

Where in a suit on a mortgage bond alleged to be lost the defendant denies execution, his alternative plea of payment does not amount to an admission of the mortgage sufficient to relieve the plaintiff from proving the loss of the original deed, and to entitle him to sue upon a copy of it. 11 A.L.J. 255, *Foll.*; 11 A.L.J. 734, *Diss. from.* (*Walsh and Pullan, JJ.*). MD. ZAFAR *v.* ZAHUR HUSAIN. **97 I.C. 82=49 All. 78=24 A.L.J. 964= A.I.R. 1926 All. 741.**

—Ss. 101 to 103—Admission—Partnership.

———*By one partner—Onus of proving it as not binding on others.*

Plaintiff sued defendants for recovery of a sum of money said to be due to him in respect of labour supplied to them. He alleged that accounts of labour supplied were settled and the sum of money was found due to him and produced a document signed by a partner in defendants' business saying the balance claimed in respect of labour was due to plaintiff.

EVIDENCE ACT (1872), Ss. 101 to 103—Adverse possession.

Held, that it was an admission and it was for the defendants to prove that such an admission was obtained from them under circumstances which would prevent its being legally binding upon them. A. I. R. 1927 Rang. 318, *Cons.* and *Dist.*; A.I.R. 1925 Lah. 471, *Rel. on.* (*Otter, J.*). FONTYNE & CO. *v.* S. C. APPANNA. **A.I.R. 1929 Rang. 263.**

—Ss. 101 to 103—Admission—Prior suit.

———*Shifts burden of proof.*

B sued *W* to recover a sum of money wrongly paid to him. *W's* admission in a previous suit between *B* and a third person that he had received the money from *B* was proved against him. In the present suit *W* pleaded that he had not received the money and that the receipt executed by him in favour of *B* was obtained from him under undue influence.

Held, that *W's* admission in the previous suit shifted the burden of proving non-receipt of the money and existence of undue influence on *W*. (*Broadway and Campbell, JJ.*). WASAKHI RAM *v.* HUSSAIN KHAN. **75 I.C. 1027= A.I.R. 1924 Lah. 650.**

—Ss. 101 to 103—Adoption.

———*Onus of proving legality.*

It is for the party who alleges adoption to prove an adoption to be legal according to the Hindu Law. (*Chevis, J.*). HIRA *v.* HARDAT SINGH. **68 I.C. 763=47 P.L.R. 1922= A.I.R. 1923 Lah. 26.**

—Ss. 101 to 103—Adverse possession.

———*Title admitted—Proof of possession—Onus on the trespasser.*

Where the plaintiff brings a suit on the basis of his title which is admitted, it is not for him to prove possession on his own part within twelve years, but it is for the trespasser to prove his adverse possession. A. I. R. 1926 Oudh 313; A. I.R. 1916 P.C. 121; A. I. R. 1921 Bom. 368, *Ref.* (*Pullan, J.*). FAKIR BAKHSH SINGH *v.* PRAG SINGH. **108 I.C. 109=5 O.W.N. 121= A.I.R. 1928 Oudh 246.**

———*Suit for redemption—Mortgagee in long possession—Plea of outright sale—Onus to prove how possession passed is on plaintiff*

A person effected a simple mortgage of the land in favour of another person and his deceased wife by a registered deed. About a year later, the mortgagor was unable to pay the interest on the mortgage and possession of the land was given to the mortgagee. Mortgagors' heirs sued for redemption of the mortgage of the land which was in possession of the mortgagee for over 20 years. Mortgagee alleged that the land was made over to him outright by way of sale.

Held, that the burden of proof as to the nature of the original transaction rests on the plaintiff. If they cannot prove how possession passed, no presumption that the possession was not adverse can be drawn. A.I.R. 1925 Rang. 377 and A.I.R. 1927 Rang. 33 (F.B.), *Expl.*; 5 L.B.R. 40, *Doubted.*

Rutledge, C.J.—In cases of long possession the onus should be on the party out of possession. In cases, however, where the possession has been less than 12 years, and where the title of the previous owner is admitted, the onus may properly be put on the person in possession who alleged an outright sale. (*Rutledge, C.J. and Brown, J.*). MAUNG PWA *v.* MAUNG PO SA. **107 I.C. 165= 5 Rang. 668=A. I. R. 1928 Rang. 44.**

EVIDENCE ACT (1872), Ss. 101 to 103—Adverse possession.

———*Onus on him who set up.*

In a case where the suit is resisted on the ground of acquisition of title by prescription it is not for the plaintiff to prove his title within 12 years. It is for the defendants to prove his adverse proprietary title. 39 Mad. 670; 17 A.L.J. 84, *Foll.* (*Gokul Prasad, J.*). L. RAGHA MAL *v.* ABDUS SATTER. **74 I.C. 879=A.I.R. 1923 All. 565.**

———*Reversioner of persons previously in possession—Title presumed.*

Where the plaintiff was a reversioner of the persons who were previously in possession of the property.

Held, that title was with them and it is for the defendants who seek to avoid that title on a plea of adverse possession to establish it. (*Daniels, J.*). CHITU *v.* CHARAN SINGH. **77 I.C. 705=A.I.R. 1923 All. 563.**

———*Onus on him who sets up.*

Where plaintiffs are in possession as having some title to the lands, in a suit by them for declaration of ownership and injunction it is for defendants to prove adverse possession for 12 years. (*Macleod, C. J. and Crump, J.*). GAVARAVA GAUDAPPA *v.* MALLANGOWDA CHANAGOWDA PATIL. **76 I.C. 559=A. I. R. 1923 Bom. 382.**

—Ss. 101 to 103—Affirmation of fact—Absence of authority.

———*Onus on principal.*

It was for the landlord to prove that the agent acted outside the powers given to him. (*Teunon and Newbould, JJ.*). AKHOY KUMAR GOSH *v.* ERADATULLA KAZI. **64 I.C. 823 (Cal.).**

—Ss. 101 to 103—Affirmation of fact—Authority to receive.

———*Payment to 3rd party*—Onus *on debtor.*

It is elementary law that when a creditor sues the debtor for the payment of a debt and the defence is that the debtor paid the debt to another person, it is for the debtor to prove that the other person had or had been held out to the debtor by the creditor as having had the authority of the creditor to receive payment of the debt on behalf of the creditor. (*Sir John Edge.*) MUHAMMAD KHALEEF SHIRAZI AND SONS *v.* LES TANNERIES LYONNAISES. **94 I.C. 767=49 Mad. 435=53 I.A. 84=3 O.W.N. 568=1926 M.W.N. 495=24 M.L.W. 115=44 C. L.J. 67=28 Bom. L.R. 1391=31 C.W.N. 1=A.I.R. 1926 P.C. 34=51 M.L.J. 570 (P.C.).**

—Ss. 101 to 103—Affirmation of fact—Bona fides.

———Where a person sets up the plea that he is a *bona fide* transferee, he is bound to prove it. (*Batton, J.C.*). MT. KASTURI BAI *v.* BALIRAM. **68 I.C. 732=A.I.R. 1923 Nag. 15.**

—Ss. 101 to 103—Affirmation of fact—Circumstances alleged.

———*Transfers attacked—Onus on plaintiff.*

In a suit attacking transfers of property the burden is on the plaintiff of establishing the attacks. (*Lord Phillimore.*) BAL KISHEN *v.* RAM CHARAN. **113 I.C. 479=29 M.L.W. 579=A.I.R. 1929 P.C. 296=56 M.L.J. 172 (P.C.).**

———*Execution proved—Plea of not binding—Onus.*

When once the execution of a document is proved, if a party alleges circumstances that would make the document not binding on him, it is for him to prove such circumstances. (*Ananthakrishna Iyer, J.*). KRISHNA KURUP *v.* VEERAN KUTTY. **116 I.C. 143 (Mad.).**

EVIDENCE ACT (1872), Ss. 101 to 103—Affirmation of fact—Knowledge.

———*Decree not binding onus to prove.*

Where it was the case of a creditor of the deceased person instituting a suit making as defendant in the action a person who, but for the will would have been the proper legal representative, then it follows that the burden is upon the legal representative to show the circumstances under which or the reasons for which that decree is not binding. (*Srinivasa Aiyangar, J.*). KOLARAMATHU AMMA *v.* MADHAVI AMMA. **108 I.C. 409=1927 M.W.N. 894=A.I.R. 1928 Mad. 243.**

—Ss. 101 to 103—Affirmation of fact—Consent.

———*Consent to a compromise.*

The burden of proving consent to a compromise to set aside which a suit is brought lies on the defendant. (*Lord Atkinson.*) SARATKUMARI *v.* AMULYADHAN. **71 I.C. 632=17 M.L.W. 481=27 C.W.N. 629=25 Bom. L. R. 548=37 C. L. J. 501=1923 M. W. N. 392=32 M. L. T. 137=A.I.R. 1923 P.C. 13 (P.C.).**

—Ss. 101 to 103—Affirmation of fact—Date of document.

———*Plea that a document was ante-dated—Onus.*

The onus of showing that a document duly executed and registered and dated was ante-dated is on the party alleging that it was ante-dated. 44 Cal. 622, *Foll.* (*Spencer, O. C. J. and Kumaraswami Sastri, J.*). KRISHNAMURTHY AIYAR *v.* KRISHNAMUTHY AIYER. **85 I.C. 882=1925 M W.N. 632=A.I.R. 1925 Mad. 932=49 M.L.J. 252.**

—Ss. 101 to 103—Affirmation of fact—Expenditure.

———*Deductions for expenditure claimed—Each item to be proved.*

In a suit for profits when certain deductions are to be made from the gross income for expenditure it is for the defendant to prove each item of expenditure alleged by him and not admitted by the plaintiff, with proper accounts and vouchers. (*Hallifax, A. J. C.*). NARAYANDAS *v.* RADHABAI. **93 I.C. 196=9 N.L.J. 7=A I.R. 1927 Nag. 62.**

—Ss. 101 to 103—Affirmation of fact—Inclusion in holding.

———*Suit for possession—Onus on plaintiff.*

In a suit for possession of land the plaintiff has to prove that the land lay within his holding and not for the defendants to prove that it lay outside: 3 C. W. N. 763, *Ref.* (*Cuming and Mallik, JJ.*). SATI PROSAD GARGA *v.* GOBINDA CHANDRA. **33 C.W.N. 227=56 Cal. 805=A.I.R. 1929 Cal. 325.**

—Ss. 101 to 103—Affirmation of fact—Knowledge.

———*Transfer by grantee—Knowledge of grantor to be proved by transferee.*

Where the question is whether the grantor knew of the transfers made by the grantee tenure holder,

Held, that the onus of proving the negative could not be laid on the grantor as in cases such as these the likelihood is that the grantor would have no such knowledge (*Adami, J.*). MAHARAJA PRATAP *v.* SUNDERBANS KOER. **71 I.C. 999=3 P.L.T. 628=24 Cr.L.J. 279=A.I.R. 1923 Pat. 76.**

———*Defective title of mortgagor—Mortgagee's knowledge of—Onus on mortgagor.*

The burden of proving mortgage's knowledge is upon the mortgagor.

A joint family consisted of the plaintiff, his brother's widow and another brother's daughter-

EVIDENCE ACT (1872), Ss. 101 to 103—Affirmation of fact—Knowledge.

The two former for family necessity mortgaged the whole property suppressing the fact that the third had any interest in the property. On the death of the latter the plaintiff sued for one-third of the property, representing the interest of the daughter of his brother, who did not join in the mortgage, from the assignee of the mortgagee who had brought the property at the mortgage sale in execution of the decree against plaintiff and his brother's wife,

Held, if mortgagee did not know then the mere fact that the assignee who claims through mortgagee may have known the fact as to the existence of interest of plaintiff's brother's daughter, does not prevent his getting a good title to the properties and relying on the estoppel which mortgagee could have set up against any claim by plaintiff in any suit. As soon as the mortgage-deed was produced which contained a representation with regard to a share in the property to which the mortgagor later on obtained title, the burden was no longer on the mortgagee or his assignee to establish that he did not know the true position but the burden of proof shifted on the mortgagors and those claiming under them to show mortgagee's knowledge of the true facts. (*Greaves and Ghose, JJ.*). SARODA PROSAD BANERJEE *v.* GOSTA BEHARI HAZRA.

70 I.C. 385=27 C.W.N. 943=36 C.L.J. 78=A.I.R. 1922 Cal. 542.

———*Representation by mortgagor—Auction-purchaser with knowledge of defect—Protected.*

When a person mortgages a property falsely representing it as his own, and after inheriting it subsequently, claims to recover the same, contending that he had no right to mortgage it, the auction-purchaser gets a good title even if he had knowledge of the facts provided the mortgagee was unaware. (*Greaves and Ghose, JJ.*). SARODA PROSAD BANERJEE *v.* GOSTA BEHARI HAZRA.

70 I.C. 385=27 C.W.N. 943=36 C.L.J. 78=A.I.R. 1922 Cal. 542.

—Ss. 101 to 103—Affirmation of fact—Loss.

———*Loss in business surety for managing partner—Onus on the other partners to prove loss.*

Plaintiff stood surety for the managing partner and executed a security bond which provided that if the business suffered any loss and the managing partner refused to pay his share of loss on demand the other partners would be entitled to deduct, from the security money, the share due to them on account of the loss,

Held, the burden of proof to show that the business had suffered a loss and that they had called upon the managing partner to pay his share lay upon the other partners. (*Abdul Raoof and Harrison, JJ.*). KASHI RAM *v.* MT. HARO.

77 I.C. 251=4 L.L.J. 214=A.I.R. 1922 Lah. 235.

—Ss. 101 to 103—Affirmation of fact—Membership of a community.

———*Onus on party alleging.*

If any person asserts in a Court of law that he is a member of a certain section of the community and this fact is denied he must prove the assertion before it can be accepted. (*Hallifax and Kotval, A.J.Cs.*). VITHOBA *v.* LAL SINGH. **76 I.C. 980=19 N.L.R. 104=A.I.R. 1923 Nag. 317.**

—Ss. 101 to 103—Affirmation of fact—Minority of executant.

———*Onus on person alleging.*

The burden of proving that a particular deed is bad on the ground that its executant was a minor at the time of its execution, lies upon the person who makes this allegation. (*Gokaran Nath Misra and Pullan, JJ.*). MUNNA LAL *v.* KAMESHARI DAT. **114 I.C. 801=5 O W.N. 1111=A.I.R. 1929 Oudh 113.**

EVIDENCE ACT (1872), Ss. 101 to 103—Affirmation of fact—Relationship.

———*Onus on executant.*

The onus of proving that on the date of executing a deed the executant was a minor is on him. (*Kanhaiya Lal, J. C. and Daniels, A.J.C.*). KANDHAN LAL *v.* MAHOMED ALAM. **63 I.C. 525=8 O.L.J. 324=A.I.R. 1921 Oudh 160.**

—Ss. 101 to 103—Affirmation of fact—Nearest reversioner.

———*Limit of proof.*

It is incumbent on a plaintiff seeking to succeed to property as a reversioner, to establish affirmatively the particular relationship which he puts forward. He is also bound to satisfy the Court that to the best of his knowledge there are no nearer heirs and for this purpose he can rely on the statement of witnesses called for defence. He cannot be expected to do anything more. It is for those, who claim that their kinship is nearer than that of the plaintiff, to prove that relationship. 40 Mad. 654, *Foll.* (*Lindsay and Sulaiman, JJ.*). JAVITRI *v.* GENDAN SINGH. **102 I.C. 167=49 All. 779=25 A. L. J. 500=A.I.R. 1927 All. 767.**

———Prima facie *evidence must be adduced.*

Where plaintiff claims certain relief as the nearest reversioner, it is for him to adduce *prima facie* evidence of his being nearest reversioner. It is not sufficient to rely upon the statements in the plaint or on an unapproved genealogical trees: 23 All. 72 (P.C.) and 40 Mad. 654, *Foll.* (*Curgenven, J.*). T. SESHAMMA *v.* Y. VENKATA REDDI.

100 I. C. 500=38 M L.T. 45=A.I.R. 1927 Mad. 1149=52 M.L.J. 155.

———*What must be proved.*

In a suit by a reversioner the plaintiff must prove not merely that he is reversioner but that he is the nearest reversioner. (*Lyle, A.J.C.*). BHIMASINGH *v.* MT. SUNDER. **69 I. C. 421=9 O. L. J. 186=26 O. C. 109=A. I. R. 1922 Oudh 218.**

—Ss. 101 to 103—Affirmation of fact—Receipt of money.

———*Wagering contract receipt of money by agent—Onus on principal to prove receipt.*

A suit cannot be brought in which the cause of action is based directly on the wagering contract, but if, as a result of a wagering contract, an agent has received money on his principal's behalf, he is then liable to account to the principal for that money and the onus lies on the principal to prove affirmatively that the agent actually received the money on his behalf. 25 All. 639, *Rel. on.* (*Brown, J.*). MAUNG PO HTAIK *v.* BRAMADIN. **119 I.C. 740=7 Rang. 300=A.I.R. 1929 Rang. 244.**

—Ss. 101 to 103—Affirmation of fact—Relationship.

———*Onus on him setting up.*

Where the plaintiff's right to succeed depends upon his being an agnatic relation of the defendant, the onus is on him to prove that he is so related. (*Das and Bucknill, JJ.*). RAGHUNATH DAS *v.* SHEOKUMAR MISSIR. **67 I.C. 464=A.I.R. 1923 Pat. 309.**

EVIDENCE ACT (1872), Ss. 101 to 103—Affirmation of fact—Separation.

—Ss. 101 to 103—Affirmation of fact—Separation.

———*Onus on him setting up.*

Where jointness up to a certain date is proved, the onus of proving a separation subsequent to that date is on the party alleging such separation. (*Lord Sinha.*) DEO NARAYAN PANDE *v.* AGYAN RAM PANDE. **101 I.C. 249=1927 M.W.N. 96=31 C.W.N. 533=A.I.R. 1927 P.C. 52=53 M.L.J. 658 (P.C.).**

—Ss. 101 to 103—Affirmation of fact—Sequence of events.

———*Must be affirmatively proved.*

The plaintiff who comes into Court alleging that on the happening of certain events in a certain order certain rights to property accrued to him is bound to establish by affirmative and satisfactory evidence the occurrence of such events in such order. Thus a plaintiff alleging that a certain person died before another must prove the fact affirmatively. (*Spencer, Offg. C.J. and Srinivasa Aiyangar, J.*). RANGAPPA NAYAKAR *v*, RANGASAMI NAYAKAR. **88 I.C. 249=1925 M. W. N. 232=A. I. R. 1925 Mad. 1005.**

—Ss. 101 to 103—Affirmation of fact—Service of summons.

———*Affidavit of service—Onus to disprove service.*

When there is an affidavit, of the peon serving the notice, of proper service thereof, the party who impugns the fact ought to prove that there was no service. (*B.B. Ghose and Basu, JJ.*). KRISHNA CHANDRA *v.* PABNA DHANA BHANDAR CO., LTD. **117 I. C. 552=A. I. R. 1928 Cal. 722.**

———Person who alleges regular service of summons must prove it. (*Sanderson, C.J. and Rankin, J.*). BENI MADHAB SAPIN *v.* JADU NATH SAPIN. **94 I. C. 907=43 C.L.J. 113=27 Cr. L.J. 715=31 C.W.N. 148=A.I.R. 1926 Cal. 1208.**

—Ss. 101 to 103—Affirmation of fact—Status.

———*Public prostitutes—Onus on them to prove they are not.*

Suit by alleged public prostitutes for grant of a perpetual injunction against the Municipal Committee to the effect that the Committee be restrained from taking any action against the plaintiffs under the notice under S. 152 of the Municipal Act on the ground that they were not public prostitutes the burden is on plaintiffs to show that they were not public prostitutes: A.I.R. 1926 Lah. 461, *Foll.* (*Jai Lal, J.*). MUNICIPAL COMMITTEE, LAHORE *v.* ALLAH RAKHI. **100 I.C. 1010=A.I.R. 1927 Lah. 358.**

—Ss. 101 to 103—Affirmation of fact—Transfer of possession.

———*Surrender by previous tenant—Onus on the subsequent tenant to prove transfer.*

It is for the rival tenant in order to make out a valid surrender to establish that the previous tenant has given over possession at the latest by the commencement of the year, when the patta in his favour took effect. (*Srivastava, J.*). MINDAI *v.* SAJID ALI. **6 O.W.N. 1094=11 L.R.A. Rev. 24=A.I.R. 1930 Oudh 69.**

—Ss. 101 to 103—Affirmation of fact—Unchastity.

———*Onus on him who alleges.*

Where the defendant alleges unchastity of the plaintiff the burden of proof is on the defendant to prove it. RAM SUNDER RAI *v.* MT. KALI KUER. **44 All. 683=A.I.R. 1922 All. 321.**

EVIDENCE ACT (1872), Ss. 101 to 103—Appeal.

—Ss. 101 to 103—Affirmation of fact—Wilful disobedience.

———*Of employee—Onus on employee.*

In a case for compensation for the death of a deceased employee, the onus to prove wilful disobedience lies on the employer. (*Kulwant Sahay and Macpherson, JJ.*). URMILA DASI *v.* TATA IRON STEEL CO., LTD. **112 I.C. 328=8 Pat. 24=9 P.L.T. 511=A.I.R. 1928 Pat. 508.**

—Ss. 101 to 103—Alluvion and Diluvion.

———*Assessment—"Added land"—Onus on Government to establish.*

Where Government seek to assess lands under the Bengal Alluvion and Diluvion Act, the burden will lie upon the Government to establish that the lands sought to be assessed are "added lands" within the meaning of S. 6 of that Act. (*Mookerjee and Chotzner, JJ.*). SREE NATH ROY *v.* SECRETARY OF STATE. **70 I.C. 510=50 Cal. 276=36 C.L.J. 345=A.I.R. 1923 Cal. 233.**

———*Possession up to diluvion proved—Continuance of possession during submersion presumed.*

If the plaintiff shows his possession down to the time of the diluvion his possession is presumed to continue as long as the land continued to be submerged.

Further in the case of land covered by water the Court may and generally should, presume, in the absence of evidence to the contrary, that a possession enjoyed by the plaintiff before the twelve years, has continued until within the 12 years. In other words when the plaintiff has shown that he was in possession of the land at the time of diluvion, it must be presumed that he has continued to be in possession within 12 years of the suit. 9 Cal. 744 (F.B.) and 19 Cal. 660 (P.C.), *Foll.* (*Das and Adami, JJ.*). GAJDHAR PRASAD *v.* MST. DULHIN GULAB KUER. **2 P.L.T. 59=A.I.R. 1921 Pat. 234.**

—Ss. 101 to 103—Ancestral property.

———*Mere conjectures insufficient.*

The party asserting the land to be ancestral must prove the fact, it not being possible to accept mere conjectures as substitutes for proof. P. R. 42 of 1910, *Foll.* (*Lumsden, J.*). RAM SARAN *v.* HARPHUL. **75 I. C. 913=A. I. R. 1924 Lah. 677.**

———*Assertion of ancestral nature—Proof of—Conjecture insufficient.*

In a case in which the ancestral nature of land is in dispute the party asserting that such land is ancestral is required to prove his assertion and conjectures cannot be accepted as a substitute for proofs. 42 P.R. 1910 (P.C.,) *Rel. on.* (*Broadway and Abdul Qadir, JJ.*). MUNSHA SINGH *v.* UTTAM SINGH. **64 I. C. 428=4 L. L. J. 31=A. I. R. 1922 Lah. 65.**

—Ss. 101 to 103—Appeal.

———*Judgment appealed from—Burden of showing it as wrong.*

In appeals the burden of showing, that the judgment appealed from is wrong, lies upon the appellant. If all he can show is nicely balanced calculations, which led to equal possibilities of the judgment on either the one side or the other being right, he has not succeeded. A.I.R. 1922 P. C. 39, *Foll.* (*Raza, J.*). MUSTAFA HUSAIN *v.* MT. SAIDUL NISAN. **99 I.C. 255=3 O.W.N. Sup. 282=A.I.R. 1927 Oudh 66.**

———*Burden of proof—Tenability—Error of principle—Appeal lies.*

EVIDENCE ACT (1872), Ss. 101 to 103—Appeal.

A decision based on an error of the principles governing the question of onus will be set aside. (*Fforde and Campbell, JJ.*). FIRM GANDA SINGH GANGARAM *v.* NUR AHAMAD. **96 I.C. 820= A.I.R. 1926 Lah. 653.**

———*Burden of proof—Appellant must show that judgment appealed from is wrong—Appeal.*

In appeal the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of judgment on either the one side or the other being right, he cannot be said to have succeeded. (*Lord Buckmaster*). NABA KISHORE MANDAL *v.* UPENDRA KISHORE MANDAL. **65 I.C. 305= 20 A.L.J. 22=35 C.L.J. 116= 1922 M.W.N. 95=26 C,W.N. 322= 3 P.L.T. 311=24 Bom. L.R. 346= 15 M.L.W. 417=30 M.L.T. 234= A.I.R. 1922 P.C. 39=42 M. L.J. 253 (P.C.).**

———*Judgment appealed from—Onus of proving it wrong.*

The onus of proving that the judgment and decree appealed against are wrong is on the appellants. (*Woodroffe and Cuming, JJ.*). TARAMONI CHAUDHURANI *v.* GOPAL DAS CHAUDHURY. **65 I.C. 182 (Cal.).**

—Ss. 101 to 103—Assets.

———*Receipt by executor—Proving extent—Onus on executor.*

Where a question is raised as to the extent of assets received by an Executor on the death of the testator, the burden of proof on the point is entirely on the executor. (*Mookerjee and Chotzner, JJ.*). PULIN BEHARI DEY *v.* SATYACHARAN. **70 I.C. 548=36 C.L.J. 367= A.I.R. 1923 Cal. 79.**

—Ss. 101 to 103—Bailment.

———*Proof of care.*

The burden of proof lies on the bailee to show that such care as a man of ordinary prudence would have exercised, was duly exercised by him in respect of goods entrusted to him. 22 Mad. 524, *Foll.* (*Pratt, J.*). MAUNG PO THAIK *v.* MAUNG THA BYAW. **74 I.C. 18=1 Bur. L.J. 132= A.I.R. 1923 Rang. 74.**

—Ss. 101 to 103—Benami.

———*Parties to sale—Near relations—Onus on vendee to prove valid sale.*

Obiter: Where the vendor and vendee are near relation and the sale-deed is in possession of the vendor the burden of proving that the sale is not bogus is on the vendee. (*Macnair, A.J.C.*). MOHANSINGH *v.* PUNJI. **103 I.C. 812= A.I.R. 1927 Nag. 327.**

———The onus of proving that the ostensible owner is not the real owner is on the party so alleging. (*Suhrawardy and Mukerji, JJ.*). RAJANIKANTA *v.* ABANI KANTA. **94 I.C. 33= A.I.R. 1926 Cal. 850.**

———*For plaintiff's benefit—Onus on him.*

The burden of proving that a bond, a suit brought thereon, and an execution sale under the decree obtained in the suit, were all *benami* for the plaintiff lies upon him. (*Woodroffe and Ghose, JJ.*). SHAM LAL RAI CHOWDHURY *v.* RADHA CHARAN RAI. **81 I. C. 774=39 C. L. J. 98.**

———*Shifting of onus.*

There is no doubt that the onus of proving *benami* was upon the defendants who set it up, but after the definite statements made by his witnesses as to the plaintiff's dealings with the property indicating that he was the owner of the property, the plaintiff

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ought to have examined himself and denied those statements on oath. (*N. R. Chatterjee and Pearson, JJ.*). JAGADISH CHANDRA DEO DHABAL DEB *v.* BHUBANESWAR MITRA. **76 I. C. 241= 27 C. W. N. 38=37 C. L. J. 265= A. I. R. 1923 Cal. 121.**

—Ss. 101 to 103—Carrier.

———*Railway Company—Necessary pleas.*

It is necessary expressly to plead "loss" and the execution of risk note, if the defendant railway wishes to escape the ordinary liabilities of a bailee. (*Foster, J.*). EAST INDIAN RAILWAY CO. AND G. I. P. RY. CO. *v.* FIRM SUKHDEO DAS. **74 I. C. 431=4 P. L. T. 443= A. I. R. 1924 Pat. 25.**

———*Weight, etc., unknown—Shortage—Onus on him alleging.*

Burden is on the plaintiff to prove shortage where the bill of lading expressly says "weight contents and value when shipped unknown." (1917) 2 K. B. 679, *Ref.* (*Krishnan, J.*). SUBRAMANIA CHETTY *v.* BRITISH INDIAN STEAM NAVIGATION CO., LTD. **72 I. C. 408=17 M.L. W. 363= A. I. R. 1923 Mad. 523.**

—Ss. 101 to 103—Compromise.

———*Compromise of suit—Conclusive on parties and their descendants.*

Where in a partition suit the defendant pleads that plaintiff is not entitled to any share as he is congenitally blind, but the defendant does not proceed with the trial of the issue and enters into an agreement with the plaintiff by which the dispute is settled and one of the conditions of which is the recognition of the plaintiff's title by the defendant, the agreement is binding on the defendant and his descendants and is conclusive of the plaintiff's right to share in the joint property. (*Lindsay and Kanhaiya Lal, JJ.*). BUDH SAGAR *v.* BISHUN SAHAI. **86 I. C. 554= 23 A. L. J. 141=47 All. 327= A.I.R. 1925 All. 366.**

———*Decree against minor—Challenged on attaining age—Proof of invalidity of proceedings—Onus on minor.*

The contention that if a minor on coming of age challenges a decree passed against him on the basis of a compromise even though he does not allege in what manner the compromise is invalid the burden is immediately thrown in the opposite party of establishing that all proceedings in the suit were regular, is a very startling one and not borne out by the authorities. (*Daniels, J.*). RADHA KRISHUN SHUKUL *v.* NOKH LAL. **74 I.C. 964= 21 A. L. J. 488=4 L.R. A. Civ. 481= A.I.R. 1923 All. 566.**

—Ss. 101 to 103—Condition.

———*Contract—Onus of proving it—Conditional.*

The party who alleged that a contract is conditional on the happening of a certain contingency must prove the existence of such a condition by clear and unequivocal evidence. (*Abdul Raoof and Jai Lal, J.*). GANSHI LAL KUNDAN LAL *v.* DEBI SAHIA GULZARI MAL. **105 I.C. 265= A.I.R. 1927 Lah. 481.**

—Ss. 101 to 103—Consideration.

———*Circumstances of parties—Shift burden of proof.*

Debtors were majors and literate having a fair knowledge of English and claiming to be businessmen possessed of large property. They were neither "expectant heirs" nor had just come of age. The creditor had not been proved to be a

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professional money-lender and the execution of the pro-notes in question was admitted.

Held, that the onus to prove want of consideration should be placed on them. 25 Bom. 367, *Dist.* (*Tek Chand and Hilton, JJ.*). DIN MUHAMNAD *v.* BADRI NATH. **120 I. C. 417=11 L.L.J. 511= A.I.R. 1930 Lah. 65.**

———*Admission in a document—Onus on him alleging failure.*

Where it has been admitted or proved that an admission of consideration has been made or executed in a document, the onus of proving want of consideration rests on the person asserting want of consideration : A.I.R. 1925 Lah. 471 (F.B.) and A.I.R. 1927 Lah. 272, *Foll.*; 17 P.R. 1888, *Diss. from.* (*Broadway and Bhide, JJ.*). PARAS DAS *v.* SURAJ BHAN. **104 I.C. 173= A.I.R. 1927 Lah. 823.**

———*Pro-note—Different stories at different stages—Onus on payee.*

Where, in a suit on promissory note, plaintiff set up different stories as to consideration at different stages, the burden of proving consideration shifts on him. 48 P. R. 1915, *Foll.* (*Tek Chand, J.*). SUNDAR SINGH *v.* KHUSH RAM. **102 I.C. 42=28 P.L.R. 295=9 L.L.J. 254= A.I.R. 1927 Lah. 864.**

———*Admission in a document—Onus on executant to prove failure.*

Where an unregistered document, the execution of which is admitted or proved, contains an admission of the payment of the consideration the onus lies on the person executing the document to prove that what he himself admitted to be true, was, as a matter of fact, false and that he did not receive the consideration : A. I. R. 1925 Lah. 471 (F.B.), *Foll.* (*Broadway and Zafar Ali, JJ*). MAHOMAD BAKHSH *v.* SHADI MAHOMED. **100 I. C. 60= 8 Lah. 123=27 P.L.R. 768= A.I.R. 1927 Lah. 272.**

———*Execution of mortgage admitted—Consideration recited but denied onus on mortgagor—Gross inadequacy—Inference.*

Where a mortgagor admits execution of a mortgage-deed, it is for him to prove that he has not received the consideration recited in the deed. The mere fact that he was a reckless borrower does not affect the question of onus. Gross inadequacy of consideration can lead a Court to the conclusion that the party did not understand what he was doing. (*Abdul Raoof and Moti Sagar, JJ.*). JIWA RAM *v.* JHANDA SINGH. **92 I.C. 346 (Lah.).**

———*As against purchaser of equity of redemption, mortgagee has to prove consideration—Onus how discharged.*

A mortgagee as against a purchaser of equity of redemption from the original mortgagor has to prove by affirmative evidence the validity of the consideration and also that it had passed from the creditor to the debtor. The mere admission of the debtor in the mortgage-bond does not shift the onus as it would have been if the suit had been brought against the mortgagor himself alone. He has to give the best evidence possible that the bond was for a really good consideration.

Where the bond debts which formed part of the consideration were debts going back to about forty years from the time when the suit was brought and the plaintiff was able to produce two of the numerous attesting witnesses to the bond, who not only proved the mortgage-bond but also stated that the consideration for the bond was admitted by the debtor before them, and there was practically no effective cross-examination of those witnesses on this point,

Held, that it could be safely said that consideration for the bond had been established by the evidence of those witnesses. (*Walmsley and Chakravarty, JJ.*). JAMINI MOHAN *v.* JAGABANDHU SINGH. **89 I.C. 927=A.I.R. 1926 Cal. 295.**

———*Admission in a document—Onus to prove failure on executant.*

Where an unregistered document, the execution of which is admitted or proved, contains an admission of the payment of the consideration the onus lies on the person executing the document to prove that what he himself admitted to be true was, as a matter of fact, false and that he did not receive the consideration. A.I.R. 1925 Lah. 471, *Foll.* (*Fforde and Campbell, JJ.*). THE FIRM GANDA SINGH *v.* NUR AHMAD. **96 I. C. 820= A.I.R. 1926 Lah. 653.**

———*Admission in mortgage-deed—Execution proved—Onus to prove failure on mortgagor.*

The onus of proving consideration in the first instance lies on the mortgagee, but when execution of the document sued upon has been proved or admitted, if the document contains a recital admitting receipt of the consideration, the onus would then lie on the opposite party to show that that admission was false. 6 Lah. 470; A.I.R 1925 Lah. 471 (F.B.). *Rel. on.* (*Broadway and Fforde, JJ.*). PUNNU RAM *v.* GHULAM HUSSAIN. **96 I.C. 630=7 Lah. 297=27 P.L.R. 463= A. I. R. 1926 Lah. 494.**

———Execution admitted, consideration denied—Onus is on executant. (*Broadway and Abdul Qadir, JJ.*). MAHOMED HUSSAIN *v.* RAM LAL. **71 I.C. 783=5 L.L.J. 198= A.I.R. 1924 Lah. 39.**

———*Admission in unregistered document—Execution proved—Onus on executant to prove failure no difference in effect between registered and unregistered documents.*

Where an unregistered document, the execution of which is admitted or proved, contains an admission or recital of the payment of the consideration, the onus lies on the person executing the document to prove that he did not receive the consideration. There is no valid reason in principle for drawing a distinction between an admission in a registered deed and that contained in an unregistered document, in so far as the question of *onus probandi* is concerned. (*Shadi Lal I.C.J., Broadway and Abdul Raoof, JJ.*). RAM CHAND *v.* CHHUNAN MAL. **88 I.C. 301=7 L.L.J. 306=6 Lah. 470= 26 P.L.R. 369=A. I. R. 1925 Lah. 471 (F.B.).**

———*Pro-note—Onus on maker to prove failure—But payee's failure to make out can be availed of by maker.*

Though it is undoubted that the onus does lie upon the defendant, to prove that no consideration was given, nevertheless, if a plaintiff, when consideration was denied in the written statement, goes into the witness box, and if the result of his examination is that he fails to establish the point which he set out to make, namely, that he gave the consideration and the Court is thus satisfied that he did not give the consideration which he alleges, the defendant can avail himself of that and has a right to decree. This in no way trenches upon the ordinary rule that the defendant must prove absence of consideration if that is his case. (*Mears,*

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C.J. and Banerjee, J.). MUHAMMAD SHAFI KHAN *v.* MUHAMMAD MOAZZAM ALI KHAN. **79 I.C. 464=67 I.C. 684=A.I.R. 1923 All. 214.**

———*Admission in registered document.*

Where plaintiff recited and admitted the receipt of a sum in the registered document, the burden of proof to show that he did not receive it is on him. (*Le Rossignol and Harrison, JJ.*). MAUGLI *v.* BIDHA LAL. **76 I.C. 916=6 L.L.J. 457=A.I.R. 1923 Lah. 404.**

———*Promise to pay—Consideration denied onus on payee.*

Where the document was couched in the following terms :—

"Undersigned promise to pay to Lala Hira Lal and Assa Ram the sum of Rs. 1,000 (rupees one thousand only) payable during the period of one year without interest,"

Held, that the burden of proof was on the executee to prove consideration where the executant admitted only execution while the other members of the family of the executant denied both execution and consideration. 100 P.R. 1915, *Dist.* (*Abdul Raoof and Moti Sagar, JJ.*). RAGHU NANDAN *v.* BUDHU MAL. **86 I.C. 230=A. I. R. 1923 Lah. 346.**

———*Admission in sale-deed—Onus on person pleading failure—Purchaser not in possession—Insufficient to discharge.*

Where a vendor admits in his sale-deed the receipt of consideration, the onus of proof that consideration was not paid lies on the person pleading the absence of consideration. The mere fact that the purchaser was not in possession after his sale is insufficient to discharge it. (*Batten, J.C.*). MT. KASTURIBAI *v.* BALIRAM. **68 I.C. 732=A.I.R. 1923 Nag. 15.**

———*Admission of execution—Onus of failure on defendant.*

Defendant having admitted the execution of the document it is for him to establish that consideration did not pass. (*Coutts and Das, JJ.*). HARI PRASAD CHOWDHURY *v.* HARIHAR PRASAD CHOWDHURY. **70 I.C. 804=1923 P H.C.C. 20=A. I. R. 1923 Pat. 205.**

———*Unstamped entry—Plaintiff's failure to produce account books—Onus of failure not on defendant.*

The plaintiffs claimed certain sum of money, principal and interest included. It was alleged that this transaction had been entered in the plaintiffs' account book, which had been duly signed by the defendant, who had also made an entry in the same account book in his own handwriting. Defendant denied having borrowed any money from the plaintiffs and alleged that there had formerly been a partnership between him and them. He stated that the plaintiffs contemplated carrying on another kiln in partnership with him and that under that impression and thinking that the plaintiffs would contribute a similar sum towards the partnership capital, he had signed and written the memorandum in question, without however having received any sum of money. The entry was not stamped and attested because it was intended to have the whole transaction duly attested and completed when land could be procured,

Held, the burden of proof of the failure of the consideration could not be thrown on the defendant. The failure to produce the Bahikatha of the previous year by the plaintiffs to contradict the defendant who alleged partnership, strengthened

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defendant's position. (*Broadway and Abdul Raoof, JJ.*). RUBIA SINGH *v.* TOONIA MAL. **60 I.C. 730=4 L. L.J. 73=A.I.R. 1922 Lah. 305.**

———*Renewal bond—Consideration yet to be proved by plaintiff.*

In a suit on a bond, the plaintiff is not absolved from proving the consideration merely because the suit bond was executed in consideration of a previous bond. (*Wilberforce, J.*). JETHA MAL *v.* HASAL. **40 P.L.R. 1921=A.I.R. 1921 Lah. 374.**

———*Execution admitted partial failure pleaded—Onus on debtor.*

Where the execution of the bond had been admitted and the receipt of consideration was not denied but it was alleged that full consideration could not be admitted, and finally repayment of the debt was definitely alleged.

Held, that the onus was on the debtor to show that the bond was without consideration. (*Broadway and Abdul Qadir, JJ.*). GIRDIT SINGH *v.* KARAM DAD. **77 I.C. 246=4 L.L.J. 199=A.I.R. 1921 Lah. 199.**

———*Partial failure—Onus on mortgagor.*

Where in a suit by mortgagee for possession as mortgagee the mortgagor did not deny receipt of whole consideration but pleaded non-receipt of a part:

Held, that the onus to show that consideration had not passed in full is on the mortgagor. 20 P.L. R. 1915. (*Broadway and Wilberforce, JJ.*). GANGA RAM *v.* RULIA. **64 I.C. 901=2 Lah. 249=106 P.L.R. 1921=A.I.R. 1921 Lah. 128.**

—Ss. 101 to 103—Contract.

———*Grounds of invalidity—Onus on him who alleges.*

If a contracting party alleges that an agreement is opposed to public policy, it is for him to set out and prove those special circumstances which will invalidate the contract: 1 C.L.J. 261 and 8 N.L.R. 182, *Foll.* (*Kinkhede, A.J.C.*). GOPAL RAO *v.* BABU. **107 I. C. 903=A.I.R. 1928 Nag. 273.**

———*Different intention—Onus on party asserting.*

The ordinary presumption is in favour of the legality of a contract and it is for those, who assert that it was not intended to perform the contract in the manner recited therein, to prove their assertion. (*Harrison and Jai Lal, JJ.*). FIRM KANWAR BHAN *v.* FIRM GANAPAT RAI. **94 I.C. 304=7 Lah. 442=A.I.R. 1926 Lah. 318.**

———*Intention not to enforce—Party alleging must prove.*

The party disputing that he was liable under certain contracts on the ground that they were wagering contracts would have to show that at the time the contracts were entered into, the parties did not intend to carry out the contracts, but agreed to abide by the prices ruling at the due dates, when differences would be paid or received. (*Macleod, C.J. and Crump, J.*). GANGADAS NARAYANDAS *v.* JEKISONDAS MANCHARAM. **73 I.C. 1032=25 Bom.L.R. 520=A.I.R. 1923 Bom. 458.**

———*Wagering—Onus on party pleading.*

In contracts, the burden of proof, that they are of wagering nature is on the person who takes that defence. (*Macleod, C.J. and Shah, J.*). RAJMAL RAMNARAYAN *v.* BUDASAHEB ABDUL SAHEB. **66 I. C. 943=24 Bom. L.R. 115=A. I. R. 1922 Bom. 81.**

EVIDENCE ACT (1872), Ss. 101 to 103—Criminal Trial.

—Ss. 101 to 103—Criminal Trial.

———*Qualified privilege—Onus of good faith on defamer.*

Qualified privilege, as the term indicates, provides only a qualified protection, and the person charged with the defamation must prove that he used the privilege honestly, and the onus of establishing that lies upon him. (*Walsh, J.*). LALA LACHMAN PRASAD *v.* MAJJU. **77 I.C. 913= A.I.R. 1923 All. 167.**

—Ss. 101 to 103—Custom—Chistis of Ferozepur.

———*Ancestral property—Restricted power of alienation—Onus to prove power on vendor.*

There is therefore the presumption that among these Chistis of Ferozepur District the power of alienation is restricted in respect of ancestral property. The onus of proving that vendor had an unrestricted power of alienation is on the vendee. (*Broadway and Currie, JJ.*). ATA MUHAMMAD *v.* FATEH MUHAMMAD. **A. I. R. 1930 Lah. 900.**

—Ss. 101 to 103—Custom—Inheritance.

———*Exclusion of daughters alleged—Onus on party alleging.*

In the case of High Class Hindus, where a custom is alleged to exist whereby daughter is excluded by collaterals from inheriting the property of her father who was separate, the onus of proving such a custom is on the party alleging it. (*Harrison and Dalip Singh, JJ.*). UMRA *v.* MT. DURGA DEVI. **106 I. C. 225=8 Lah. 541= 29 P.L.R. 112= A.I.R. 1927 Lah. 539.**

—Ss. 101 to 103—Custom—"Office dhara" contract.

———*Person relying must produce and prove printed forms.*

Where a contract is alleged to be on "office dhara" and where the "office dhara" refers to the practice of certain firms as seen in printed forms used by them, a plaintiff relying on the term "office dhara," must produce and prove the printed forms above mentioned. (*Kennedy, J.C. and Rupchand Bilaram, A.J.C.*). FIRM OF DASSOMAL RAMCHAND *v.* FIRM OF YUSAFALI ADAMJI. **86 I.C. 364=18 S.L.R. 265= A.I.R 1925 Sind 80.**

—Ss. 101 to 103—Custom—Opposed to statutory right.

———*Onus on party relying on custom.*

Where the widow of a co-sharer has a statutory right to demand partition and another co-sharer denies her right to compel partition by virtue of a custom to the contrary, the onus of proving such custom is on him. (*Martineau and Moti Sagar, JJ.*). SANTA SINGH *v.* BASANT KAUR. **71 I.C. 28= 19 P.W.R. 1923= A.I.R. 1923 Lah. 81.**

—Ss. 101 to 103—Custom—Riwaj-i-am.

———*Daughters excluded—Onus of proving right to succeed is on daughter.*

Where, therefore, there is an entry to the effect that agnates exclude daughters in succession to the property, whether ancestral or self-acquired of their sonless fathers, the onus is on the daughter claiming to succeed to her father's land to show custom entitling her to succeed : A.I.R. 1916 P.C. 129 and A.I.R. 1928 P. C. 294, *Rel. on.* (*Tek Chand and Agha Haidar, JJ.*). DHARA SINGH *v.* MT. ARURI. **A.I.R. 1930 Lah. 761.**

———*Presumption—Riwaj-i-am—Correctness of the entries.*

The Courts in the Punjab are bound to make an initial presumption in favour of the correctness of the entries in riwaj-i-am. (*Tek Chand and Agha Haidar, JJ.*). DHARA SINGH *v.* MT. ARURI. **A.I.R. 1930 Lah. 761.**

EVIDENCE ACT (1872), Ss. 101 to 103—Duty of Court.

———*Custom—Contrary to—Onus on party relying.*

Where a party wants to rely on a custom opposed to that given in the Riwaj-i-am of a certain district, it is incumbent on him to prove the existence of such a custom. (*Tek Chand and Bhide, JJ.*). GULAM MAHAMMAD *v.* MT. FATIMA. **109 I.C. 326=10 L. L. J. 304.**

———*Onus on person challenging.*

Onus of proving an entry in *Riwaj-i-am* to be wrong lies on the party asserting it to be wrong: 45 P. R. 1917 (P.C.), *Foll.* (*Martineau and Moti Sagar, JJ.*). ALLAH WASAYA *v.* MT. ZOHRAN. **85 I.C. 436=5 Lah. 535= A.I.R. 1925 Lah. 258.**

———*Defendants' plea of special custom supported—Plaintiff to prove general custom applies.*

Where the defendants plea of the applicability of a special custom to the parties, is supported by entries in the *Riwaj-i-am* the onus will be shifted to the plaintiff to make out that only the general custom applies. (*Martineau and Harrison, JJ.*). MST. SARDAR KHANAM *v.* AMIR ZAMAN KHAN. **70 I.C. 227=3 Lah. 392= A.I.R. 1923 Lah. 125.**

———*Initial onus shifted by entry in.*

Though the initial onus is on the collaterals of the 6th degree, to prove their right to succeed in the presence of daughters yet an entry in the *Riwaj-i-am* to that effect is sufficient to shift the onus from the collaterals to the daughters. (*Scott-Smith and Broadway, JJ.*). MST DHAN KAUR *v.* SUNDAR. **67 I.C. 415= 3 Lah. 184= A.I.R. 1922 Lah. 387.**

—Ss. 101 to 103—Declaration.

———*Suit to establish—Sale by judgment-debtor—Consideration, possession and good faith must be proved in serial order by plaintiff.*

In a suit by an objector for establishing sale by judgment-debtor, burden lies on plaintiff of proving consideration, possession and good faith. Questions of consideration, possession and good faith must be decided in serial order.

The burden of establishing the passing of consideration rests on the plaintiff. That is obviously the primary question to determine ; then the question of possession is to be decided. If these points are found in favour of the plaintiff the onus of establishing good faith would still rest upon plaintiff but would be a much lighter one: 15 W.R. 280 ; 23 Cal. 950; 25 Cal. 78, *Dist.*; 2 N.L.R. 87, *Foll.* (*Findlay, O. J. C.*). VINAYAK *v.* KANIRAM. **92 I. C. 810= A. I. R. 1926 Nag. 293.**

—Ss. 101 to 103—Duty of Court.

———Onus probandi *applies in case of doubt—Court cannot be blind to facts established.*

Onus probandi applies to a situation in which the mind of the Judge determining the suit is left in doubt as to the point on which side the balance should fall in forming a conclusion. It does happen that as a case proceeds the onus may shift from time to time. There never is any duty upon the part of the Judge to be blind to facts established before him or to a whole category of facts extending over a long period of time and establishing the possession of property for generations as being in one line and not in two lines. (*Lord Shaw.*) YELLAPPA RAMAPPA *v.* TIPPANNA. **114 I. C. 13=31 Bom. L. R. 249= 53 Bom. 213=56 I. A. 13=1929 A. L. J. 4= 49 C.L.J. 104=29 M.L.W. 231=33 C.W.N. 238= A.I.R. 1929 P. C. 8=56 M. L. J. 287 (P.C.).**

EVIDENCE ACT (1872), Ss. 101 to 103—Duty of Court.

———*Court to fix the burden where it lies in law.*

It would be wholly wrong to allow the burden of proof to be shifted by a redundant averment in the pleading or by an incautious acceptance of an issue framed upon that averment. The Court ought to consider where the burden lies in law. (*Phillips, Offg. C. J., Beasley and Ananthakrishna Ayyar, JJ.*). GUNSHAMDOSS *v.* GULAB BI BAI.

106 I. C. 150=50 Mad. 927=39 M. L. T. 431=26 M. L. W. 697=A I. R. 1927 Mad. 1054=53 M. L. J. 709 (F.B.).

———*Onus on plaintiff—Defendant cannot be called to traverse.*

Where the onus of establishing a positive or negative allegation lies upon the plaintiff, the Court will not order the defendant to give particulars of his traverse of that allegation. (*Madgavkar, A. J. C.*). L. COLLINS *v.* CHARLES BOOTH & CO., LTD.

80 I.C. 958= 17 S.L. R. 9=A.I.R. 1921 Sind 106.

—Ss. 101 to 103—Ejectment.

———*Right to remain—Onus on defendant.*

Where in an ejectment suit the plaintiff's main case was that the defendants were on the land and that they were trespassers with no rights to remain on the land and the defendants admitted the plaintiff's superior title to the land.

Held, that the defendants must show that they had a right to remain. (*Newbould and Panton, JJ.*). PROBODH CHANDRA DAS *v.* BIRSINHA BAGANI. **71 I.C. 319=A.I.R. 1924 Cal. 350.**

—Ss. 101 to 103—Execution of decree.

———*Attachment of property—Decree-holder to prove—Judgment debtor's ownership.*

It is for the decree-holder to clearly establish that the property belongs to his judgment debtor only and is liable to be sold in execution of the decree. (*Broadway and Moti Sagar, JJ.*). ISHAR DAS *v.* FAZAL ILAHI. **77 I.C. 516=A.I.R. 1923 Lah. 522.**

—Ss. 101 to 103—Execution of document.

———*Proof of date—Onus on plaintiff.*

The plaintiff has to state when his cause of action arose, *e.g.*, the date of the execution of a promissory note on which a suit is based and it lies upon him to substantiate that statement. To cast the burden on the defendants would run counter to the provisions of Ss. 101 and 102, Evidence Act : 5 Cal. 36 ; 9 Cal. 744 and A.I.R. 1926 P.C. 9, *Rel. on*; 7 All. 677, *Dist.* (*Curgenven, J.*). SUBBARAYULU NAIDU *v.* VENGAMA NAIDU. **A.I.R. 1930 Mad. 742.**

———*Execution on blank paper—Onus on plaintiff to prove execution.*

Where the plaintiff sued relying on a document which the defendant affirmed to be only a blank piece of paper to which he was asked to affix his signature and thumb impression,

Held, the burden of proof of its execution lay on the plaintiff. (*Rafique and Lindsay, JJ.*). PIRBHU DAYAL *v.* TULA RAM. **68 I.C. 809=20 A. L.J. 672=A.I.R. 1922 All. 401.**

—Ss. 101 to 103—Exception to rule.

———*General rule*—Prima facie *case being made out, onus is on defendant to disprove—Does not apply where defendant is not claiming under the executant.*

The general rule that where no other suspicious circumstances appear, the plaintiff by merely proving the execution of the document containing recitals must be taken to have made out a *prima facie* case, and it is for the defendant to meet that case by adducing evidence, applies only to the case where the defendant is executant or person claiming under him. It has no application where the executant mortgages joint family property and defendant is not his heir, but one to whom the family properties came by survivorship : A.I.R. 1930 Mad. 251, *Ref.* ; 35 I.C. 455, *Expl.* ; A.I.R. 1922 P. C. 56, *Rel. on.* (*Ananthakrishna Ayyar, J*). MARRIAPPA GOUNDAN *v.* PALANIAPPA GOUNDAN. **A.I.R. 1930 Mad. 796.**

EVIDENCE ACT (1872), Ss. 101 to 103—Fraud.

—Ss. 101 to 103—Fraud.

———*Effects of fraud removed—Onus on party benefitted by the fraud.*

Where fraud has been established in a case against a party who is deriving benefit therefrom it is for him to show that the continuing effects of fraud which was perpetrated have been removed : 17 Bom. 341 (P C.); A.I.R. 1923 Pat. 435 and A.I.R. 1924 Pat. 496, *Foll.* (*Wort, J.*). BEAS SINGH *v.* KHEDU MIAN. **123 I.C. 637=A.I.R. 1930 Pat. 58.**

———*Knowledge of fraud before limitation.*

Fraudulent nature of the sale proceedings and the competency of the applicant in the circumstances to have the sale set aside having been established the onus of proving that the fraud was known long before limitation is upon the decree-holder: 12 P. R. 1898, *Foll.* (*Coldstream, J.*). MT. JAMNAT *v.* ABDUL RAMAN KHAN. **112 I.C. 847 (Lah.).**

———*Burden on person alleging.*

The burden of proving the fraudulent nature of a transaction lies ordinarily on the persons who seek to impeach it. (*Raza, J.*). LACHMI NARAIN *v.* MT. NAZEER FATIMA. **94 I.C. 927=A.I.R. 1926 Oudh 501.**

———Where a transaction has remained unchallenged for over 50 years, and where the managing trustees at the date of the transaction are dead, the onus is on the plaintiffs to upset it on the ground of fraud or breach of trust. (*Schwabe, C.J. and Odgers, J.*). C. DORAIVELU MUDALIAR *v.* AUDIKESAVALU NAIDU. **70 I.C. 87=1922 M.W.N. 620=A.I.R. 1922 Mad. 409.**

———Prima facie *open transaction—Onus on person attacking to prove fraud.*

Where a transaction is carried out openly and publicly and everything is done which ordinarily would be done to give effect to it, it certainly lies on the person challenging the transaction to show that the transaction was other than appeared on the face of it and was really intended to cover a fraudulent motive. (*Daniels and Dalal, A.J.Cs.*). MST. HAFIZ-UN-NISA *v.* JAWAHIR SINGH. **66 I. C. 24=24 O. C. 374=A. I. R. 1921 Oudh 209.**

———*Transferee for consideration—Onus of proving fraud is on the other party.*

Where the claim of the transferee has been rejected in execution proceedings and a suit is brought to vindicate that claim, the onus lies in the first instance on the transferee. The onus is discharged as soon as he establishes that the transfer under which he claims is for good consideration and then the onus is on the opposite party to establish a fraudulent intention underlying the transfer. (1919) P.H.C.C. 409, *Ref.* ; 44 Cal. 662 (P. C.), *Rel. on.* (*Coutts and Macpherson, JJ.*). BIBI SAIRA *v.* BIBI SALIMAN. **63 I.C. 111=2 P.L.T. 577=A.I.R. 1921 Pat. 395.**

———*Ostensibily* bona fide *transaction—Party alleging fraud must prove it—When onus shifts.*

Where outwardly a deed of sale which is duly registered purports to create a title in a certain person, it is ordinarily not for him to prove the

EVIDENCE ACT (1872), Ss. 101 to 103—Genuineness.

bona fides of the transaction, or that there was valid consideration. It is for the party who alleges that that was a fraudulent transaction to defeat a creditor, to prove the fraud alleged and the want of consideration. But when he has established circumstances pointing to the truth of the facts he alleges the onus will be shifted and it will be for the other party to prove consideration (*Robinson, C.J. and Duckworth, J.*). MAUNG PO LU *v.* MAUNG PO KWA. **65 I.C. 322=11 L. B. R. 89=A. I. R. 1921 L. B. 58.**

—Ss. 101 to 103—Genuineness.

———*Pro-note alleged as forged—Onus on defendant.*

Plaintiff sued defendant for a certain sum due on the promissory note. The defendant denied taking the principal sum mentioned in the promissory note, *viz.*, Rs. 1,300 and denied signing the promissory note in the form it had assumed when the case was brought. He admitted that his signature appeared on the note, but said that when he signed it, the only entries were the figures Rs. 300 at the top of the paper, and signature at the bottom.

The case was decreed in favour of the plaintiff, not because the trial Court was satisfied that the loan alleged had been made, but because the defendant had not succeeded in proving affirmatively that the note as produced was a forgery. (*Rutledge, C.J. and Brown, J.*). HOE MDH. *v.* I. M. SHEDAT. **105 I.C. 361=5 Rang. 527=A.I.R. 1927 Rang. 319.**

—Ss. 101 to 103—Genuineness—Accounts.

———*Suspicious circumstances—Onus of proving accounts to be fictitious is not on defendant.*

The family firm of which the debtor was once a member was once the richest firm, so much so that the plaintiffs themselves were indebted to it to the extent of over three lakhs of rupees, and all their property was mortgaged in favour of it for that debt. Another suspicious circumstance was that they had this debt set off against their own debts. Secondly, there was the fact that they brought the suit after the debtor's death though he lived for more than five years after the date of the last balance. They kept quiet for all this long period and did not even obtain fresh acknowledgments from the deceased member year by year which money-lenders generally do to charge compound interest and strengthen the evidential value of accounts. If the accounts were wholly or partly fictitious the deceased member alone could prove the same.

Held, the belated suit and non-renewal of acknowledgments strongly point to the conclusion that the plaintiffs could not trust the debtor and did not consider it safe to see him. Under all these circumstances the onus of proving that the account was fictitious did not lie upon the defendants. (*Broadway and Zafar Ali, JJ.*). DHAG MAL DAYA RAM *v.* GARINIJU MAL. **83 I. C. 810=A.I.R. 1923 Lah. 471.**

—Ss. 101 to 103—Grant.

———*Exemption from Revenue—Onus on claimant.*

Title to exemption from revenue must be proved by the preson setting up such title and it must be proved, not by inference but by positive proof by a grant to hold as revenue-fee. At least such evidence should be available as would lead to the necessary inference that there was a grant. 4 M.I.A. 466, *Foll.* (*B. B. Ghose and Roy, JJ.*). RAMNEBASH CHANBOY *v.* JYOTI PROSAD SINGH. **104 I.C. 742=31 C.W.N. 1012=A.I.R. 1927 Cal. 921.**

EVIDENCE ACT (1872), Ss. 101 to 103—Landlord and tenant.

———*Resumability on grantor.*

The burden of founding a resumable grant or tenure is on the grantor. (*Ayling and Ramesam, JJ.*). RAMASAMI *v.* LAKSHMI VARSSIAR. **72 I.C. 627=17 M.L.W. 514=32 M.L.T. 399=1923 M.W.N. 343=A.I.R. 1923 Mad. 572.**

—Ss. 101 to 103—Jurisdiction.

———*Onus on party seeking.*

The onus of showing that a party is entitled to bring a suit in the special Revenue Court lies undoubtedly on him. (*Wallace, J.*). THIRUMALAYAPPA *v.* KARUPPAYI. **106 I.C. 505=A.I.R. 1928 Mad. 375.**

———Power of Crown to act under a Special Act challenged—Onus is on Crown to show that they come under the statute. (*Mookerjee and Cuming, JJ.*). SECRETARY OF STATE *v.* UPENDRA NARAIN ROY. **71 I.C. 849=36 C.L.J. 336=A I.R. 1923 Cal. 247.**

—Ss. 101 to 103—Landlord and tenant.

———*Permanent tenancy—Right to enhance rent—Onus on landlord.*

In the case of permanent tenancy the onus is on landlord to prove a right to enhance rent by agreement usage or otherwise. A. I. R. 1926 Bom. 52, *Foll.* (*Madgavkar and Murphy, JJ.*). MANSUKH PANCHAND SHAH *v.* TRIKAMBHAI ICHHABHAI PATEL. **123 I.C. 492=31 Bom.L.R. 1279=A.I.R. 1930 Bom. 39.**

———*Suit to recover land as* mal *land—Onus on the zamindar.*

Where a zamindar or a person claiming through the zamindar brings a suit for recovery of certain land as forming part of his *mal* land and the defendant contends the suit on the ground that it was the *lakheraj* property of which they were the *shebaits* or which they held through the *shebait*, it is not enough for the plaintiff to show that it lay within the ambit of the zamindari but they must prove that the land lay within the zamindar's regularly assessed estate or mahal and that it formed part of the *mal* assets at the time of the decennial settlement. The burden then will shift on defendants to prove that it was *lakheraj* property. A.I.R.1922 P.C.272, *Expl.*; A.I.R. 1924 Cal. 328, *Ref.*; 14 M. I. A. 152, *Dist.* (*Cuming and Pearson, JJ.*). MAKHAN LAL PAUL *v.* RUPCHAND MAJI. **51 C.L.J. 41=33 C.W.N. 1168=A.I.R. 1930 Cal. 164.**

———*Ejectment suit—Permanent tenancy set up—Onus on defendant.*

It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to ejeet him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant. A. I. R. 1924 P. C. 65 and 16 Cal. 223 (P. C.), *Rel, on*; 32 Cal. 51 (P. C.) and 28 Cal. 738, *Dist.* (*Rankin, C.J. and Mitter, J.*). RAY MONMOTHA NATH MITTER *v.* RAJESWAR RAI CHOUDHURY. **107 I.C. 81=55 Cal. 355=32 C.W.N. 184=A.I.R. 1928 Cal. 315.**

———*Tenant pleading termination of tenancy—Onus on tenant.*

Where in a suit for recovery of rent by the landlord, a tenant has alleged that the relationship of landlord and tenant that existed between them had terminated resulting in the termination of his liability, the initial as well as the ultimate onus in such a case is on the tenant. (*Cuming and Mukerji, JJ.*). SATU PRAMANIK *v.* MT. JOYNAB BIBI. **110 I.C. 438 (Cal.).**

EVIDENCE ACT (1872), Ss. 101 to 103—Landlord and tenant.

———*Variation in rent—Tenant to prove the reason.*

Where there has been a variation in the amount of rent, the onus is on the tenants to prove why there has been such variation. (*Cuming and Chakravarty, JJ.*). NRISINHA CHANDRA NANDI *v.* BATASI DASHI. **90 I.C. 602= A.I.R. 1926 Cal. 106.**

———*Tenant alleging termination of tenancy—Onus on tenant.*

Where a tenant-at-will alleges that his relationship as a tenant ceased to exist, the onus is on him to prove that the relationship subsequently ceased to exist. (*Rupchand Bilaram, A.J.C.*). MAHOMED FARUK *v.* SIDIK. **79 I.C. 59= A. I. R. 1925 Sind 36.**

———*Ejectment suit—Permanent tenancy—Onus on tenant setting up—Proof of—Long occupation not sufficient.*

When a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such a right is upon the tenant and proof of long occupation at a fixed rent does not satisfy that onus: 16 Cal. 223 P. C. and 43 Mad. 567 P. C., *Ref.* (*Lords Shaw and Carson, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins*). A. S. N. NAINAPILLAI MARAKKAYAR *v.* T.A.R.A. RM. RAMANATHAN CHETTIAR. **82 I.C. 226=5 L.R.P.C. 33= 19 M.L.W. 259=22 A.L.J. 130=51 I.A. 83= 34 M.L.T. 10=1924 M.W.N. 293= 47 Mad. 337=28 C.W.N. 809= A.I.R. 1924 P.C. 65=46 M.L.J. 546 (P.C.).**

———*Not record as tenant—Onus on tenant.*

Where a person is not recorded as tenant and the landlord does not admit that he was a tenant, the burden is upon him to prove that he was a tenant. (*Batten, J.C.*). ALAM SINGH *v.* SETH GOPALDAS. **68 I.C. 664=A.I.R. 1923 Nag. 7.**

—Ss. 101 to 103—Legal necessity—Alienation.

———*Onus on alienee.*

In cases of alienations where necessity is pleaded it is the duty of the alienee to show the validity of the alienation: 65 P.R. 1900, *Foll.* (*Addison, J.*). MAHAMUD *v.* MT. GHULAM FATIMA. **117 I.C. 905 (Lah.).**

———*By restricted owner—Onus on alienee—How discharged.*

In a suit on a bond made by a person with restricted power of alienation the defendants are not required to plead the absence of legal necessity for the borrowing. It is for the plaintiffs to allege and prove the circumstances which alone will give validity to the mortgage. Even though there may not be legal necessity in fact the alienee would be equally protected if he honestly did all that was reasonable to satisfy himself that the required necessity existed. *Sham Sundar Lal* v. *Achhan Kunwar*, 25 I. A. 183, *Foll.* (*Sir Lawrence Jenkins.*) KONDAMA NAICKER *v.* KANDASAMI GOUNDAR. **79 I.C. 961= 28 C.W.N. 1050=22 A.L.J. 16=1924 M.W.N. 86= 19 M. L. W. 107=5 L. R. P. C. 19= 26 Bom. L.R. 198=51 I.A. 145=34 M.L.T. 20= 47 Mad. 181=39 C.L.J. 194=A.I.R. 1924 P. C. 56= 46 M.L.J. 172 (P.C.).**

———*Suit for declaration as to invalidity—Onus on plaintiff—Not exonerated by defendant's absence.*

Where plaintiff sues for declaration that a sale-deed executed by a member of a Hindu family is fictitious and should be set aside, as being executed without necessity, the burden of proving his allegations is on him, and the absence of defendant from suit, would not relieve him from that burden. The granting of a declaration is a matter of discretion of the Court though such discretion should be exercised only on Judicial Principles. (*Rafique and Piggott, JJ.*). RAM RAGHUBIR LAL *v.* DIP NARAIN SINGH. **71 I.C. 749=21 A.L.J. 168= 45 All. 311=4 L.R.A. Civ 380= A.I R. 1923 All. 287.**

EVIDENCE ACT (1872), Ss. 101 to 103—Limitation.

———*Pre-emptor supporting alienation—Onus on him as to necessity—Extent of proof required.*

A pre-emptor cannot stand in a better position against the sons than the vendee from father except that, being in a less favourable situation than the vendee to prove proper enquiry as to the existence of necessity or of antecedent debts of the father, less strict proof of enquiry may be required of him. The burden of proving their existence, however, is not shifted by pre-emption from the transferee to the sons, unless the sons were parties to the pre-emption decree. (*Ashworth, J.C.*). JAMNA PRASAD *v.* BALBHADDAR. **74 I.C. 353=25 O.C. 388= 9 O.L.J. 601=A.I.R. 1923 Oudh 147.**

—Ss. 101 to 103—Legal necessity—Borrowing.

———*High rate of interest—Onus on lender.*

Where the rate of interest is unusually high, the burden lies on the mortgagee to prove that there was necessity to borrow at so high a rate. (*Daniels, J. C.*). SAGAR SINGH *v.* MATHURA PRASAD. **87 I.C. 1035=A. I. R. 1925 Oudh 750.**

—Ss. 101 to 103—Legal necessity—Hindu widow.

———*Dealings with a Hindu widow—Onus on person so dealing—Proof of fair rent or price alone not sufficient.*

A person who deals with a Hindu widow having a limited estate must be aware that he may be called upon to establish the facts which justify the transactions under which he claims.

It is sufficient to say that the mere fact that the rent reserved was a fair market rent or the price, obtained was a fair market price, cannot alone and in themselves be regarded as sufficient. (*Lord Buckmaster*). NABA KISHORE MANDAL *v.* UPENDRA KISHORE MANDAL. **65 I. C. 305= 20 A. L. J. 22=35 C. L. J. 116= 1922 M. W. N. 95=26 C. W. N. 322= 3 P. L. T. 311=24 Bom. L. R. 346= 15 M. L. W. 417=30 M. L. T. 234= A.I.R. 1922 P.C. 39=42 M.L.J. 253 (P.C.).**

—Ss. 101 to 103—Legal necessity—Mortgage.

———Hindu Law—Alienation—Necessity—Mortgage of joint property by Manager—Party supporting mortgage must prove that conditions imposed were reasonable under the circumstances. (*Syed Wazir Hasan, J. C.*). MANNU LAL *v.* BISHAMBHAR NATH. **79 I. C. 35=11 O. L. J. 415= A. I. R. 1924 Oudh 378.**

—Ss. 101 to 103—Limitation.

———*Suit by a minor on attaining majority—Onus on him to prove—Date of majority.*

It is the duty of the person bringing a suit and claiming exception under Limitation Act, S. 8 to show that he attained majority within three years of the institution of the suit. (*Stuart, C. J. and Srivastava, J.*). MEHDI ALI *v.* WALAYAT HUSAIN KHAN. **121 I. C. 277=7 O. W. N. 25= A. I. R. 1930 Oudh 97.**

———*Pro-note—Two different dates of endorsement for same payment—Onus on plaintiff to prove the date bringing the suit in time.*

Where there are two endorsements on the promissory note as to the same payment of interest

EVIDENCE ACT (1872), Ss. 101 to 103—Limitation.

but the dates of the two differ, and if one is correct, the suit is in time while if the other is correct, the suit is time-barred ; it is the duty of the plaintiff to prove that his suit is within time, and, to do that he must prove that the date bringing the suit in time is correct. (*Carr and Maung Ba, JJ.*). M. K. AHMEDSA ROWTHER *v.* MG. SAN MYEIN.
104 I.C. 368=6 Bur. L.J. 102=A.I.R. 1927 Rang. 255.

———*Onus on plaintiff to prove suit is not barred.*

Where the defendants plead limitation to a suit, it is for the plaintiff to prove facts which would bring the claim within time. (*Macleod, C. J. and Shah, J.*). BANK OF BOMBAY *v.* FAZULBHAY EBRAHIM. **67 I.C. 761=24 Bom.L.R. 513=A.I.R. 1923 Bom. 155.**

———*Suit by minor on attaining majority—Onus on him to prove that suit is in time.*

In a suit by minor on attaining majority to set aside sale by his mother on the ground that she was induced by fraud and misrepresentation the burden lies on plaintiff to prove that his suit is in time. (*Campbell, J.*). JOGAT SINGH *v.* BALAJA SINGH. **70 I.C. 984=A.I.R. 1923 Lah. 254.**

———Prima facie *barred—Onus on plaintiff to disprove bar.*

When a suit or an application is on the face of it barred it is for the plaintiff or the applicant to satisfy the Court of the circumstances which would prevent the statute from having its ordinary effect. 36 Cal. 654, *Foll.* (*Daniels and Dalal, A.J.Cs.*). YAQUB BELG *v.* RASUH BEG. **74 I.C. 517=10 O.L.J. 86=A.I.R. 1923 Oudh 254.**

—Ss. 101 to 103—Material alteration.

———*Pro-note—Alteration in the figure representing consideration—Onus for plaintiff to prove consideration.*

Plaintiff sued defendant for a certain sum due on the promissory note. The defendant denied taking the principal sum mentioned in the promissory note, *viz.*, Rs. 1,300, and denied signing the promissory note in the form it had assumed when the case was brought. He admitted that his signature appeared on the note, but said that when he signed it, the only entries were the figures Rs. 300, at the top of the paper, and signature at the bottom.

Held, that all that the defendant admitted was that his signature appeared on the document filed and the case to be decided was not whether the plaintiff had been proved to have committed forgery but whether the plaintiff had proved that he lent the Rs. 1,300, to the defendant as he alleged and the burden of proving this loan rested on the plaintiff. (*Rutledge, C. J. and Brown, J.*). HOE MOH *v.* I. M SEEDAT. **105 I.C. 361=5 Rang. 527=A.I.R. 1927 Rang. 319.**

———*Erasure or interlineation—Person producing the document must show when it was made.*

A writing which is intended to be under hand only can be altered by erasure or interlineation or otherwise before it is signed but it lies upon the party who puts the instrument in suit to explain the alteration and show *when* it was made. An alteration made while the instrument is in the custody of one party although not made with his knowledge or consent has the same effect in avoiding the instrument as if made by him, on the principle that he who has the custody of an instrument made for his benefit is bound to preserve it

EVIDENCE ACT (1872), Ss. 101 to 103—Mortgage—Redemption.

is its original state. (*Kinkhede, A. J. C.*). KANHAYALAL TARACHAND *v.* SITARAM TUKARAM. **81 I.C. 847=20 N.L.R. 76=A.I.R. 1924 Nag. 250.**

—Ss. 101 to 103—Minority.

———*Representation as major—Onus of proving him a minor heavy on those setting it up.*

Where a deed is executed by a person who alleges himself to be a major at the time of execution, a heavy burden rests upon him or his representatives when they set up the defence of minority. (*Lord Salvesen*). SADIQ ALI KHAN *v.* JAI KISHORI. **109 I.C. 337=26 A.L.J. 685=47 C.L.J. 628=32 C.W.N. 874=5 O.W.N. 547=28 M.L.W. 17=30 Bom. L.R. 1346=A.I.R. 1928 P.C. 152=55 M.L.J. 88 (P.C.).**

———*Defendant pleading minority—Onus on him.*

In a suit to recover money on a bond executed by defendant who pleads minority at the time of execution of the bond, the burden of proving minority is on defendant : A. I. R. 1924 All. 730, *Foll.* (*Ryves and Mukerji, JJ.*). SURJA *v.* JOTI PRASAD. **87 I.C. 445=47 All. 493=6 L.R.A. Civ. 283=A.I.R. 1925 All. 681.**

———*Contract-deed alleged to be executed by minor—Onus on party setting up the deed to prove competence.*

When the validity of a contract is questioned on the ground that the executant is a minor it is for the party setting up the deed to establish by *prima facie* evidence that the contract was valid and entered into by a person who was competent to do so. (*Stuart, J.*). BACHCHA LAL *v.* HASAN KHAN. **66 I.C. 814=A.I.R. 1922 All. 240.**

———*Minor acted and appeared like major—Onus of proving minority on those alleging it.*

It is doubtful whether any heavier burden is laid on the plaintiff than that of establishing that the plaintiff has good reason to believe the alleged minor was of full age. If the minor acted and appeared like a major, the burden of proving minority lies on the party alleging it and presumably basing its allegation on peculiar knowledge. (*Le-Rossignol, J.*). DAHARAN SINGH *v.* HARBANS SINGH. **A.I.R. 1922 Lah. 75.**

———*No clear evidence as to date of birth—Evidence cannot be strained to favour.*

Where the burden of proof of minority is on the plaintiff and his witnesses are not exact as to the date of his birth their evidence cannot be strained in his favour. (*Daniels, J. C.*). MT. MANZURAM BIBI *v.* JANKI PRASAD. **66 I.C. 930=9 O. L. J. 35=A.I.R. 1922 Oudh 50.**

—Ss. 101 to 103—Mortgage.

———*By* Karta*—Onus on mortgagee to prove validity.*

In a suit by the mortgagee on a mortgage executed by the *Karta* of a joint family the onus is on the mortgagee to prove that the mortgage was a valid one. 14 Ben. L.R. 21, *Rel. on.* (*Das and Ross, JJ.*). SADHU SARAN PRASAD SINGH *v.* BRAHMADEO PRASAD SINGH. **61 I. C. 20=2 P. L. T. 318=6 P.L.J. 256=A.I.R. 1921 Pat. 99.**

—Ss. 101 to 103—Mortgage—Redemption.

———*Plea of extinction by sale—Onus on mortgagee.*

Where once a mortgage has been admitted the onus is on the mortgage to show that the mortgage has been extinguished by subsequent sale. (*Sir Benod Mitter*). WALLI MOHAMMAD *v.* MOHAMMED BAKSH. **122 I C. 316=1930 A.L.J. 292=32 Bom.L.R. 380=31 P.L.R. 145=31 M.L.W. 321=11 Lah. 199=57 I.A. 86=A.I.R. 1930 P.C. 91 (P.C.).**

EVIDENCE ACT (1872), Ss. 101 to 103—Mortgage—Redemption.

———*Onus on plaintiff to prove subsistence of mortgage.*

In a suit for redemption, the onus is on the plaintiff to prove mortgage he set up, *i. e.*, that it was still subsisting. (*Kanhaiya Lal, J. C.*). BINDA *v.* SANKATA PRASAD. **95 I. C. 945=8 O. L. J. 401.**

———*Subsistence of mortgage—Initial onus on mortgagor—If mortgage is admitted—Onus shifts mortgagee to prove subsequent sale.*

Plaintiffs alleged that certain trees had been mortgaged by their ancestor to the predecessors-in-title of the defendants,

Held, the onus of proving that the mortgage subsists at the date of suit, lies on plaintiffs in the first instance. If the defendants admit previous mortgage but allege subsequent sale, the onus is shifted on to them to prove ownership by sale when they produce and prove revenue records in their favour, the onus is re-shifted to the plaintiffs, who must prove their case. (*Broadway, J.*). JOTI PRASAD *v.* RAHAMAT ALI. **81 I.C. 336= A.I.R. 1923 Lah. 243.**

———*Larger sum claimed—No burden on plaintiff to prove right to redeem.*

The plaintiffs sued to redeem a mortgage. The defendant admitted the mortgage but pleaded that the mortgage amount was more than that alleged by the plaintiffs,

Held, that no burden lay on the plaintiff to prove his right to redeem on payment of the lesser amount. (*Brown, A.J.C.*). MG. SHWE MYIN *v.* MA NAING. **70 I.C. 911=4 U.B.R. 114= 1 Bur. L.J. 248=A.I.R. 1923 Rang. 24.**

———'Neerozhikka Otti Kanom'—*Onus of proving it is irredeemable is on party alleging it.*

The person setting up the plea that a mortgage is irredeemable must prove that it is so. There is nothing in books on Malabar Law to show that the tenure *Neerozhikka Otti Kanom* is irredeemable. (*Krishnan and Ramesam, JJ.*). KUNNUMMAL-THAMMASIKUM NANTHOTH RYRU NAMBIAR *v.* KAPPALLI KANARA KURUP. **70 I.C. 20= 1923 M.W.N. 76=16 M L.W. 930= A.I.R. 1922 Mad. 185=42 M.L.J. 350.**

—Ss. 101 to 103—Negligence.

———*Collections of rents—Negligence alleged—Onus on party alleging.*

In a suit by a *thekadar* against his joint *thekadar* entrusted with collection of rent and keeping accounts, in which the plaintiff seeks to make the defendant liable not only for the profits which the latter has actually collected but for those which through gross negligence or misconduct he has omitted to collect, the burden of proving such negligence or misconduct rests in the first instance on the plaintiff. 12 All. 301 (F.B.), *Rel. on.* (*Wazir Hasan and Raza, JJ.*). RAM PADAR NATH *v.* GANGA PRASAD. **99 I. C. 185= 3 O.W.N. (Sup.) 271=8 L. R. A. Rev. 31= A. I. R. 1927 Oudh 90.**

—Ss. 101 to 103—Negotiable Instruments.

———*Hundi not presented for payment—Loss sustained by drawer—Onus heavy on payee to disprove loss.*

Where a hundi is not presented for payment and the drawer withdraws the money after many days, the burden of proof lies heavily on the payee to prove that the drawer did not suffer any loss, and the circumstances will be very exceptional in which he could prove that the drawer could not possibly have suffered any damage and burden is certainly not discharged by the oral admission of the defendant drawer that some time or other subsequently he got back his money. (*Boys and Ashworth, JJ.*). BHIKKI MAL *v.* RAGHUBIR SINGH. **88 I. C. 915= 6 L. R. A. Civ. 500=23 A. L. J. 861= A. I. R. 1925 All. 811.**

EVIDENCE ACT (1872), Ss. 101 to 103—Omission to discharge onus.

—Ss. 101 to 103—Notice.

———*Absence of notice—Must be alleged and proved.*

The defence of a purchase without notice is one which ought to be specifically alleged as well as proved by one who relies upon it : 42 Cal. 625, *Foll.* (*Dawson Miller, C. J. and Ross, J.*). MURAT SINGH *v.* PHEKER SINGH. **110 I. C. 526= 7 Pat. 584=9 P. L. T. 743= A.I.R. 1928 Pat. 587.**

———*Onus on person setting up notice—Other circumstances than mere registration must be proved.*

Registration by itself is no notice. There must be other circumstances in the case from which the Court could come to the conclusion that the subsequent purchaser had notice of the prior registered agreement and the burden of proof lies on the person setting up notice. 36 B. 446, *Dist.* (*Macleod, C.J. and Crump, J.*). PEERKA LALKA *v.* BAPU KASHIBA MALI. **73 I.C. 231= 25 Bom.L.R. 375=A. I. R. 1923 Bom. 410.**

———*Prior mortgage—Onus on purchaser to prove he had no notice of.*

Where a subsequent purchaser of property pleads that he had no notice, of a prior mortgage thereon,

Held, that the onus is on him to prove it. This rule applies equally in the case of movable property and immovable property. (*Heald and Lentaigne, JJ.*). (MAUNG) CHIT U *v.* BANSI DHAR BAZAZ. **75 I. C. 328=2 Bur. L. J. 63= A. I. R. 1923 Rang. 153.**

—Ss. 101 to 103—Objection to onus.

———*Cannot be made at a late stage.*

A party accepting the onus without demur cannot object at a late stage saying that burden was wrongly put on them. (*Zafar Ali and Bhide, JJ.*). POKHAR DAS *v.* THAKER DAS. **120 I.C. 168=31 P. L. R. 481= A.I.R. 1930 Lah. 213.**

—Ss. 101 to 103—Omission to discharge onus.

———*Inability to prove the basis of claim—No excuse.*

The mere inability to prove a thing, on proof of which alone he can succeed, cannot possibly be regarded as a ground for granting relief to the plaintiff. (*Srinivasa Ayyangar, J.*). K. RAGHAVENDRA RAO *v.* K. S. SHIVAJI & CO. **108 I. C. 758 (Mad.).**

———*Facts proving either way—Onus not discharged.*

The onus of proof is not discharged by producing evidence which is just as consistent with the allegation of the party on whom the onus of proof lies as with the denial of the opponent. (*Das and Foster, JJ.*). GOPINATH SARANJI *v.* AIHARRUL HAQUE. **101 I.C. 119=8 P.L.T. 578= A.I.R. 1927 Pat. 225.**

———*Facts proving either way—Onus not discharged.*

Where the undoubted evidence is consistent both with the allegation of the plaintiff as with the denial of the defendant, the plaintiff must fail. (*Das and Adami, JJ.*). RAMESHWAR NARAIN SINGH *v.* RANI REKNATH KOERI. **67 I. C. 451= A.I.R. 1923 Pat. 165.**

EVIDENCE ACT (1872), Ss. 101 to 103—Onus immaterial.

—Ss. 101 to 103—Onus immaterial.

———*All available evidence led.—Wrong onus.*

The fact that onus is wrongly placed makes no difference when the parties have led all the available evidence. (*Tek Chand, J.*). AMAR DAS *v.* DALI. **121 I.C. 377=A.I.R. 1930 Lah. 677.**

———*Evidence let in on both sides.*

The question of onus does not matter when both parties have let in their evidence in the case. (*Ananthakrishna Ayyar, J.*). MARIAPPA GOUNDAN *v.* PALANIAPPA GOUNDAN. **A.I.R. 1930 Mad. 796.**

———*All material facts before Court.*

Where the relevant facts are before the Court and all that remains for decision is what inference is to be drawn from them, the question of burden of proof is not pertinent and this is more so at the appellate stage. A.I.R. 1920 P.C. 67; A.I.R. 1922 P.C. 292 and A.I.R. 1922 Cal. 160, *Foll.* (*Findlay, J.C. and Subhedar, A.J.C.*). TRIMBAKDAS *v.* MT. MATHABAI. **124 I.C. 609=A.I.R. 1930 Nag. 225.**

———*Plaintiffs' failure to prove—Can yet avail of defendant's pleading.*

A plaintiff, who fails to prove all the facts alleged by him, may yet obtain the whole or any part of the relief claimed by him if the facts pleaded by the defendant and found by the Court, show him to be entitled to it. 4 N.L.R. 86, *Foll.* (*Subhedar, A.J.C.*). GAJADHAR *v.* SETH MEGHRAJ. **121 I.C. 39=26 N. L.R. 130=A.I.R. 1930 Nag. 8.**

———*Appeal—Question of onus hardly arises.*

The question of onus has greater force in original trial and hardly arises in an appeal where the appellate Court has to consider the facts and arrive at a conclusion on the evidence led before Trial Court. (*Patkar and Baker, JJ.*). HIRABHARTHI JAMNABHARTHI *v.* BAIJAVER. **113 I. C. 406=30 Bom. L.R. 1555=A.I.R. 1929 Bom. 35.**

———*Evidence let in on both sides.*

The question on whom the burden of proof should fall is of very little importance when evidence has been gone into by both sides. (*Cuming and Mallik, JJ.*). SATI PROSAD GARGA *v.* GOBINDA CHANDRA. **33 C.W.N. 227=56 Cal.805=A.I.R. 1929 Cal. 325.**

———*All evidence taken.*

After all the evidence has been taken, no question of burden of proof remains. (*Chari, J.*). MA SAW TINT *v.* ABDUL BARI. **119 I.C. 222=A.I.R. 1929 Rang. 183.**

———*Whole case before Court—Onus material only in ambiguity.*

When all the circumstances have been ascertained so far as the parties have thought fit to ascertain them, discussion on the point of onus of proof becomes immaterial. The question of onus only becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it: *Robins* v. *National Trust Co.*, (1927) A.C. 515, *Ref.* (*Lord Warrington of Clyffe*). SIME, DARBY AND CO., LTD. *v.* OFFICIAL ASSIGNEE OF LEE SONG PENG. **107 I.C. 233=30 Bom. L.R. 290=47 C.L.J. 339=27 M.L.W. 744=A.I.R. 1928 P.C. 77=54 M.L.J. 337 (P. .C).**

———*All evidence led.*

When evidence is led by both sides, question of burden of proof has no importance. (*Sulaiman and Ashworth, JJ.*). KIRTARATH RAI *v.* SRIPAT RAI. **107 I.C. 254=A.I.R. 1928 All. 307.**

EVIDENCE ACT (1872), Ss. 101 to 103—Onus immaterial.

———*Evidence on particular issue—Wrong allocation of burden—Not entitled to claim remand—Rule not inflexible.*

The rule that where parties have led evidence on a particular issue, the wrong allocation of the burden of proof does not entitle the party on whom the burden of proof is subsequently placed to claim a remand, is not inflexible but its applicability must depend upon the facts of the case, the nature of the point involved and the evidence produced by both parties. (*Jai Lal, J.*). JAGADISH RAM *v.* MUKAND LAL. **109 I.C. 331=10 L. L.J. 309=30 P.L.R. 105=A.I.R. 1928 Lah. 763.**

———*All available evidence let in.*

Where the parties have produced all their available evidence, the dispute on the point of onus is mainly of an academic nature. (*Addison and Johnstone, JJ.*). FEROZE DIN *v.* NAWAB KHAN. **112 I.C. 89=9 Lah. 224=30 P.L.R. 154=A.I.R. 1928 Lah. 432.**

———When the whole evidence is in, the question of onus is merely academical. (*Mullick, Ag. C.J. and Jwala Prasad, J.*). MAHADEO LAL *v.* DULIP NARAYAN SINGH. **106 I.C. 243=9 P. L. T. 393=A. I. R. 1928 Pat. 190.**

———*All evidence let in.*

The question of onus is not very material after the whole of the evidence has been adduced by the parties and gone into in the case. (*Greaves and Mukerji, JJ.*). ISWAR CHANDRA *v.* JOGENDRA LAL. **98 I C. 137=A.I.R. 1927 Cal. 126.**

———*All evidence let in—Appeal stage.*

When all the evidence is in, the question of burden of proof has little or no importance at the stage of appeal. (*Kinkhede, A.J.C.*). MT. MAINEBAI *v.* YADO. **103 I.C. 166=A.I.R. 1927 Nag. 382.**

———*Evidence let in on both sides.*

When evidence has been given on both sides the question of the burden of proof is of academic interest only, and the Court has to decide on the evidence that has been given which version of the transaction is true. (*Ross and Kulwant Sahay, JJ.*). KALI PRASAD CHAUDHARY *v.* NARAYAN PRASAD. **103 I.C. 488=A.I.R. 1927 Pat. 417.**

———*Evidence let in on both sides.*

When both the parties adduced evidence in support of their respective allegations, the question of burden of proof becomes almost immaterial. (*Iqbal Ahmad, J.*). DALLE *v.* AMIR. **98 I.C. 827 (All.).**

———*Evidence let in on both sides.*

When both sides have produced their evidence, the appellate Court should not decide merely on the onus, but should come to its own finding on the evidence recorded. (*Le Rossignol, J.*). TARA CHAND *v.* NASIR-UD-DIN. **96 I.C. 415=8 L.L.J. 238=28 P.L.R. 61=A.I.R. 1926 Lah. 514.**

———*Evidence let in on both sides.*

Where evidence has been produced by both parties on a particular point and the Court has come to a conclusion on consideration of that evidence, the question of burden of proof becomes a matter of pure academic interest. (*Raza, J.*). JEORAKHAN *v.* MT. GOURE. **95 I.C. 826 (Oudh).**

———*Whole evidence considered in appeal.*

The question of onus ordinarily becomes of very little importance when the whole evidence is considered especially by the appellate Court. (*Suhrawardy and Cuming, JJ.*). JNANENDRA NATH ROY *v.* NALINI MOHAN GHOSE. **87 I.C. 565=A.I.R. 1925 Cal. 1262.**

EVIDENCE ACT (1872), Ss. 101 to 103—Onus immaterial.

———*Wrong onus—Merits not affected.*

The question of burden of proof loses its importance when evidence has been adduced on both sides and considered by the Court provided the wrong placing of the onus has not affected the merits of the case. (*Suhrawardy and Duval, JJ.*). HEM CHANDRA DE SARKAR *v.* AMIABALA DE SIRKAR.
84 I.C. 693=52 Cal. 121=40 C. L. J. 184=A.I.R. 1925 Cal. 61.

———*All evidence before appellate Court.*

At the stage of appeal, when all the evidence is before the Court, the question of the burden of proof is not of great importance. (*Kinkhede, A.J.C.*). GOPALRAO *v.* HIRALAL.
83 I.C. 246=A.I.R. 1925 Nag. 225.

———*Evidence let in on both sides.*

Where evidence was given by both parties.

Held, the question of the inital onus loses its importance. (*Neave, J.*). SHIN PRASAD SINGH *v.* MUNESHWAR DUBHE. **5 L. R. A. Civ. 354=A.I.R. 1924 All. 924.**

———*All evidence before trial Court.*

The question of onus ceases to be pertinent after all the evidence is once before the trial Court. (*Kinkhede, A. J. C.*). BALIRAM *v.* KAMALJA.
78 I.C. 330=A.I.R. 1924 Nag. 367.

———*Wrong onus—Parties not misled.*

Where the burden of proof has been wrongly laid, but the parties have led evidence and the Court has on that evidence material to go upon for deciding any disputed point the question of the burden of proof is not very pertinent. 25 C. W. N. 942 and 43 M. 567, *Foll.* (*Prideaux, A. J. C.*). SONAJI *v.* DAULAT. **75 I.C. 782=A.I R. 1924 Nag. 242.**

———*Material for legitimate conclusion present.*

The question of onus becomes of little materiality when evidence is adduced from which a conclusion of fact may be legitimately drawn. (*Lord Salvesen*). SECY. OF STATE *v.* LAXMI BAI.
72 I.C. 898=47 Bom. 327=28 C.W N. 49=17 M.L.W. 405=32 M.L.T. 111=50 I.A. 49=25 Bom. L.R. 527=37 C.L.J. 464=A.I.R. 1923 P.C. 6=44 M.L.J. 471 (P.C.).

———*Evidence let in by both parties.*

The question of onus of proof is of no importance when both parties produce evidence. (*Pigott and Walsh, JJ.*). RAMANAND SHUKUL *v.* CHHOTEY LAL. **71 I.C. 417=20 A.L.J. 969=4 L.R.A. Civ. 31=A.I.R. 1923 All. 124.**

———*Question of onus—When material—Both parties adducing evidence.*

The question of onus of proof only arises where there is a question of fact to be determined and there is no evidence one way or the other which will enable the Court to come to a conclusion. Where evidence is adduced by both parties, then the question of the burden of proof becomes immaterial and the Court has to determine on the evidence before it. (*Campbell and Moti Sagar, JJ.*). NIHAL CHAND *v.* GURDITTA MAL.
80 I. C. 170=5 L.L.J. 451=A.I.R. 1923 Lah. 641.

———*Wrong onus—Evidence nevertheless let in.*

Where the defendants led evidence on the issue as to notice they cannot be said to have held back their evidence because of the imposition of the onus on the other side. 46 I.C. 659; 29 All. 184; 25 I.C. 648, *Foll.* (*Campbell, J.*). LADHA RAM *v.* JINDA RAM. **76 I.C. 891=A. I. R. 1923 Lah. 339.**

EVIDENCE ACT (1872), Ss. 101 to 103—Onus immaterial.

———*All evidence before Court.*

The question of onus is not of much importance when the whole of the evidence is before the Court. (*Spencer and Devadoss, JJ.*). **71 I.C. 130=16 M.L.W. 936=1923 M.W.N. 57=A. I. R. 1923 Mad. 262.**

———*Evidence let in by both sides considered.*

The question of onus is not of importance when both sides have given evidence and the Court has considered it and preferred the evidence of one side to that of the other. (*Kotval, A.J.C.*). GOWARDHAN DAS *v.* R.S. HARLAL RAMSUTH.
69 I.C. 541=A.I.R. 1923 Nag. 62.

———*All evidence before Court.*

When the entire evidence on both sides is once before the Court the debate as to onus is purely academical. Where the relevant facts are before the Court all that remains for decision is what inference should be drawn from them. (*Mr. Ameer Ali*). CHIDAMBARA SIVAPRAKASA *v.* VEERAMA REDDI. **68 I. C. 538=45 Mad. 586=16 M.L.W. 102=31 M L.T. 54=49 I.A. 286=1922 M.W.N. 749=37 C.L.J. 199=27 C.W.N. 245=A.I.R. 1922 P.C. 292=43 M.L.J. 640 (P.C.).**

———*Evidence let in by both sides.*

However important the question of burden of proof may be in the early stages of the case, after all the evidence is out on both sides, it must be looked at as a whole and the truth of the occurrence must be inferred from it. (*Lord Sumner*). THE EAST INDIA RY. CO. *v.* MAJOR ANDREW TORTON KIRKWOOD. **67 I.C. 921=15 M.L.W. 248=48 Cal. 757=A.I.R. 1922 P.C. 195 (P.C.).**

———*Evidence let in on both sides.*

Where both parties have let in evidence the incidence of onus is an academic question which does not affect the conclusion. (*Pratt and Fawcett, JJ.*). DODDAVA KONU PARAHYA *v.* YELLAWA KONU YELLAPPA NINNI. **70 I.C. 417=A.I.R. 1922 Bom. 233.**

———*All evidence before Court.*

Where the entire evidence on both sides is once before the Court, the debate as to onus is purely academical the controversy then is past the stage at which discussion as to the burden of proof is pertinent; the relevant facts being before the Court all that remains for decision is, what inference should be drawn from them. 47 I.A. 767. (*Mookerjee and Chotzner, JJ.*). ABINAS CHANDRA (DAS *v.* MAJIB ALI CHOWDHURY. **70 I.C. 273=27 C.W.N. 328=36 C.L.J. 196=A.I.R. 1922 Cal.461.**

———*Evidence on both sides—All facts before Court.*

Where evidence has been adduced by both contestants in support of their respective cases and the relevant facts are before the Court, the question of burden of proof is immaterial and importance should not be attached to the question on whom the initial onus lay. (*Mookerjee and Buckland, JJ.*). SATIS CHANDRA GHOSE *v.* KALIDASI DASI.
68 I. C. 577=26 C. W. N. 177=34 C.L.J. 529=A. I. R. 1922 Cal. 203.

———*Evidence on both sides let in—Appellate Court.*

The question of onus loses its importance when both parties have adduced evidence in support of their respective cases and the Court on an examination of such evidence shifts the burden of proof from one party to the other. This must be more so at the appellate stage. 34 C.L.J. 333, *Foll.* (*Suhrawardy and Cuming, JJ.*). SHIB CHANDRA SINGHA *v.* GOUR CHANDRA PAUL. **68 I.C. 86=35 C. L. J. 473=27 C. W. N. 134=A. I. R. 1922 Cal. 160.**

EVIDENCE ACT (1872), Ss. 101 to 103—Onus, immaterial.

———*Evidence on both sides let in.*

Where both parties have gone into evidence the question of onus disappears. (*Simpson, A. J. C.*). MUHAMMAD ANWAR KHAN *v.* JHANDA SINGH.
69 I. C. 888=9 O.L.J. 404=25 O. C. 237=A. I. R. 1922 Oudh 271.

———*Evidence on both sides—All facts before Court.*

Where evidence has been adduced by each of the contestants in support of their respective cases and the relevant facts are before the Court the question of burden of proof is immaterial, and importance should not be attached to the question on whom the initial onus lay. (*Mukerjee and Buckland, JJ.*). JOGENDRA NATH *v.* JAGADINDRA NATH.
67 I. C. 170=34 C. L. J. 133=A. I. R. 1921 Cal. 577.

———*Question of onus—When material—Evidence let in on both sides.*

The question of onus of proof arises only where there is no evidence one way or the other which will enable the Judge to come to a conclusion upon the question of fact to be determined; but where evidence has been adduced by both the parties and the relevant facts are before the Court the question of burden of proof becomes immaterial, and importance should not be attached to the question on whom the initial onus lay; in such circumstances, the question of the burden of proof is really not pertinent. (*Mookerjee and Buckland, JJ.*). KRISHNA KISOR *v.* NAGENDRABALA.
66 I. C. 694=34 C.L.J. 333=25 C.W.N. 942=A.I.R. 1921 Cal. 435.

———*Evidence let in on both sides.*

The question of burden of proof is not very material where both sides have adduced evidence. (*Krishnan and Odgers, JJ.*). PONNALAGU KONAN *v.* SINNIAH ODAYAN. **70 I.C. 27=1921 M.W.N. 719=A.I.R. 1921 Mad. 462.**

—Ss. 101 to 103—Partition.

———*Survivorship among co-widows—Precluded by—Onus.*

The onus of proving that a partition that was effected by the co-widows precludes the rights of survivorship in each other is on the person who asserts the same. (*Ananthakrishna Ayyar, J.*). MINAKSHI AYI *v.* SUBRAMANIAN CHETTIAR.
123 I. C. 35=1929 M. W. N. 667=A.I.R. 1930 Mad. 175.

———*Custom as to impartibility—Onus.*

Where there is a dispute with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance according to which custom the estate is to be held by a single member and, as such, not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom. A.I.R. 1928 P.C. 10, *Foll.* (*Mohiuddin and Macnair, A. J. Cs.*). MT. SARJABAI *v.* GANGARAM. **118 I.C. 871=A.I. R. 1930 Nag. 35.**

———*Plea of permanent occupancy right—Onus.*

Where in a suit for partition defendants resist by setting up acquiescence in their permanent right of occupancy in a part of the land the burden of proving existence of those rights is on them. A.I.R. 1924 P. C. 65 and A. I. R. 1920 P. C. 67,

EVIDENCE ACT (1872), Ss. 101 to 103—Possession.

Rel. on. (*Lord Salvesen*). SUBRAMANYA CHETTIAR *v.* SUBRAMANYA MUDALIAR. **116 I.C. 601=31 Bom. L.R. 830=33 C.W.N. 734=30 M.L.W. 30=56 I.A. 248=52 Mad. 549=1929 M.W.N. 561=A.I.R. 1929 P. C. 156=57 M.L.J. 1 (P.C.).**

———*Partition list proved—Onus to prove jointness.*

The onus is heavy on the person who desires to show that certain partition lists were not acted upon and the parties continued to be joint in spite of these lists. (*Kumaraswami Sastri and Reilly, JJ.*). VENKATAKRISHNAYYA *v.* RANGAYYA.
117 I.C. 720=A.I.R. 1928 Mad. 865.

———*Temporary nature of—Onus.*

Most partitions that are made are permanent and if any party wishes the Court to believe that a given partition was temporary, he must prove it. (*Hallifax, A.J.C.*). JUMMA *v.* ABU.
93 I. C. 193=A. I. R. 1926 Nag. 301.

———*Time of partition—Proof of subsequent partition—Does not shift burden.*

It is well-established law that those who allege that the members of a joint Hindu family had separated must prove, unless it is admitted, that there was a separation at some material time. A separation proved to have taken place at a time subsequent to the material time does not shift the burden of proving separation at the material time, on the opposite party. (*Sir John Edge*). MT. BHAGWANI KUNWAR *v.* MOHAN SINGH. **88 I.C. 335=29 C.W.N. 1037=23 A.L.J. 589=41 C.L.J 591=22 M L.W. 211=1925 M. W. N. 421=A.I.R. 1925 P.C. 132=49 M.L.J. 55 (P.C.).**

———*Muhammadans—Acquisition by one member—Proof that it was from joint fund—Onus.*

In a partition suit among Mohammadans the burden is on the plaintiff to prove that the consideration for the acquisition of property by one member only came from the joint fund. (*Raymond, A.J.C.*). YUSIF MAHOMMED *v.* ABUBACKER IBRAHIM. **78 I.C. 817=A. I. R. 1925 Sind 26.**

—Ss. 101 to 103—Plea under—Shifting of onus.

———*Mixed question of fact and law.*

The question of onus is not a mere question of law. Once the principle of onus has been settled, the question still remains, whether having regard to the transactions proved, the onus still remains where it was or shifts. So that in each particular case, whether the onus has been shifted or not becomes a mixed question of fact and law or rather a question of the due application of a recognised principle to the shifting scenes and circumstances of the countless varieties of human life in business. (*Walsh and Ryves, JJ.*). PEARE LAL *v.* SUNDER SINGH. **68 I.C. 805=44 All. 756=20 A.L.J. 658=A. I. R. 1922 All. 436.**

—Ss. 101 to 103—Possession.

———*Dispossessed party—Proof of possession within 12 years—Onus.*

Where in a case for possession by ejectment of the defendants who, it was alleged, had taken forcible possession of the lands two years before the institution of the suit, it was expressly stated in the plaint that the defendants had no right whatsoever to dispossess the plaintiffs.

Held, that the burden of proving possession by the plaintiffs within 12 years of the institution of the suit was on them. (*Jai Lal, J.*). RAHELLA *v.* WAZIRA. **109 I.C. 320=9 L.L.J. 334=A.I.R. 1928 Lah. 32.**

EVIDENCE ACT (1872), Ss. 101 to 103—Possession.

———*Usufructuary mortgage—Consideration and possession denied by third party—Onus.*

Plaintiff was the purchaser of the interest of a usufructuary mortgagee of certain tenant land. Defendant who was the landlord disputed the validity of the mortgage on the ground that no consideration passed from the mortgagee to the mortgagor, nor did the mortgagee take possession, and that the transaction was therefore *farzi* in character. Documents on which plaintiff relied were found to be executed by the mortgagor who never disputed the passing of consideration. The Record-of-Rights recorded the mortgagee as in possession.

Held, that the onus was not on plaintiff to show that consideration passed but that the onus was on defendant to show that no possession passed to the mortgagee. (*Das and Allanson, JJ.*). HITNARAIN SINGH *v.* RAMBARI RAI. **115 I.C. 196=7 Pat. 733=9 P. L. T. 484=A.I.R. 1928 Pat. 459.**

———*Suit for—Proof, that defendants were in possession—Onus.*

In a suit for possession in order to be entitled to possession against the defendants, the plaintiffs must satisfactorily prove that at the date when they filed their suit the defendants were in possession of the property.

Per *Cuming, J.*—The plaintiffs must prove possession of defendants within 12 years of the suit. (*Cuming and Page, JJ.*). BIRENDRA NATH RAY *v.* SATIS CHANDRA JOURDAR. **97 I.C. 1003=44 C.L.J. 121=A.I.R. 1926 Cal. 1166.**

———*Suit by person dispossessed—Proof of possession within 12 years—Land incapable of actual possession—Presumption as to continuance of possession.*

Where the plaintiff sued for possession on the allegation of dispossession,

Held, that he is bound to prove possession within 12 years before suit. In order to prove this, he may rely on the presumption that possession of the lawful owner continues as long as the land is incapable of actual possession. But if he relies on this presumption he must prove that the land was incapable of actual possession within twelve years before suit. (*Newbould, B.B. Ghose and Page, JJ.*). SURESH CHANDRA MUKERJEE *v.* SHITI KANTA BANERJEE. **78 I.C. 679=51 Cal. 669=28 C.W.N. 637=A.I.R. 1924 Cal. 855.**

—Ss. 101 to 103—Presumption.

———*Suppression of account books.*

Where it appeared that the other legatees had seized large portion of the testator's property and the account books kept by the testator and they were suppressing the same.

Held, the residuary legatee need not prove each item of property beyond the possibility of doubt. On proof of *prima facie* case the other legatees were bound to show that the testator did not own the property or that it was subsequently accounted for. (*Phillips and Venkatasubba Rao, JJ.*). K. VENKATARAMAYYA *v.* K. PITCHAMMA. **78 I.C. 274=A.I.R. 1925 Mad. 164.**

———*Commission agent—No presumption of acting in a particular agency.*

The fact that a party is a commission agent does not raise a presumption that he was acting as an agent in a particular transaction; the onus is on him who alleges agency. (*Martineau, J.*). FIRM SHIB LAL *v.* FIRM HARI RAM. **67 I.C. 959=5 P.W.R. 1923=A.I.R. 1922 Lah. 408.**

EVIDENCE ACT (1872), Ss. 101 to 103—Presumption—Fraud.

—Ss. 101 to 103—Presumption—Consideration.

———*Recited in mortgage-deed—Presumption may be rebutted by even circumstantial evidence.*

In a mortgage suit for sale, the initial presumption arising, under S. 118, Negotiable Instruments Act and from the acknowledgment admitting the receipt of the entire consideration, can be rebutted even by circumstantial evidence. And when it is thus rebutted the burden of evidence shifts on to the mortgagee to show that full consideration did actually pass.

In a mortgage suit for sale the execution of the mortgage document was established and further the mortgagor had made an acknowledgment admitting the receipt of the entire consideration as well as the fact that there were hundis and promissory notes executed by him which had been set off or for the payment of which money had been left in the hands of mortgagee. But the mortgagor was a very young man of profligate habits and the mortgagee was in a position to dominate his will and to exercise undue influence over him. Further the mortgagee was not in a position to lend big sum of money,

Held, that the initial presumption of the passing of full consideration was sufficiently rebutted. 29 M.L.J. 236 and 31 I.C. 739, *Foll.* (*Sulaiman and Kendall, JJ.*). SINGAR KUNWAR *v.* BASDEO. **124 I. C. 717=A.I.R. 1930 All. 568.**

—Ss. 101 to 103—Presumption—Custom.

———*Presumption of caste approval—Proof to the contrary.*

When a particular form of marriage is recognised by custom it is to be presumed that the caste approves of it and no social censure attaches to it, unless the contrary is established. The burden lies on the person who asserts the contrary. (*Sulaiman and Daniels, JJ.*). MT. KISHAN DEI *v.* SHEO PALTAN. **90 I. C. 358=48 All. 126=23 A. L. J. 981=6 L.R.A. Civ. 557=A. I. R. 1926 All. 1.**

—Ss. 101 to 103—Presumption—Cutchi Memons.

———*Custom of governance by Hindu Law—Onus how discharged.*

There is a presumption that Muslims are governed by Muhammadan Law, and if a person alleges that Cutchi Memons are governed by Hindu Law, by custom, the burden of proving the custom lies on him and the onus will be discharged by proof of actual instances in which the alleged custom has been followed. (*Tyabji, A. J. C.*). TULSIDAS KESHOWDAS *v.* FAKIR MAHOMED. **93 I. C. 321=19 S.L.R. 376=A. I. R. 1926 Sind 161.**

—Ss. 101 to 103—Presumption—Fraud.

———*Conveyance by married woman—Husband not joined—Witnesses, living not called—Writer and attesting witness said to be dead—Presumption of fraud arises.*

Where, in a case of conveyance from one married woman to another, husband is not joined; the persons who were said to be present when the consideration was said to have been paid were not called though they were alive; the attesting witness and the person who drew up the document were said to be dead and were not called,

Held, that a presumption of fraud arose and that consideration must be proved by the plaintiff: A.I.R. 1925 Rang. 227, *Dist.* (*Otter, J.*). MA TIN *v.* P.L.V.R. RAMASWAMY CHETTY. **95 I.C. 384=5 Bur. L.J. 49=A. I. R. 1926 Rang. 133.**

EVIDENCE ACT (1872), Ss. 101 to 103—Presumption—Joint business.

—Ss. 101 to 103—Presumption—Joint business.
———*Property acquired from profits—Proof that it is joint—Onus.*

Property purchased with the profits derived from a joint business cannot be presumed to be joint and the Hindu Law of joint property is not applicable to such property. Burden of proving that such property is joint is on the party alleging it to be so. (*Suhrawardy and Graham, JJ.*). GHOLAM SIDHIQUE KHAN *v.* JOGENDRA NATH MITRA.
96 I. C. 199=43 C. L. J. 452=31 C.W.N. 205=A.I.R. 1926 Cal. 916.

—Ss. 101 to 103—Presumption—Possession.
———*Kabja receipt—Person named as purchaser—Presumption as to his having got possession.*

From the Kabja receipt, the Court is entitled to presume that the person named therein as purchaser had obtained possession through the Court, and although it is possible that when Kabja receipts are passed, physical possession of the land may not always be given to the purchaser, there is no reason why the Court should presume that no possession was given in a particular case. (*Macleod, C.J. and Crump, J.*). PANDURANG WASUDEO *v.* BASAPPA BIN SHIDDAPPA. **77 I.C. 479=A.I.R. 1923 Bom. 364.**

—Ss. 101 to 103—Presumption—Promissory note.
———*Date and place of execution—Proof to the contrary.*

If pro-note is proved to be genuine and it bears the date and place of execution, the presumption is that it was executed at the place and on the date it shows and the onus lies on the party pleading a different place and date, to show it. (*Ramesam and Reilly, JJ.*). KIRMANY & SONS *v.* AGA ALI AKBAR.
109 I.C. 170=A.I.R 1928 Mad. 919.

—Ss. 101 to 103—Presumption—Registered document.
———*Bearing date—Presumption as to date of execution—Lapse of time—Effect of.*

In cases where a document has been executed and registered and the question arises as to the date it bears there can be little doubt that the presumption is that the document was executed on the date it bears, and the onus is on the contesting party to show that it was not. In all such cases lapse of time does strengthen the onus cast. (*Kumaraswami Sastri and Venkatasubba Rao, JJ.*). RUKMANI AMMAL *v.* ANKAMA NAIDU.
96 I. C. 26=23 M. L. W. 664=1926 M.W.N. 938=A.I.R. 1926 Mad. 744.

—Ss. 101 to 103—Presumption—Relationship.
———*Presumption as to continuance—Burden of proving the contrary.*

When a particular relationship such as marriage has been shown to exist between two persons, there is a presumption in favour of its continuance, and the burden of proving that they do not stand to each other in that relationship lies on the person who affirms it. (*Shadi Lal, C.J. and Agha Haidar, J.*). GULAM MOHY-UD-DIN KHAN *v.* KHIZAR HUSSAIN. **114 I.C. 74=10 Lah. 470=30 P. L. R. 7=A.I.R. 1929 Lah. 6.**

—Ss. 101 to 103—Recitals.
———*Execution admitted—Lack of understanding pleaded—Onus.*

Where the execution of a document is admitted, the onus is on the executant to prove that he did not understand its terms, even if he is an illiterate person. (*Broadway and Addison, JJ.*). CHANDU MAL *v.* MAHMUD HASAN. **97 I.C. 71=27 P.L.R. 641=A.I.R. 1926 Lah. 692.**

EVIDENCE ACT (1872), Ss. 101 to 103—Record-of-Rights.

———*Covenant to pay interest—Absence of consent—Onus.*

When a stipulation as to interest is found in a bond, the execution of which is either proved or admitted, the onus of proving that a covenant to pay interest has found its way into a bond without the consent of the debtor must ordinarily lie upon the debtor. (*Le Rossignol, J.*). KEWAL RAM *v.* ALLAH DIYA. **79 I.C. 55=A.I.R. 1925 Lah. 64.**

———*Promissory note — Consideration recited — Plaintiff undertaking to prove—Failed in part—Effect.*

In a suit on promissory note, which contained a recital that the consideration was paid in cash, the plaintiff abandoned the recital and undertook to prove that the consideration consisted partly of cash and partly of reduction of defendant's liability to a certain firm which was in turn indebted to the plaintiff. He failed to prove the latter part of the case,

Held, that in respect of the latter part a decree could not be passed in plaintiff's favour merely on the strength of the defendant's signature.

Obiter: He could have got a decree for the whole amount if he had offered no evidence at all but relied on the recital. (*Mears, C. J. and Piggott, J.*). SHAMBHU DAYAL *v.* LALLU MAL. **80 I.C. 717=4 L.R.A. Civ. 458=A.I.R. 1924 All. 256.**

———*Possession stated to have been given—Proof to the contrary.*

Where plaintiff signed a document saying that possession has been delivered under a gift-deed the onus of proof that she did not give possession is on the plaintiff. (*Schwabe, C. J. and Wallace, J.*). FATIMA BIBI *v.* KHAIRUM BIBI.
16 M.L.W. 894=A.I.R. 1923 Mad. 52.

—Ss. 101 to 103—Record-of-Rights.
———*Lessee's suit for possession—Land entered as defendant's ancestral holding—Onus on defendant to establish.*

Where on the basis of a lease executed by the landlord in favour of the plaintiff, the plaintiff sues defendants for recovery of possession of that land, and that land is recorded in Record-of-Rights as defendants' ancestral holding, having regard for the lease it is for the defendants to establish that the plot was part of their ancestral holding. (*Das, J.*). CHAMAN MAHTO *v.* GANESH MAHTO.
123 I. C. 410=A.I. R. 1930 Pat. 149.

———*Correctness presumed—Entries presumed to be relevant.*

The ordinary rule with regard to official document like Record-of-Rights is that they must be presumed to be correct until the contrary is shown, that is to say, it must be presumed that the entries made in the Record of Rights were those entries and those entries only which are required to be made in the order passed under S. 80, and if any party wishes to dispute the validity of the entry, then the onus would be on him to produce the order passed under S. 80 to show that these particulars were not in fact required. (*Dawson Miller, C. J. and Jwala Prasad, J.*). KALYANDAS *v.* JYOTI LAL.
99 I. C. 492=1926 P. H. C. C. 338=8 P. L T. 239=A. I. R. 1927 Pat. 97.

———*Tenure-holders—Recorded as holding within zamindari must prove nature of title—Entered as non-resumable tenure-holders—Burden shifted.*

Where the defendants, the tenure-holders, are recorded in the Record-of Rights as holding land within the ambit of the zamindari of the plaintiff

EVIDENCE ACT (1872), Ss. 101 to 103—Record-of-Rights.

and that he was paying revenue for the same, the onus of showing the nature of their title is upon the tenure-holders and upon a failure to show that they had had a tenancy therein the plaintiff is entitled to resume. But if it is recorded that the defendants were owners of a non-resumable tenure the onus is shifted upon the plaintiff to rebut the presumption created by the Record-of Rights. (*Dawson-Miller, C. J. and Mullick, J.*). KAMAKHYA NARAIN SINGH *v.* JAWAHIR KHAN.

94 I. C. 1007 = A.I.R. 1926 Pat. 369.

———*Entered as tenants—Proof to the contrary—Rent proved not in excess of revenue—Onus not discharged.*

If in the revenue records the defendants were shown as tenants paying rent, the onus is on them to show that they are not tenants, and that onus is not discharged by the fact that the amount of the rent which they paid did not exceed the amount of the revenue and cesses. (*Martineau, J.*). RAM DAS *v.* CHANDI. **69 I.C. 363 = A. I. R. 1923 Lah. 35.**

—Ss. 101 to 103—Scope of.

———*Conflicting evidence does not necessarily fail.*

Where the evidence is conflicting the party on whom onus lies does not necessarily fail as in the case where no evidence is led on either side. (*Wort, J.*). BADRINATH UPADHAY *v.* BAIJNATH MANDAL. **123 I. C. 612 = A.I.R. 1930 Pat. 134.**

———*Onus—Not an invariable obligation—Changes according to pleadings and progress of evidence.*

Question as to the onus depends on the pleadings in a particular case. Onus is not an invariable obligation resting on a party to a suit by fixed and pre-determined rules of evidence. It not only changes according to the nature of the pleadings but it also frequently changes according to progress of evidence. (*Wazir Hasan and Raza, JJ.*). SARJOO PRASHAD *v.* DEO DAT LAL. **105 I. C. 410 = 4 O.W.N. 958 = A.I.R 1927 Oudh 499.**

———*Applicability of general rule—Must also show exceptions do not apply.*

Party on whom onus of showing that a rule applies to him lies, must not only establish that the general rule applies to him, but also establish facts showing that the exception of the general rules does not apply. (*Das and Foster, JJ.*). GOPINATH SARANJI *v.* AJHARRUL HAQUE.

101 I.C. 119 = 8 P.L.T. 578 = A.I.R. 1927 Pat. 225.

———*Burden of proof—Benefit of doubt not given.*

Law does not recognise the principle of giving the benefit of the doubt to a party on whom the burden of proof lies. Burden of proving that a person is of an agriculturist tribe is on him, especially when entries in Settlement record are against him. (*Jai Lal, J.*). THAKAR DAS *v.* GHULAM MD. **94 I.C 158 = A.I.R. 1926 Lah. 484.**

———*Burden of proof—No hard and fast rule—Depends on circumstances of each case.*

As regards the question of burden of proof no hard and fast rule can be laid down in the sense that the rule should apply to all cases. The determination of initial onus of proving a certain fact depends on the particular circumstances of each case, and onus also shifts from time to time during the progress of the trial as the evidence develops and facts are established. (*Wazir Hasan and Neave, A. J. Cs.*). DWARKA PRASAD *v.* NASIR AHMED. **78 I.C. 850 = 11 O.L.J. 219 = A.I.R. 1925 Oudh 16.**

EVIDENCE ACT (1872), Ss. 101 to 103—Special agreement.

———*Weakness of defendant's title will not avail.*

The plaintiff must succeed on the strength of his own title and is not assisted by any weakness, real or apparent in the case for the defendant. (*Mukerjee and Suhrawardy, JJ.*). LAKSHAN CHANDRA MANDAL *v.* TAKIM DHALI.

80 I.C. 357 = 39 C.L.J. 90 = 28 C. W. N. 1033 = A.I.R. 1924 Cal. 558.

———*Onus—A question of law.*

The question upon which party the onus of proving any particular point lies, is undoubtedly a question of law. (*Scott Smith, J.*). MT. NIAMAT BIBI *v.* MAHOMED FAIZ. **86 I.C. 745 (Lah.).**

—Ss. 101 to 103—Shifting of onus.

———In a mortgage suit for sale, the initial presumption arising, under S. 118, Negotiable Instruments Act and from the acknowledgment admitting the receipt of the entire consideration, can be rebutted even by circumstantial evidence. And when it is thus rebutted the burden of evidence shifts on to the mortgagee to show that full consideration did actually pass.

In a mortgage suit for sale the execution of the mortgage document was established and further the mortgagor had made an acknowledgment admitting the receipt of the entire consideration as well as the fact that there were hundis and promissory notes executed by him which had been set off or for the payment of which money had been left in the hands of mortgagee. But the mortgagor was a very young man of profligate habits and the mortgagee was in a position to dominate his will and to exercise undue influence over him. Further the mortgagee was not in a position to lend big sum of money.

Held, that the initial presumption of the passing of full consideration was sufficiently rebutted. 29 M. L. J. 236 and 31 I. C. 739, *Foll.* (*Sulaiman and Kendall, JJ.*). SINGAR KUNWAR *v.* BASDEO PRASAD. **124 I.C. 717 = A.I.R. 1930 All. 568.**

———Where plaintiff has given *prima facie* evidence of loss of profits caused by defendant, the defendant must prove that the loss was less than that proved by plaintiff. A.I.R. 1924 Nag. 117, *Foll.* (*Hallifax, A.J.C.*). RAMCHARAN *v.* SARWARKHAN. **94 I.C. 999 = A.I.R. 1927 Nag. 75.**

———Onus is liable to shift on proof of particular circumstances. (*Daniels, J.*). B. BHAGWAN DAS *v.* ALLAN KHAN. **78 I.C. 649 = A.I.R. 1925 All. 28.**

———*Burden shifts according to facts proved.*

Burden of proof is often of a shifting character and may change from one party to the other as facts are proved which render the case of one party more probable than that of the other. (*Krishnan and Odgers, JJ.*). PONNALAGU KONAN *v.* SINNIAH ODAYAN. **70 I.C. 27 = 1921 M.W.N. 719 = A.I.R. 1921 Mad. 462.**

—Ss. 101 to 103—Special agreement.

———*Redemption suit—Mortgagee setting up special covenant—Onus on him.*

Where in a redemption suit the mortgagees set up an alleged deed of further charge which contained a covenant: "There are two bonds by which the plots are mortgaged. So long as I do not redeem these two bonds then first, I will pay the money due on this bond and then I shall be allowed to redeem the fields," and there was nothing to show what were the mortgage-bonds to which it referred or that it referred to the mortgages in suit.

Held, that the mortgagees were setting up a special covenant entitling them to an additional

EVIDENCE ACT (1872), Ss. 101 to 103—Special plea.

amount and the burden of proof clearly lay on them. (*Daniels, J.C.*). BHUP SINGH *v.* LAZIM SINGH. **65 I.C. 121=24 O.C. 319= A. I. R. 1921 Oudh 257.**

—Ss. 101 to 103—Special plea.

———*Trustees—Misfeasance—Onus.*

It is for those who attack the administration of the trustees to show that there was misfeasance. (*Coutts-Trotter, C. J. and Walsh, J.*). R. RATHNASABAPATHY CHETTIAR *v.* AMMAKANNUMMAL. **123 I. C. 15=30 M.L.W. 914= A.I.R. 1930 Mad. 78=57 M.L.J. 609.**

———*Award attacked—Multifariousness—Applicability to arbitration proceedings—Onus to prove.*

It is incumbent on the person opposing an award to establish first that the provisions of the Civil Procedure Code as to multifariousness apply to proceedings before arbitrators and secondly if they do apply that in view of those provisions the award could not be upheld. (*Rupchand and Barlee, A.J.Cs.*). DATTARAM MUNSHILAL *v.* HARJIMAL & SONS. **121 I.C. 161=24 S.L.R. 145= A.I.R. 1930 Sind 170.**

———*Breach of trust—Action by co-owner—Proof of unlawful advantage taken.*

Where a co-owner of property wants to take action against other co-owner for breach of trust under S. 90, Trusts Act, it is incumbent on him to allege and prove as a fact that the other co-owner by availing himself of the position of a co-owner had gained an advantage in derogation of his rights : A.I.R. 1916 P.C. 227, *Ref.* (*Rupchand and Barlee, A.J.Cs.*). ABDUL RAHMAN *v.* HAJI MD. IDRIS. **118 I. C. 207=23 S. L. R. 461= A.I.R. 1929 Sind 212.**

———*Bar of suit.*

The burden of proving that a suit is barred under O. 2, R. 2, Civil P. C., is upon the defendant : 20 Cal. 716, *Foll.* (*Addison, J.*). ABDUL QADIR *v.* IMAM DIN. **102 I.C. 31=A.I.R. 1927 Lah. 840.**

———*Landlord purchasing tenant's interest—No merger—Proof that the interests continued to be kept apart—Onus.*

When a landlord purchases a tenant's interest but there is no merger of the two interests, the onus of proving that the distinction between the interests continued to be kept alive subsequently also is not on the party alleging that the distinction was so kept alive. (*Dawson-Miller, C. J. and Macpherson, J.*). PARMESHWAR SINGH *v.* MT. SUREBA KUER. **88 I.C. 495=1925 P.H.C.C. 185=6 P.L.T. 805= A.I.R. 1925 Pat. 530.**

———*Objectors to award must prove the grounds of objection.*

Any party wishing to set aside an award on the ground that the arbitrators in arriving at an unfair award either refused to hear somebody or heard the matter without giving notice of the hearing, undertakes the burden of satisfying the Court that this is what really happened. (*Walsh, A.C.J. and Ryves, J.*). GOBIND SINGH *v.* BHIRGUNADH. **82 I.C. 16= 46 All. 686=22 A.L.J. 676=5 L.R.A. Civ. 465= A.I.R. 1924 All. 788.**

———*Proof that the apparent is not the real.*

Burden of proof lies upon the person who asserts that the apparent is not the real state of things. (*Mookerjee and Chotzner, JJ.*). BHUBAN MOHINI DASI *v.* KUMUD BALA DASI. **82 I.C. 934= 28 C.W.N. 131=39 C.L.J. 140= A.I.R. 1924 Cal. 467.**

———Prima facie *case of damage proved—Not bound to prove how damaged.*

EVIDENCE ACT (1872), Ss. 101 to 103—Suit for profits.

Where plaintiff's case was that the article given by him to the defendant for cleaning was damaged by chemicals in the process of cleaning and where he made a *prima facie* case that the article was in good condition at the time it was given to the defendant but was torn at the time it was got back from the defendant,

Held, that he was not bound to prove that the article had been damaged by chemicals in the process of cleaning. (*Lentaigne, J.*). HOLLANDIA PINMEN *v.* HOPPENHEIMER. **84 I. C. 274= 3 Bur. L.J. 203=A.I.R. 1924 Rang. 356.**

———*Mortgage by executor—Onus of proving authority—Not on the mortgagee.*

Where an executor mortgaged the properties of the testator under authority given by the will,

Held, that the onus of proving that the executor was acting within his powers is not on the mortgagee. (*Schwabe, C.J. and Wallace, J.*). PARTHASARATHY NAIDU *v.* MUKUNDAMMAL. **68 I. C. 856=45 Mad. 867=16 M.L.W. 670= 1922 M.W.N. 729=1923 M. W. N. 14= A.I.R. 1923 Mad. 84=43 M.L.J. 551.**

———*Immoral debt by Hindu father—Onus on the sons.*

The onus of proving illegality or immorality as affecting the debt incurred by the father is upon the sons, for after the death of their father their liability to pay the father's debt arises under the express text of the *Mitakshara*. (*Jwala Prasad and Adami, JJ.*). SHEIK KAROO *v.* RAMESWAR SAO. **62 I.C. 905=3 P.L.T 43=6 P.L.J. 451= A.I R. 1923 Pat. 143.**

———*Trustee—Assertion of private ownership—Onus on the trustee.*

The view, that, where the discoverable origins of property show it to be trust property, the onus of establishing that it must have illegitimately come into the trustee's own right rests upon the beneficiaries, must be entirely dissented from. On the contrary the onus is, and is heavily, upon the trustee to show by the clearest and most unimpeachable evidence the legitimacy of his personal acquisition. (*Lord Shaw.*) SRINIVAS CHARIAR *v.* EVALLAPPA MUDALIAR. **68 I.C. 1=45 Mad. 565= 16 M.L.W. 247=31 M L. T. 1=49 I. A. 237= 24 Bom. L. R. 1214=21 A. L. J. 250= 27 C. W. N. 317=36 C. L. J. 524= A. I. R. 1922 P. C. 325=43 M. L.J. 536 (P.C.).**

———*Knowledge of transferee—Onus of proving.*

Burden of proving knowledge of the transferee lies on the person who asserts that a transaction was something different from what, on the face of it purports to be. (*Daniels and Lyle, A. J. Cs.*). BIJAI PARTAB SINGH *v.* RAGURAJ SINGH. **67 I.C. 572= 9 O. L.J. 173=25 O. C. 115=A.I.R. 1922 Oudh 7.**

———*Muhammadan Law—Mother's unfitness for custody of son until 7 years—Burden of proof.*

In Mahomedan Law the custody of a boy until, at any rate, the age of seven belongs to the mother. The burden, therefore, of proving that the mother in a particular case is not entitled to be the guardian of her infant son lies heavily on any one who would assert it. (*Kincaid, J.C.*). MST. BIBI FATMA *v.* BAKARSHAH. **66 I.C. 888=15 S.L.R. 175= A.I.R. 1921 Sind 45.**

—Ss. 101 to 103—Suit for profits.

———In a suit by co-sharers against *lambardar* for profits, the burden of proving the amount of arrears lies on the *lambardar*. (*Prideaux, A.J.C.*). SARJE RAO *v.* HARAKCHAND. **6 N.L.J. 234= A.I.R. 1923 Nag. 287.**

EVIDENCE ACT (1872), Ss. 101 to 103—Title.

—Ss. 101 to 103—Title.

———*Negative necessary for proving title—Claimant must prove.*

The general rule of evidence is that if in order to make out a title, it is necessary to prove a negative, the party who avers a title cannot be absolved from proving it : 9 W.R. 190 (F.B.), *Foll.* (*Misra and Srivastava, JJ.*). MOSHUQ ALI *v.* HURUNISSA. **114 I.C. 113= A.I.R. 1929 Oudh 204.**

———*Property of deceased person.*

Where the title of a deceased person to certain properties is disputed and it is shown that those properties belonged to the partnership firm, the onus lies on persons claiming through the deceased person to prove that those properties belonged to him at the time of his death (*Percival, J.C. and Rupchand, A.J.C.*). ISMAIL *v.* TAYABALLI. **A.I R. 1929 Sind 182.**

———*Ejectment suit — Plaintiff's title must be proved.*

In a suit for ejectment even though the defendant has no title, he can still put the plaintiff to the proof of his title and the plaintiff has still to show that the title-deed on which he relies as having given him a title superior to that of the defendant is a valid one. (*Kumaraswami Sastri and Reilly, JJ.*) VENKATASUBBA *v.* VIGNESWARADU. **110 I.C. 554=1928 M.W.N. 336= 28 M. L. W. 82=A. I. R. 1928 Mad. 840= 56 M L.J. 52.**

———*Suit for declaration—Defendant's want of title —Not sufficient.*

In a suit for a declaration of title and for possession the plaintiff must prove his title. It is not sufficient for him to say that the defendant has no title. (*Cuming, J.*). KARUNA CHARAN *v.* KRISHNA SUNDAR. **90 I. C. 480=A.I.R. 1926 Cal. 179.**

———Shamilat *land—Sale of proprietary land— Onus lies on purchaser to show that* shamilat *was included.*

The rights of proprietors in the *shamilat* of the village are not a mere accessory to the land separately held by them and the onus lies on the purchaser of the proprietary land to show that the sale to him included also a share of the *shamilat.* (*Scott-Smith and Fforde, JJ.*). GOBIND RAM *v.* ALI MUHAMMAD. **79 I. C. 84= A. I. R. 1925 Lah. 99.**

———*Party out of possession—Must prove subsisting title.*

The burden of proving a subsisting title to a land lies on the party out of possession and the fact that the party in possession forced to institute a suit under O. 21, R. 103, C. P. Code does not shift the burden of proof on to him. (*Kincaid, J. C. and Rupchand Bilaram, A. J. C.*). RAMZAN *v.* FAKIR MAHOMED. **82 I. C. 861= A.I.R. 1925 Sind 201.**

—Ss. 101 to 103—Undue influence.

———*Inequality in partition between adult and minor co-owner—Onus is on adult co-owner to show that transaction is not unconscionable.*

Where a partition between a minor and an adult co-owner is attacked by the minor as not binding on him and when it is found that at the time of the partition the minor's mother was a young widow, with no near male relations who could give independent advice to her, and when the defendant knows all about the property from the very beginning and a great disparity in extent of the two lands exists and when there is no ostensible reason for the partition except the wish of the defendant, the onus shifts and it is for the defendant to make out that the transaction was a fair one. (*Spencer and Devadoss, JJ.*). S. PARAMASIVAM *v.* MEENAKSHISUNDARAM. **73 I. C. 863= 1922 M. W. N. 732=16 M. L. W. 721= A.I.R. 1923 Mad. 96.**

EVIDENCE ACT (1872), Ss. 101 to 103—Will.

—Ss. 101 to 103—Vendor and purchaser.

———*Vendor should disprove shortage—Buyer accepting subject to proper quality—Burden as to shortage not on the vendor.*

Where there is no conduct on the part of the buyer amounting to accepting the goods without any question as to the measurement, the burden is on the seller to show that he sent the goods of the proper measurement and there was no shortage.

But where the buyer said "we shall check the invoice and intimate to you; we shall also send money" and never afterwards even suggested that there was shortage in the goods sent and on the other hand accepted the goods subject to the only condition that they should be of the proper quality,

Held, to throw the burden on the seller, of showing that there was not shortage at the time of despatch, would be improper. (*Ramesam, J.*). DORAISWAMI MUDALIAR *v.* SUBBANNA CHETTIAR. **105 I. C. 613=1927 M. W. N. 549= A. I. R. 1927 Mad. 880.**

———The burden lies heavily on the person alleging it to prove that the vendee of immovable property agreed to take the property with a defective title. (*Raymond, A. J. C.*). ABDULALI MOOSABHOY *v.* GOKULDAS LALJI. **97 I.C. 269= 19 S.L.R. 41=A I.R. 1927 Sind 49.**

———Where a person enters into an agreement to sell his property to one person but subsequently sells it to another person, it is for the vendee to prove that he is a transferee in good faith and without notice of the original contract. (*Shadi Lal, C. J. and Coldstream, J.*). JIWAN DASS *v.* LORIND CHAND. **96 I.C. 175= A.I.R. 1926 Lah. 580.**

———*Sale on credit—Plea of purchase for cash— Onus on defendant.*

Plaintiff pleaded that he had sold certain cattle on credit. The defendant replied that he had bought them for cash,

Held, that S. 103 is the more specific section more particularly applicable and that the onus was on defendant to prove payment. (*Young, J.*). RASU *v.* KATTARA. **82 I.C. 658=2 Rang. 202= A.I.R. 1924 Rang. 349.**

—Ss. 101 to 103—Will.

———*Onus on those who attack the will.*

The onus of proving that the will is invalid as the testator was of unsound mind lies upon the persons attacking that document. (*Fforde and Agha Haidar, JJ.*). HIRA *v.* SHAH DIN. **109 I.C. 640=29 P.L.R. 217.**

———*Proof of will—Onus on the propounder how discharged.*

It is not open to doubt that the *onus probandi* lies in every case upon the party propounding the Will : and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator. But the onus is in general discharged by the proof of capacity and the fact of execution from which the knowledge of and assent to its contents by the testator will be assumed. (*Das and Foster, JJ.*). MT. RAJ DULARI BIBI *v.* MT. KRISHNA BIBI. **95 I.C. 1036=7 P.L.T. 203= A. I. R. 1926 Pat. 269.**

EVIDENCE ACT (1872), Ss. 101 to 103—Will.

———*Qualified admission as to signature—Burden not shifted.*

The qualified admission of a party regarding the signature of a testator does not shift the burden of proving the non-execution of the will to him: A.I.R. 1924 Nag. 103 and A.I.R. 1922 P. C. 366, *Appl.* (*Findlay, O. J. C.*). KESHEO *v.* VITHAL.

89 I.C.468=8 N.L.J. 123=A.I.R. 1925 Nag. 427.

———*Soundness of mind and majority—Propounder to prove.*

The onus of proving not only the soundness of the testator's mind but also the fact that the testator was not a minor at the time of the execution of the will rests upon the person who propounds the will. (*Broadway and Campbell, JJ.*). RAJINDAR SINGH *v.* MT. RAMJOWAI.

83 I.C. 1017=5 Lah. 263=A.I.R. 1924 Lah. 541.

—S. 104—Adoption.

———A very grave and serious onus rests upon any person who seeks to displace the natural succession of property by the act of an adoption. In such case, the proof requires strict and almost severe scrutiny: A. I. R. 1930 P. C. 79, *Rel. on.* (*Addison and Bhide, JJ.*). BALAK RAM HIGH SCHOOL, PANIPAT *v.* NANU MAL. **31 P. L. R. 509=A.I.R. 1930 Lah. 579.**

—S. 104—Dispute about land.

———Suit for establishing title and ejectment—Plaintiff claiming land in dispute under sale-deed—Defendants contesting the claim as holders of *lakheraj* property—Plaintiff has to prove that the land is within the geographical limits of the patni village—Burden of proving that the land is dedicated to a foundation as Niskar Pirattar then shifts on the defendants: A. I. R. 1922 P.C. 272, *Foll.* (*B. B. Ghose and Bose, JJ.*). ABDUL BARI *v.* HRISHIKESH MITTRA. **49 C. L. J. 546=A. I. R. 1929 Cal. 459.**

—S. 104—Receipt of letter.

———The presumption is that if a letter properly directed is proved to have been posted, it reached its destination and was received by the person to whom it was addressed. (*Ross and Kulwant Sahay, JJ.*). KAMAKHAYA NARAIN SINGH *v.* KHALIK AHMAD. **102 I. C. 821=8 P. L. T. 633=A. I. R. 1927 Pat. 305.**

—S. 105—Defamation.

———Where the statements made by the defendants are *per se* defamatory, the burden is on the defendant to prove that the allegations on which his comment was based are substantially true. The plaintiff should not be called upon to prove the quantum of damages: A. I. R. 1929 Sind 90 and *Devis* v. *Shepstone*, (1888) 55 L. J. P. C. 51, *Ref.* (*Rupchand, A. J. C.*). MURLIDHAR *v.* NARAINDAS. **117 I. C. 155=A. I. R. 1929 Sind 172.**

———Prosecution must make out a case for conviction but the accused must prove that his case comes within exceptions: A.I.R. 1924 All. 299, *Dist. from.* (*Kinkhede, A. J. C.*). SURAJMAL *v.* RAMNATH.

105 I. C. 820=28 Cr. L. J. 996=9 A. I. Cr. R. 204=A. I. R. 1928 Nag. 58.

—S. 105—Discharge of burden.

———Where prosecution itself has proved the exception. accused need not prove it. Section 105 says nothing about pleas but merely places burden of proof on the accused. (*Hallifax and Kotval, A.J.Cs.*). MANGAL GAUDA *v.* EMPEROR.

81 I.C. 901=25 Cr. L. J. 1077=A. I. R. 1925 Nag. 37.

———Although under the Indian Evidence Act the burden of proving an exception under the Penal Code is on the accused person, it does not follow that the circumstances together with the accused person's statement cannot be sufficient evidence to establish the exception in his favour. (*Mukerji and King, JJ.*). MANGALIA *v.* EMPEROR.

98 I.C. 707=7 L.R.A. Cr. 187=27 Cr. L. J. 1395=A.I.R. 1927 All. 119.

—S. 105—Exceptions.

———In order to bring a case within the exception, strict compliance with its terms is necessary. It is one of the established canons of interpretation that exceptions are to be taken most strongly against the party for whose benefit they are introduced. (*Tek Chand, J.*). E. I. RY., CALCUTTA *v.* GOT RAM CHANDRA BHAN. **108 I.C. 189=10 L. L. J. 202=29 P.L.R. 371=A.I.R. 1928 Lah. 162.**

———*Onus of proving circumstances is on accused unless they are apparent from evidence before the Court.*

The law requires as laid down in S. 105 that the onus of proving circumstances which give the benefit of the general exception to an accused person lies on him, and in the absence of evidence the presumption is against the accused. But this does not mean that the accused must lead evidence. If it is apparent from the evidence on the record, whether produced by the prosecution or by the defence, that the general exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception. (*Walsh and Ryves, JJ.*). MT. ANANDI *v.* EMPEROR. **71 I.C. 689=24 Cr. L.J. 225=45 All. 329=A.I.R. 1923 All. 327.**

———The burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code rests upon the accused, and S. 105 says the Court shall presume the absence of such circumstances. (*Scott-Smith and Broadway, JJ.*). MAHANT NARAIN DAS *v.* EMPEROR. **68 I.C. 113=3 Lah. 144=4 L. L. J. 91=9 P.W.R. 1922 Cr.=23 Cr. L.J. 513=A.I.R. 1922 Lah. 1.**

—S. 105—Infancy.

———*No proof as to infancy and immaturity of understanding—Defence is not barred.*

There is this difference between a child and a lunatic that the latter is not able to be tried unless he has regained sanity whereas the child may be tried while he is still a child. If a child commits an offence when he is unable to understand the nature of the offence, it can hardly be supposed that he will be able to understand that he must plead his own lack of understanding when placed upon his trial. He cannot be debarred from the defence allowed to him by S. 83 of the I. P. C., merely because of his ignorance of the Court procedure. Therefore, the question cannot be excluded from consideration by the jury notwithstanding that no proof may have been adduced on the point. (*Pullan, A. J. C.*). EMPEROR *v.* ALI RAZA.

84 I.C. 454=26 Cr. L.J. 310=28 O. C. 69=A.I.R. 1925 Oudh 311.

—S. 105—Insanity.

———*Penal Code, S. 84.*

Where the evidence as to the insanity of accused is conflicting, the accused should be convicted as on him lies the burden of proving insanity which in the case of conflicting evidence cannot be said to

EVIDENCE ACT (1872), S. 105—Plea of justifiable homicide.

be sufficiently discharged. (*Daniels, J.*). CHANDU LAL *v.* THE CROWN. **77 I.C. 236= 21 A.L.J. 776=4 L.R.A. Cr. 234= 25 Cr. L.J. 348=A.I.R. 1924 All. 186.**

—S. 105—Plea of justifiable homicide.

———*Causing death to burglar—Onus.*

Where it appeared that a thief was killed with lathi blows by the inmates of the house when the thief was trying to escape through a hole,

Held, that the burden of proving that the death was justifiable homicide lay upon the persons who were proved to have dealt the blows. (*Raza and Nanavutty, JJ.*). MAHABIR *v.* EMPEROR. **7 O.W.N. 797=1930 Cr. C. 948= A.I.R. 1930 Oudh 408.**

—S. 105—Provocation.

———Accused must prove that his case came within the Exception 1 to S. 300 of the Penal Code and the Court is bound to presume the absence of any such case. (*Broadway and Campbell, JJ.*). KAKAR SINGH *v.* THE CROWN. **81 I.C. 717= 25 Cr. L.J. 1005=6 L.L.J. 575= A.I.R. 1924 Lah. 733.**

—S. 105—Self-defence.

———It lies upon the person bringing the plea of self-defence to establish the circumstances under which each blow that causes an injury to a member of the opposite party is inflicted. (*Tek Chand, J.*). HAZURA SANG *v.* EMPEROR. **104 I.C. 454= 28 Cr. L.J. 838=A.I.R. 1927 Lah. 786.**

—S. 106—Date of transaction.

———The burden of proving the exact date of a mortgage transaction entered into orally being not peculiarly within his knowledge, does not lie on the mortgagee. 17 A.L.J. 330, *Dist.* (*Niamatullah, J.*). MIHI LAL *v.* SONI RAM. **115 I. C. 451= A.I.R. 1929 All. 209.**

—S. 106—Fraud.

———*Question whether or not transfer is fraudulent —Vendee should personally be examined.*

The true object to be achieved by a Court of justice in finding out whether or not a transfer is fraudulent can only be furthered with propriety by the testimony of the vendee who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination. It is an error to rely on the abstract doctrine of burden of proof. A.I.R. 1917 P.C. 6 and A.I.R. 1929 P.C. 95, *Rel. on.* (*Ananthakrishna Ayyar, J.*). MOHIDEEN THARAGAN *v.* MD. MUSTAPPAH ROWTHER. **A.I.R. 1930 Mad. 665.**

—S. 106—Knowledge of facts.

———Assistant Manager of a Press cannot be presumed to have knowledge of every job printing done in the press—Especially where consequences of the knowledge are grave, stricter proof than assumption is necessary. (*Darwood, J.*). CHELLAM PILLAI *v.* EMPEROR. **117 I. C. 49= 30 Cr. L. J. 707=A.I.R. 1928 Rang. 276.**

—S. 106—Misappropriation by servant.

———It is settled law that where property is entrusted to a servant, it is the duty of the servant to give a true account of what he does with the property so entrusted to him. If such a servant fails to return the property or to account or gives an account which is shown to be false and incredible, it is ordinarily a reasonable inference that he has criminally misappropriated the property so entrusted to him and dishonestly converted it to his

EVIDENCE ACT (1872), S. 106—Shifting of burden.

own use. (*Lentaigne, J.*). SONA MEAH *v.* EMPEROR. **84 I.C. 331=2 Rang. 476= 26 Cr.L.J. 267=A.I.R. 1925 Rang. 47.**

—S. 106—Pedigree.

———Plaintiff relying on pedigree—Pedigree showing number of persons higher than plaintiff—Plaintiff must prove death of all these persons. (*Wazir Hasan, A.J.C.*). JASODHA *v.* MURLIDHAR. **61 I.C. 144=24 O. C. 1=A.I.R. 1921 Oudh 104.**

—S. 106—Plea of jus tertii.

———Where a defence of *jus tertii* is set up, it is for the defendants to establish that the persons, in whom they allege the right to the plots to exist, have a title superior to that of the plaintiff. (*Lindsay, J.C. and Wazir Hasan, A.J.C.*). SECY. OF STATE *v.* MD. QASIM. **61 I.C. 871=24 O.C. 77= 8 O.L.J. 160=A.I.R. 1921 Oudh 88.**

—S. 106—Presumption.

———*Presumption applies only in absence of clear or sufficient evidence.*

In a case where all the facts are proved by ample evidence and the Court is in a position exactly to say what happened, no importance need be attached to the rule as regards burden of proof. It is only in cases where evidence is meagre and the Court is not in a position definitely to know what happened that the technical rule as to burden of proof is to be observed. (*Ramesam and Jackson, JJ.*). RAGHAVENDRA RAO *v.* VENKATASWAMY. **30 M.L.W 966=1929 M.W.N. 752= A.I.R. 1930 Mad. 251.**

—S. 106—Rent suit.

———Claim for rent based on produce—Tenant preventing landlord from estimating crops—Onus is on tenant to prove actual produce. (*Jwala Prasad and Kulwant Sahay, JJ.*). RANI BHUNESHWARI KUER *v.* SUKHDEO SINGH. **85 I.C. 566= 6 P. L. T. 419=A. I. R. 1925 Pat. 505.**

—S. 106—Scope.

———Representatives of parties to transaction cannot take advantage of the section. 35 I.C. 455, *Diss. from.* (*Ramesam and Jackson, JJ.*). RAGHAVENDRA RAO *v.* VENKATASWAMY. **30 M.L.W. 966= 1929 M.W.N. 752=A.I.R. 1930 Mad. 251.**

—S. 106—Setting aside sale.

———Suit to set aside sale by Collector on the ground of absence of arrears—Plaintiff must prove absence of arrears. (*Walmsley and Suhrawardy, JJ.*). O. S. MEAH *v.* DURGA CHURN DUTTA. **90 I.C. 456=29 C.W.N. 1027= A.I.R. 1926 Cal. 243.**

—S. 106—Shifting of burden.

———Where it is proved that thefts occurred at quite different dates the presumption is that the stolen property passed from the hands of the thief to the receiver at different dates also. The burden is then shifted from the Crown to the accused to prove that that he received it at one time only in a case where the accused is charged separately of offences of receiving stolen property. (*Kincaid, J. C. and Kennedy, Ag. J. C.*). GHULAMO *v.* EMPEROR. **96 I.C. 120=27 Cr. L.J. 872 (Sind).**

———Where in a charge under S. 373, I. P. C. the intention to supply as prostitute a girl when physically ready, is proved, burden lies upon accused to prove intention to wait until age of majority. (*Walmsley and Suhrawardy, JJ.*). KHETRAMANI DASI *v.* EMPEROR. **71 I.C. 232= 35 C.L.J. 451=24 Cr. L.J. 104= A.I.R. 1922 Cal. 539**

EVIDENCE ACT (1872), S. 106—Suit against Railways.

—S. 106—Suit against Railways.

———*Damages.*

In a suit against railway for damages caused by sparks coming out of engine, the onus is initially on railway to prove that precaution had been taken by them to protect adjoining property from fire. (*Mukerji, J.*). SECY. OF STATE *v.* DWARKA PRASAD. **100 I.C. 640=49 All. 559=25 A.L.J. 336=A.I.R. 1927 All. 349.**

———*Railways Act, S 75—Articles specified in Sch. 2 included in consignment—Loss—Onus.*

Where articles specified in Sch. 2, Railways Act and requiring a special declaration under S. 75 are included in a consignment, the burden of proof as to what articles are contained in each specific parcel and that the value of such special articles in each package was less than Rs. 100, rests on the consignee as the contents of each parcel is a special matter of knowledge to the consignee. But onus to prove the loss of packages rests on the railway company. (*Findlay, J.C.*). GULAM ABBAS *v.* SECY. OF STATE. **103 I.C. 756=A.I.R. 1927 Nag. 328.**

———*Risk note H—Liability—Onus is on consignor.*

Where goods are consigned under Risk note H, the onus of proving the facts necessary to bring the company within the terms of the contract will be on the consignor. Section 106 of the Evidence Act does not apply and if in all cases of loss, of destruction or deterioration of goods consigned the onus will be on the company to prove how it came about, the special contract will be useless. (*Kumaraswami Sastri, J.*). P. ALBUQUERSQUE AND SONS *v.* THE S. I. RY. COMPANY, LIMITED. **68 I.C. 269=1922 M W.N. 328=16 M.L.W. 667=31 M.L.T. 470=A.I.R. 1922 Mad. 231=43 M.L.J. 90.**

—S. 106—Suit for mesne profits.

———Although in a suit for mesne profits the person out of possession has to prove what profits the man in possession made out of the property, yet as soon as the plaintiff gives some evidence proving *prima facie* that the profits were somewhere about the sum alleged, the burden of proving that they were less shifts to the shoulders of the defendant. 15 N.L.R. 85, *Foll.* (*Hallifax, A.J.C.*). JAI LAL SAO *v.* LAL FATEH SINGH. **75 I.C. 826=20 N.L.R. 52=A.I.R. 1924 Nag. 117.**

—S. 106—Tenancy.

———Onus of proving that a certain person is a certain other person's tenant lies on the person setting up the plea. *Black* v. *Christ Church Finance Company, Limited*, (1894) A.C. 48 and *Hughes* v. *Percival*, (1883) 8 A. C. 443, *Foll.* (*Lentaigne, J.*). MAUNG PEIN *v.* MA THE NGIVE, **84 I.C. 1009=2 Rang. 549=A.I.R. 1925 Rang. 143.**

—S. 106—Validity of decree.

———Decree against executor impeached on the ground that he had ceased to represent estate before suit—Party impeaching decree must prove his allegations. (*Cuming and Chakravarty, JJ.*). BIRENDRA NATH ROY *v.* ANADI PRASANNA DUTTA. **91 I.C. 416 (Cal.).**

—S. 107—Converse of presumption.

———*A person not heard of for seven years—True rule.*

It is constantly assumed that, where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years may be presumed to have taken place at its close. This is not correct. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one "of not less than seven years." (*Lord Blanbesburgh.*) LALCHAND MARWARI *v.* MAHANT RAMRUPGIR. **93 I.C. 280=5 Pat. 312=53 I.A. 24=24 A.L.J. 105=1926 M. W. N. 203=7 P.L.T. 163=3 O.W.N. 335=43 C.L.J. 240=28 Bom L.R. 855=30 C.W.N. 721=A.I.R 1926 P.C. 9=50 M.L.J. 289 (P.C.).**

—S. 107—Muhammadan law.

———The rule of Muhammadan Law about missing persons is purely one of evidentiary presumption and is not applicable in the face of Evidence Act: 7 All. 297 (F.B.), *Foll.* (*Lindsay and Kanhaiya Lal, JJ.*). MAIRAJ FATIMA *v.* ABDUL WAHED. **63 I.C. 286=43 All. 673=19 A. L. J. 713=A.I.R. 1921 All. 175.**

—S. 107—Scope of presumption.

———Sections 107 and 108 only relate to the date when the suit was brought, that is to say, as to whether a man is alive or dead as the case may be at the date of the suit, and not at some particular period anterior to the suit. The decisions also establish that there is no presumption as to whether a particular person was dead at any time within the period in question. (*Marten and Fawcett, JJ.*). RAMCHANDRA SADASIV OKA *v.* KESHVA DHONDU NARVEKAR. **82 I. C. 27=A.I.R. 1923 Bom. 208.**

—S. 107—Time of death.

———There is no presumption about the time of death—Time must be proved by party concerned. (*Kinkhede, A. J C.*). MT. DESHRANI *v.* THAKUR KISHORE SINGH. **100 I.C. 446=22 N L.R. 175=10 N.L.J. 5=A.I.R. 1927 Nag. 104.**

—S. 108—Hindu law.

———*12 years' rule—Inapplicable.*

The rule of Hindu Law that at least 12 years should elapse before a man unheard of should be treated as dead is only a rule of evidence and is nol applicable after the passing of the Evidence Act: 2 Beng. L. R. 134, *Dist.*; 1 All. 53, *Foll.* (*Krishnan and Venkatasubba Rao, JJ.*). PONDURI ADEYYA *v.* JALADI BURREYA. **71 I.C. 305=16 M.L.W. 976=1923 M.W.N. 49=32 M.L.T. 6=A.I.R. 1923 Mad. 182=43 M.L.J. 725.**

—S. 108—Presumption—Nature of.

———The presumption is only that the person in question is dead; there is no presumption that he died at any particular time. (*Dalal, J.*). GUDRI SINGH *v.* JANGI SINGH. **124 I.C. 25.**

———Where a person is not heard of for seven years, there is no presumption that he died after the expiry of seven years from the time when he was last heard of. The presumption is only that is dead at the time when the dispute arises. (*Sulaiman and Sen, JJ.*). JAGESHAR SINGH *v.* MAHADEO SINGH. **115 I.C. 626.**

—S. 108—Presumption of death.

———Section 108 of the Evidence Act provides that in certain circumstances a rebuttable presumption of law arises as to death. It does not follow that if those circumstances do not exist there cannot be a presumption or inference of fact, as to death. (*Ashworth, J.*). BADAL *v.* SARASAVATI, **103 I.C. 329=A.I.R. 1927 All. 687.**

———Person not heard of for 7 years by near relatives—Presumption under section must be drawn.

EVIDENCE ACT (1872), S. 108—Presumption of death.

(*Broadway and Campbell, JJ.*). KAHAN CHAND *v.* MT. JAWANDI. **79 I.C. 500= A.I.R. 1923 Lah. 174.**

———There is a presumption in favour of continuance of life and it is for the person asserting death to prove it. The death of a person cannot be presumed to have taken place more than 7 years before the date of suit calling the question into controversy: 22 Bom. L. R. 771; 1 Lah. 554, *Foll.* (*Wilberforce, J.*). MUHAMMAD CHIRAGH *v.* ABDUL HUQ. **64 I.C. 468 (Lah.).**

—S. 108—Proof of death.

———Where a reversioner is suing persons who are merely trespasses no strong proof is required of the death of a nearer reversioner. A prudent man might within the meaning of the definition of "proved" consider the death of the nearer reversioner sufficiently probable on very little evidence. (*Ashworth, J.*). BADAL *v.* SARASWATI. **103 I.C. 329=A I.R. 1927 All. 687.**

—S. 108—Time of death.

———*Presumption is as to factum.*

The presumption raised by S. 108 is confined to the factum of death and not the exact time when death may have occurred. Where a party affirms that a certain person died on or before a particular date, that fact has to be established by positive evidence. (*Sen and Niamatullah, JJ.*). JIWAN SINGH *v.* KUAR REOTI SINGH. **123 I.C. 759= 11 L.R.A. Rev. 121=1930 A.L.J. 469= A.I.R. 1930 All. 427.**

———While there is a presumption that a person who is proved not to have been heard of for seven years by those who would be likely to hear of him if living, is dead, there is no presumption that he died after the expiry of seven years from the time when he was last heard of. The presumption only is that he is dead at the time when the dispute arises. (*Sulaiman and Sen, JJ.*). JAGESHAR SINGH *v.* MAHADEO SINGH. **115 I.C. 626 (All.).**

———When the Court has to determine the point whether a particular person ought to be presumed as dead on the ground that he has not been heard of for more than seven years, there can be no presumption that he was dead at a particular time. The utmost that can be considered is that he was dead at the time when the suit was brought. A.I.R. 1926 P.C. 9, *Foll.* (*Gokaran Nath Misra, J.*). MAHADEO SINGH *v.* HAR BUKHSH DUBE. **106 I.C. 489=4 O. W. N. 1077= A.I.R. 1928 Oudh 13.**

———Person not heard of for seven years—That he died on any particular date cannot be presumed. A.I.R. 1926 P.C. 9, *Foll.* (*Addison, J.*). FATEH ALI *v.* AHMAD DIN. **100 I.C. 833= A. I. R. 1927 Lah. 284.**

———*No presumption as to time.*

The question for which provision is made in S. 108 is whether a man is alive or dead at the time the question is raised; in other words, the presumption of the continuance of life ceases at the expiration of seven years from the period when the person in question was last heard of. 1 Lah. 554, *Rel. on.*

There is no presumption, however, as to the time of his death, and if any one seeks to establish the precise period at which such person died, he must do so by actual evidence. (*C. C. Ghose, J.*). IN THE GOODS OF GANESH DAS AURORA. **97 I.C. 247=54 Cal. 186=43 C.L.J. 578= A. I. R. 1926 Cal. 1056.**

EVIDENCE ACT (1872), S. 109—Nafargats.

———*No presumption as to time.*

What the Court may presume under S. 108 is confined to the *factum* of death; it cannot presume that because the person has not been heard of he died at any particular moment, or in any particular way, or from any particular cause. 34 All. 36 (F. B.), *Foll.*

Ryves, J.—It does not follow that merely because a person has not been heard of for 7 years, where there is no positive or reliable evidence, that he is in fact alive, the Court must find that he was dead at the date of suit, much less that he was dead at any given particular date. (*Walsh and Ryves, JJ.*). REKHAL DAS *v.* MT. SHEOBAI. **74 I.C. 656=21 A.L.J. 393=45 All. 466= 4 L.R.A. Civ. 532=A.I.R. 1923 All. 495.**

———*No presumption as to date.*

The presumption under S. 108, relates only to the fact of death, and has no reference whatever to the date of the death.

That fact must be proved like any other fact by the party who is interested in establishing that he died on or before a particular date. 40 B. 239, *Dist.* (*Shah and Crump, JJ.*). GOPAL BHIMAJI SAVTE *v.* MANAJI GANUJI PADWAL. **81 I.C. 449= 25 Bom. L. R. 134=47 Bom. 451= A.I.R. 1923 Bom. 163.**

———*Presumption of death arises after lapse of seven years.*

In a case where the point of time to which the death has to be referred, may be placed indifferently either during the seven years or after the lapse of the seven years (it not being necessary to show that the person lived during the seven years), there is a presumption after the lapse of the seven years in favour of the death and it is for the other side to displace the presumption and the party relying on the presumption is entitled to succeed if no evidence is offered by the other side. 37 Mad. 440 and Mad. Second Appeal 1911 of 1918 *Rel. on*; 34 All. 36 and 6 L. W. 633, *Rel. on.* (*Oldfield and Ramesam, JJ.*). BAL NAICKER *v.* ACHAMA NAICKER. **69 I. C. 835=14 M. L. W. 315= 1921 M.W.N. 610=A.I.R. 1921 Mad. 285= 41 M. L. J. 295.**

—S. 108—Wife.

———Wife leaving her husband and being in another's keeping is not one who would naturally hear from him if he were alive. (*Macnair, A.J.C.*). KAMPTABAI *v.* UMABAI. **117 I.C. 209= 12 N.L.J. 51=A.I.R. 1929 Nag. 127.**

—S. 109—Co-judgment-debtors.

———*Suit for contribution—Defendant may plead and he must prove his non-liability to contribute.*

Where on the decree as passed several defendants were made jointly and severally liable, in the subsequent suit for contribution by one of them, it was for any defendant, who contended that he was not liable to pay the full share, to plead and prove it. The mere fact that he was a sleeping partner did not shift the onus from where it primarily lay. (*Harrison, J.*). MAULA BAKSH *v.* KARIM BAKSH **95 I.C. 1007=A. I. R. 1926 Lah. 553.**

—S. 109—Nafargats.

———The Nafargats only prove a chain of cultivators in succession, but they do not in themselves prove whether each successor came upon the land under a derivative title or independently of the landlord. So long as each cultivator held the land, there might arise a presumption under S. 109 of the Evidence Act that his tenancy had a continuance, but there is no presumption that his successor is

EVIDENCE ACT (1872), S. 110—Burden of proof.

necessarily a transferee from him. (*Kinkhede, A.J.C.*). RAMCHAND *v.* SHRI RATNANATH SAUNSHAN OF BHAR. **98 I.C. 674=A.I.R. 1927 Nag. 99.**

—S. 110—Burden of proof.

———Where plaintiff is in possession of property of which he says he is the owner the onus of proving that he is not the owner lies on the defendant. (*Zafar Ali, J.*). NYZAM DIN *v.* NARANJAN DAS. **103 I.C. 36=A.I.R 1927 Lah. 841.**

—S. 110—Cattles.

———*Person tethering cattle for four months in year —Presumption of title—Proof.*

Where a person is in possession of property and he uses it for four months of every year for tethering his cattle, such possession is *prima facie* evidence of title, but Court should not say that the person's ownership is established. 13 N. L. R. 25, *Dist.* (*Jackson, A.J.C.*). KASTURCHAND BHICUMCHAND SHOP *v.* ATMARAM. **119 I.C. 701= A.I.R. 1929 Nag. 318.**

—S. 110—Converse of presumption.

———*Person with title is not necessarily presumed to be in possession.*

The presumption, that the plaintiff having the title, also has possession can properly be made in the case of the jungle or waste land, where there is no proof or very little proof of acts of ownership having been exercised on either side, or in cases where the evidence as to such acts of such ownership is very nearly equal. Though the S. 110 recognised a presumption that the person in possession also has a good title there is no corresponding section saying that the person with the title should be presumed to be in possession. This presumption is one that can only come under S. 114 of the Evidence Act which allows the Court to presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, etc. (*Marten and Fawcett, JJ.*). KASHINATH GYANOKA *v.* GANESH SITARAM. **77 I.C. 506=A.I.R. 1923 Bom. 361.**

—S. 110—Dispute with Government.

———Plaintiff in possession of land—Government showing that under general law it is owner—Plaintiff must prove better title or adverse possession for 60 years. (*Macleod, C. J. and Fawcett, J.*). VASTA BALWANT *v.* SECY. OF STATE. **61 I.C. 440=45 Bom. 789= 23 Bom. L.R. 238=A.I.R. 1921 Bom. 177.**

—S. 110—Plea of no possession.

———*Absence of.*

The absence of any plea that the apparent purchaser was out of possession entitles the purchaser to the law's presumption under S. 110, that he was in possession as an owner. (*Kinkhede, A. J. C.*). DAULAT *v.* RAMAPPA. **90 I.C. 196= A.I.R. 1926 Nag. 197.**

—S. 110—Possession as evidence of title.

———Prior pieceful possession is *prima facie* evidence of ownership under S. 110 of the Evidence Act and is a good title against all persons except the true owner and can be relied on in successfully maintaining a suit for ejectment against another who has no title to the land in dispute. (*Subhedar, A. J. C.*). NAGO *v.* RAJESHWAR SANSTHAN AKOLA. **118 I.C. 680.**

—S. 110—Possession of stolen articles.

———Stolen articles found in accused's premises raise a *prima facie* presumption against him—Accused not having control over premises, evidence against him is not conclusive but circumstances of

EVIDENCE ACT (1872), S. 111—Fiduciary relation.

each case should be considered. (*Bucknill, J.*). LACHMI PRASAD *v.* EMPEROR. **A. I. R. 1921 Pat. 480.**

—S. 110—Suit for injunction.

———*Prior possession—Value of.*

N brought a suit claiming injunction against *K* restraining him from building a wall on a site of land. Although the site did not belong to *N*, his prior possession was established,

Held, that the suit of *N* could not be dismissed for want of title and that he could be allowed to succeed on the ground of prior possession as such possession is *prima facie* evidence of ownership. 10 N. L. R. 188; 11 N. L. R. 231 and A.I.R. 1917 Rang. 203, *Foll.* (*Subhedar, A. J. C.*). NAGO *v.* RAJESHWAR SANSTHAN AKOLA. **118 I. C. 680 (Nag.).**

—S. 110—Suit for possession.

———Where a person brings a suit for possession and it is proved that possession was with the defendants and title was not clearly established in favour of either party, the plaintiffs' suit must fail. (*Addison, J.*). SULEMAN *v*- GANGA BALLAB. **116 I. C. 546=10 L. L. J. 488.**

———*Dispossession by defendant—What the plaintiff must prove.*

In a suit for possession based upon plaintiff's dispossession by the defendant, the burden of proof is on the plaintiff to prove his possession at some time within 12 years preceding the suit, and it is not enough to show merely an anterior title, without proof of possession within 12 years to shift the burden of proof on to the defendants to show that they were entitled to retain possession. 16 Cal. 473 (P. C.), *Foll.*; 41 All. 669; 39 Mad. 617 and A.I.R. 1922 P. C. 181, *Dist.* (*Campbell, J.*). RAWAL BAKHSH *v.* DOLU MAL. **93 I. C. 1006 (Lah.).**

—S. 110—Vendee and vendor.

———*Plea of bogus transaction—Vendee to prove the sale is real.*

Although under ordinary circumstances the party to a sale-deed duly executed and registered who alleges non-payment of consideration and unreal nature of the transaction is bound to prove his allegation, the fact, that the plaintiff had silently submitted to the withholding'of possession for a period of nearly twelve years combined with the continuous possession of the vendor, favoured the allegation of the latter and raised such a counter-presumption as to make it incumbent on the plaintiff to give evidence that the sale was real. 8 All. 641; 33 All. 483, *Ref.* (*Kinkhede, A. J. C.*). RAJA RAM *v.* BAPU. **79 I. C. 596= 20 N.L.R. 154=A.I.R. 1924 Nag. 173.**

—S. 111—Applicability.

———Where the vendor had been living separately and was not under the vendee's influence S. 111 does not apply. (*Abdul Raoof and Moti Sagar, JJ.*). JAI LAL *v.* SHEO CHAND. **85 I. C. 293= 6 L.L.J. 408=A. I. R. 1925 Lah. 123.**

—S. 111—Creditor and debtor.

———Plaintiff, a malguzar money-lender—Suit against tenants—Written statement pleading illiteracy and terrorizing influence of plaintiff amounts to plea of undue influence though not raised in words—Burden of proof is on plaintiff. (*Findlay, J. C.*). VITHOBA *v.* BHANGI. **112 I.C. 893= A.I.R. 1928 Nag. 322.**

—S. 111—Fiduciary relation.

———Whenever a person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the Courts so far presume

EVIDENCE ACT (1872), S. 111—Necessary elements.

against the validity of the instrument as to require some proof varying in amount according to circumstances, of the absence of anything approaching to imposition, over-reaching, undue influence, or unconscionable advantage. (*Mookerjee and Panton, JJ.*). NIBARAN CHANDRA *v.* NIRUPAMA DEVI. **69 I.C. 476=34 C.L.J. 563=26 C.W.N. 517= A.I.R. 1921 Cal. 131.**

—S. 111—Necessary elements.

———*Position of dominating the will and actual unfair advantage are both necessary.*

To treat undue influence as having been established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it, is erroneous. That merely proves influence. It must be further established that a person in a position of domination has used the position to obtain unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid. A.I.R. 1920 P.C. 65, *Foll.* (*Addison and Tek Chand, JJ.*). FAYYAZ-UD-DIN *v.* KUTAB-UD-DIN. **116 I.C. 899=10 Lah. 761=30 P.L.R. 288= A.I.R. 1929 Lah. 309.**

—S. 111—Pardanashin lady.

———Party relying on a deed executed by a pardanashin lady must prove that it was the free and intelligent act of the lady, and that she adopted it with full knowledge and comprehension. A.I.R.1925 P.C. 204, *Foll.* (*Hallifax and Kotval, A.J.Cs.*). MIR DILWAR ALI *v.* RABIA BEGAM. **95 I.C. 506= A.I.R. 1926 Nag. 414.**

———*The burden of proving absence of undue influence is on the party asserting it.*

Where a pardanashin lady was possessed of considerable property which she inherited from her father but which was entirely managed by her husband who used to receive and spend the entire income without reaching the lady's hands and whom she used to obey implicitly.

Held, her husband should be deemed to have stood in a position of active confidence to her. The provisions of S. 111 of the Evidence Act, 1872, applied to the case and the burden of proving good faith lay on the party stating that the transaction into which she had been led by her husband was free from undue influence. The question for determination in the case was not merely that the lady knew what she was doing or had done but a still further vital question to be determined was how her intention to execute the mortgage was produced and whether all that care and prudence was placed around her as against those who advise her which from their situation and relation with respect to her they were bound to exert on her behalf. (*Wazir Hasan and Neave, A.J.Cs.*). DWARKA PRASAD v. NASIR AHMAD. **78 I.C. 850= 11 O.L.J. 219=A.I.R. 1925 Oudh 16.**

———*Transaction with person in active confidence—Latter must prove good faith.*

Where there is a question as to the good faith of a transaction between parties one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. It is an elementary principle that, whenever any person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the Courts so far presume against the validity of the instrument as to require some proof, varying in amount according to anything approaching to imposition, over-reaching, undue influence or unconscionable advantage. (*Mookerjee and Buckland, JJ.*). SATISH CHANDRA GHOSE *v.* KALIDASI DASI. **68 I.C. 577=26 C.W.N. 177= 34 C. L. J. 529=A.I.R. 1922 Cal. 203.**

EVIDENCE ACT (1872), S. 112—Applicability.

—S. 111—Pleader and client.

———Pleader appearing in one or two cases of his client—Pleader's father purchasing property from the client—Pleader and father constituting joint Hindu family—Pleader cannot be said to be permanent pleader and does not stand in a position of active confidence so as to justify the throwing on the pleader burden of proving good faith of the transaction—Father is not bound to prove *bona fides* of the transaction. (*Gokaran Nath Misra, J.*). RAM SUMRAN *v.* SARJOO PERSHAD. **114 I.C 806= 4 Luck. 270=5 O.W.N. 1062= 10 L.R.A.Rev. 230=A.I.R. 1929 Oudh 67.**

—S. 111—Subsequent purchaser.

———Where *A* buys property from *B* after *B* has agreed to sell the same to *C*, the onus will be on *A* to show that he bought it in ignorance of the previous contract and in good faith. Where the consideration is paid in full and the vendees are ignorant of the original contract, good faith must be presumed in the absence of evidence to the contrary. (*Abdul Raoof and Harrison, JJ.*). KANSHIRAM *v.* ISHWARDAS. **67 I.C. 888= 5 L.L.J. 150=A. I. R. 1923 Lah. 108.**

—S. 111—Undue influence.

———*Necessary elements.*

For establishing undue influence it must be proved that one person was in a position to dominate the will of and exercise his influence over another and secondly that the former did influence the latter. (*Macleod, C.J. and Shah, J.*). SHIDDUBAI RUDRAGAUDA DESAI *v.* NILAPPAGAUDA BHARMAGAUDA. **83 I.C. 616= 26 Bom. L.R. 622=A.I.R. 1924 Bom. 457.**

—S. 111——Widow and reversioners.

———Hindu widow whose previous mismanagement was proved must show that her subsequent management will be in the interests of the reversioners. (*Findlay, J.C. and Macnair, A.J.C.*). MT. RUPA *v.* CHAUDHARI BHAIRAON PRASAD. **105 I.C. 353=A.I.R. 1928 Nag. 93.**

—S. 112—Acknowledgment by parents.

———*Shifting of burden.*

Where parentage of the plaintiff is challenged, though the burden is initially on him to show that he was the son of his parents, it is shifted on to the defendants as soon as he shows that he has been acknowledged by his parents to be their son and that he has been accepted as such by repute and habit for the last many years, and it would require much clearer and stronger and more reliable evidence on the defendant's part to justify a finding against the plaintiff's paternity. (*Krishnan and Venkatasubba Rao, JJ.*). KRISHNA RAO *v.* RAJA OF PITTAPUR. **102 I.C. 713= A.I.R. 1927 Mad. 733.**

—S. 112—Applicability.

———There is no reason for extending the presumption which exists in favour of a marriage and against concubinage, and in favour of legitimacy and against bastardy, to a case in which the validity of the marriage and the legitimacy of the offspring are admitted and where the only point is as to whether the marriage was conducted in such a way as to confer a particular status and precedence upon the offspring of the union. (*Lord*

EVIDENCE ACT (1872), S 112—Birth after dissolution.

Chancellor.) MOLAPO MOJELU *v.* THABO LEROTHOLI MOJELA. **111 I. C. 193=28 M.L.W. 744=5 O.W.N. 1142=A.I.R. 1928 P.C. 276 (P.C.).**

—S. 112—Birth after dissolution.

———*Child born* 419 *days after.*

A son was born to a Mahomedan wife after 419 days after her husband's death,

Held, that the period of gestation is so extraordinarily unusual as to be suspiciously improbable and rebuts all assertions of mother's chastity: 77 P. R. 1911, *Ref.* (*Johnstone, J.*). MT. RAHIM BIBI *v.* CHIRAGH DIN. **120 I.C. 435=A.I.R. 1930 Lah. 97.**

—S. 112—Birth after father's death.

———*Child born nine months after death of his father—Legitimate.*

The case of the brother of the deceased was that the deceased's widow never had been pregnant at all, and that the story about the birth of a child involved the introduction of a supposititious heir nine months after the death of the husband to a woman who had never been pregnant by her husband or anybody else,

Held, on a consideration of evidence that the child must be taken to be the son of the deceased husband. (*Lord Atkin.*) BHAIRON PRASAD *v* MT. GOPI KUNWAR. **123 I.C. 550=A. I. R. 1930 P. C. 139=58 M. L. J. 708 (P.C.).**

—S. 112—Birth immediately after marriage.

———*Defendant born five and half months after marriage—Legitimate.*

Defendant's father was married to the defendant's mother on 2nd August 1889 and the defendant was born on 23rd January 1890.

Held, that the defendant being born during the continuance of the marriage between his parents is his father's legitimate son unless it is shown that his parents had no access to each other at any time when he could have been begotten. It is immaterial how soon after the marriage the defendant was born: 79 P. R. 1907, *Foll.* (*Martineau, J.*). KAHAN SINGH *v.* NATHA SINGH. **90 I.C. 123=7 L.L.J. 184=26 P.L.R. 509=A.I.R. 1925 Lah. 414.**

—S. 112—Burden of proof.

———It is for the plaintiff to establish all the facts mentioned by S. 112 before he could ask that they should be treated as conclusive proof of his paternity. (*Hallifax, A.J.C.*). MAROTI *v.* BHAGI. **68 I. C. 465=A.I.R. 1923 Nag. 43.**

———The plaintiff set up the case that he was the son of *M* by *I*. The defendants' case was that the union took place after the birth of the plaintiff,

Held, that it was for the plaintiff to prove that *M* was his father and no presumption could be raised in his favour. (*Lindsay, J. C. and Daniels, A.J.C.*). AHMAD KHAN *v.* HURMUJI KHANAM. **61 I.C. 177=8 O.L.J. 27=A.I.R. 1921 Oudh 81.**

—S. 112—Deciding factor.

———Section 112 refers to the point of time of the birth of the child as the deciding factor and not to the time of conception of that child. A. I. R. 1924 Mad. 677, *Foll.* (*Broadway and Fforde, JJ.*). PAL SINGH *v.* JAGIR. **98 I.C. 366=7 Lah. 368=27 P.L.R. 531=3 L.L.J 447=A.I.R. 1926 Lah. 529.**

———*Non-access and second marriage.*

Section 112 refers to the point of time of the birth of the child as the deciding factor and not to the time of the conception of that child. The point of time of the conception of the child has to be considered only to see whether the husband had not access to the mother.

EVIDENCE ACT (1872), S. 112—Muhammadans.

A child born in wedlock should be treated as the child of the father, who was then the husband of the mother, unless it is shown that he had no access to the mother at the time of conception, quite inrespective of the question whether the mother was a married woman or not. Where the mother was married again after dissolution of the first marriage before the child was born, the child is the legitimate son of the second husband. (*Krishnan, J.*). PALANI *v.* SETHU. **81 I.C. 456=20 M.L.W. 69=1924 M.W.N. 502=47 Mad. 706=A.I.R. 1924 Mad. 677=47 M.L.J. 155.**

—S. 112—Divorce.

———Where a woman is divorced by her first husband and she marries a second husband and a child is born during the subsistence of the second marriage, the child is the legitimate son of the second husband, although he might have been conceived during the first marriage, unless it is shown that the second husband had no access to the woman at the time when the child could have been begotten. The English Law and the Hindu Law do not differ in such matters. The date of birth and not that of conception is the test: 24 Cal. 216, *Dist.* (*Devadoss and Waller, JJ.*). SETHU *v.* PALANI. **93 I.C. 317=49 Mad. 553=24 M.L.W. 142=A. I. R. 1926 Mad. 628=50 M. L.J. 453.**

—S. 112—English law.

———*Rule does not apply to India.*

The rule of English Law that the declarations of a father or mother cannot be admitted to bastardise the issue born after the marriage is not applicable in India as it is excluded by the terms of the Act. (*Macleod, C. J. and Coyajee, J.*). BAI KOMALA *v.* BABUBHAI. **95 I. C. 834=28 Bom. L.R. 607=A.I.R. 1926 Bom. 348.**

—S. 112—Foundation of presumption.

———Presumption of legitimacy arises only on proof of marriage which itself can be inferred from living together or recognition as husband and wife. (*Oldfield, J.*). CHOCKALINGAM PILLAI *v.* SANI BATTAR. **79 I.C. 623=A.I.R. 1925 Mad. 426.**

———The presumption arises only after it is proved that a child was born during continuance of a valid marriage. (*Mears, C.J. and Banerjee, J.*). RAO NARASINGH *v.* B. M. LAKSHMI BAI. **66 I C. 902=44 All. 470=20 A.L.J. 274=A.I.R. 1922 All. 214.**

—S. 112—Muhammadans.

———*Rule regarding gestation—Superceded by Evidence Act.*

The rule of Mahomedan Law regarding gestation is a rule of evidence and the Courts are not bound by the rule of Mahomedan Law in this respect. To such case S. 112 applies. 76 P.R. 1891 and A.I.R. 1923 All. 570, *Rel. on.* (*Johnstone, J.*). MT. RAHIM BIBI *v.* CHIRAGH DIN. **120 I. C. 435=A.I.R. 1930 Lah. 97.**

———*Evidence Act applies to determine legitimacy of Muhammadan children.*

Where a Muhammadan child was born during the continuance of a valid marriage between its parents, but its birth was within six months of the date of its parents' marriage.

Held, that S. 112 applied and the child was legitimate. 10 All. 289, *Ref.*; A.I.R. 1928 All. 570, *Appr.* (*Daniels and King, JJ.*). SIBT MUHAMMAD *v.* MD. HAMEED. **96 I. C. 582=43 All. 625=24 A.L.J. 723=A.I..R. 1926 All. 589.**

———*Fasid marriage—Section inapplicable.*

Section 112 cannot be applicable in any way to a marriage which is neither void *ab initio*

EVIDENCE ACT (1872), S. 112—Muhammadans.

(batil), nor absolutely void, but is *fasid*, *i.e.*, irregular, inasmuch as S. 112 is based on a division of marriages merely into two categories, and cannot be applicable to Muhammadan Law which divides marriages into three categories. If S. 112 can be held applicable the word "valid" in the section must be construed as "flawless" so that the presumption would not apply to *fasid* marriages. (*Ashworth and Raza, JJ.*). MT. KANIZA *v.* HASAN AHMAD KHAN. **92 I.C. 82=1 Luck. 71=3 O. W. N. 114=A.I.R. 1926 Oudh 231.**

———Under the presumption of Mahomedan Law in the case of a *fasid* marriage a child born on the expiry of six months of copula is to be regarded as legitimate. (*Ashworth and Raza, JJ.*). MT. KANIYA *v.* HASAN AHMAD KHAN. **92 I C 82=1 Luck. 71=3 O. W. N. 114=A. I. R. 1926 Oudh 231.**

———Section 112 applies to Mahomedans. (Tyabji's Mahammadan Law, 2nd Ed., p. 267, *Ref.*). (*Daniels, J.*). MT. HAZIRA KHATUN *v.* MT. AMINA KHATUN. **73 I. C. 983=A.I.R. 1923 All. 570.**

———*Legitimacy—Rule of Mahomedan Law—Rebuttable presumption arises—Mahomedan Law.*

Where it was found that the plaintiff was born 331 days or eleven full months after his alleged father's death and that his mother had been living for the previous few years in illicit connection with another person.

Held, that the plaintiff-appellant was not the legitimate son of the alleged father. (*Daniels, J.*). FATTEH DIN *v.* UMRAO. **82 I.C. 592=A. I. R. 1923 All. 440.**

—S. 112—Non-access and second marriage.

———A child born in wedlock should be treated as the child of the father, who was then the husband of the mother, unless it is shown that he had no access to the mother at the time of conception, quite irrespective of the question whether the mother was a married woman or not. Where the mother was married again after dissolution of the first marriage before the child was born, the child is the legitimate son of the second husband. (*Krishnan, J.*). PALANI *v.* SETHU. **81 I.C. 436=20 M L.W. 69=1924 M. W. N. 502=47 Mad. 706=A.I.R. 1924 Mad. 677=47 M.L.J. 155.**

———Claim to succeed to mother's first husband's properties—Plaintiff born after second marriage of mother—Non-access between mother and first husband proved—Presumption under S. 112 is rebutted. (*Hallifax, A.J.C.*). MAROTI *v.* BHAGI. **68 I. C. 465=A.I.R. 1923 Nag. 43.**

—S. 112—Personal law.

———Section 112 is not opposed to the personal law of such parties who are allowed to re-marry and divorce according to their personal law. (*Devadoss and Waller, JJ.*). SETHU *v.* PALANI. **93 I.C. 317=49 Mad. 553=24 M.L.W. 142=A.I.R. 1926 Mad. 628=50 M.L.J. 433.**

—S. 112—Rebuttal.

———Very cogent evidence is necessary to rebut the presumption raised by S. 112. (*Hallifax and Macnair, A.J.Cs.*). JANGLIA *v.* JHINGRYA. **63 I.C. 594=A.I.R. 1921 Nag. 71.**

—S. 112—Validity of marriage.

———Validity of marriage established—Legitimacy of child is presumed. (*Curgenven, J.*). NARAYAN NAIR *v.* MANIKKATH KULLAPPURA VETTIL BHARGAVI AMMA. **100 I.C. 123=38 M.L.T. 39=25 M.L.W. 151=28 Cr. L.J. 251=7 A. I. Cr. R. 351=A.I.R. 1927 Mad. 361=52 M.L.J. 118.**

EVIDENCE ACT (1872), S. 114—Common course of events.

—S. 112—Void divorce.

———Where divorce in the sense of a legal dissolution of the marriage, has not taken place, a child born must be taken to be born during the continuance of a valid marriage between a woman and her husband. (*Curgenven, J.*). M. KANNIAPPAN *v.* KULLAMMAL. **1930 Cr. C. 88=1929 M.W.N. 696=2 M. Cr. C. 275=A.I.R. 1930 Mad. 194.**

—S. 114.

Adoption.
Common course of events.
Criminal Trial.
Custom.
Death.
Documents.
Guiding principles.
Human conduct.
Joint Hindu family.
Marriage.
Murder.
Notice.
Possession and ownership.
Retracted confession.
Scope.
Statements and affidavits.
Miscellaneous.

—S. 114—Adoption.

———Datta homa—*Presumption of performance.*

When an adoption has not been challenged by any member of the family for 48 years though definite evidence is not forthcoming to prove that the *Datta Homa* had been performed at the time adoption took place, it is permissible to presume from the fact, that the adoption had not been challenged for such a long period, that, if the ceremony was necessary, it must have been performed. 29 All. 148 (P.C.), *Ref. to.* (*Kanhaiya Lal and Sulaiman, JJ.*). L. CHHOTEY LAL *v.* CHANDRA BHAN. **80 I.C. 1041=43 All. 59=A.I.R. 1923 All. 176.**

———*Authority alleged to be given 100 years before suit—No direct evidence—Presumption from conduct of members.*

In the case of a dispute as to the authorisation of a Hindu widow to adopt a son to her deceased husband, when the authorisation, if ever given, was given almost a hundred years before the date of the suit, the absence of direct evidence on the point is not conclusive. The question in such a case is whether it can be presumed, as a fair matter of inference from established facts that the lady must have had authority to make the adoption, that her authority to do so was known and recognised in the family and that it could safely be inferred from the conduct of the members of the said family. (*Walsh and Piggott, JJ.*). PREMI DEVI *v.* SHAMBHU NATH. **76 I.C. 651=18 A. L. J. 473=42 All. 382.**

—S. 114—Common course of events.

———*Ghee.*

The Court is entitled to take for granted, when it is not denied, that ghee is an article intended for human consumption. It is possible that it can be employed for remote or extraordinary purposes but the ordinary presumption that ghee is intended for human consumption is not a presumption of law but a supposition based on common sense when there is no assertion to the contrary. (*Suhrawardy and Graham, JJ.*). DAULAT RAM *v.* CORPORATION OF CALCUTTA. **49 C. L. J. 502=A. I. R. 1929 Cal. 283.**

EVIDENCE ACT (1872), S. 114—Common course of events.

———*'Common' course—Meaning.*

The course of conduct which S. 114, calls "common" can be only that which is most common in the experience of the Judge who has to decide the point. *(Hallifax, A. J. C.).* SECY. OF STATE (G. I. P. RY. CO.) *v.* NANDLAL. **107 I. C. 206= 24 N. L. R. 87= A. I. R. 1928 Nag. 52.**

———Court can take judicial notice that registered letter reaches the destination 24 hours later than an ordinary letter. *(Walsh, Ag. C. J. and Banerje, J.).* CHATUBHUJ RAM LAL *v.* SECY. OF STATE. **99 I. C. 622= A. I. R. 1927 All. 215.**

———*Food partaken at evening meal by husband.*

It is a violent presumption drawn from one's knowledge of human nature and of Indian village life which it is the duty of a tribunal in a case of dhatura poisoning to apply, namely, that the food partaken at the evening meal by a husband in an ordinary constituted house is prepared for him and served to him by his wife. *(Walsh and Pullan, JJ.).* EMPEROR *v.* MT. HAR PIARI. **97 I.C. 44= 49 All. 57= 24 A.L.J. 958= 27 Cr.L.J. 1068= 7 L.R.A.Cr. 156= A.I.R. 1926 All. 737.**

———*Sending cheques by post.*

From the mere fact that cheques were sent from time to time by post. in the ordinary course of business to a certain person it cannot be inferred that there was any implied request from that person to send cheques by post. *(Kajiji, J.).* JAGJIVANDAS *v.* NAGAR CENTRAL BANK. **93 I. C. 619= 50 Bom. 118= 28 Bom.L.R. 226= A. I. R. 1926 Bom. 262.**

———Posting of letter proved—Letters bearing note by postman that it was refused by addressee—Presumption that it was so refused arises. 15 Cal. 681; 17 C.W.N. 1073 and 23 C.W.N. 319, *Foll. (Zafar Ali, J.).* SHER AFZAL *v.* MOHAN LAL. **94 I. C. 103= A.I.R. 1926 Lah. 520.**

———*Hindu Law—Ascetic ceremonies—Presumption.*

Where a ceremony is admittedly performed, the presumption is that it was performed in accordance with the shastras. *(Kumaraswami Sastri and Venkatasubba Rao, JJ.).* RUKMANI AMMAL *v.* ANKAMA NAIDU. **96 I.C. 26= 23 M.L.W. 664= 1926 M.W.N. 938= A. I. R. 1926 Mad. 744.**

———The fact that a man is arrested in the district where an offence has been committed many months after its commission does not in any way lead to any inference against him. *(Scott-Smith and Fforde, JJ.).* MANSHA SINGH *v.* CROWN. **86 I.C. 347= 7 L. L. J. 51= 26 Cr. L.J. 763= A. I. R. 1925 Lah. 371.**

———The presumption is that a letter which is proved to be posted and posted to the right address is in fact received by the recipient. *(Schawabe, C.J. and Krishnan, J.).* ABURUBAMMAL *v.* OFFICIAL ASSIGNEE OF MADRAS. **79 I.C. 809= 47 Mad. 215= 19 M.L.W. 54= 33 M.L.T. 217= A.I.R. 1924 Mad. 214= 45 M.L.J. 817.**

———A given fact whose existence at a particular time is once established is presumed to continue to exist as long as such fact usually exists. *(Mookerjee and Cuming, JJ.).* SECY. OF STATE *v.* UPENDRA NARAIN ROY. **71 I. C. 849= 36 C.L.J. 336= A.I.R. 1923 Cal. 247.**

———Things continuous in nature may be presumed to have continued until contrary is shown. *(Woodroffe and Cuming, JJ.).* SECY. OF STATE *v.* ANANDA MOHAN. **66 I.C. 287= 34 C.L.J. 205= A.I.R. 1921 Cal. 661.**

EVIDENCE ACT (1872), S. 114—Criminal trial.

—S. 114—Criminal trial.

———Person carrying in his cart dacoits, one of whom being injured and having blood-stains on clothes soon after dacoity—Unless he explains circumstances presumption is that he knew of part taken by those persons in dacoity and that one injured was injured in dacoity. *(Boys and Young, JJ.).* EMPEROR *v.* KANHAIYA. **124 I.C. 553= A.I.R. 1930 All. 481.**

———Evidence of eye-witnesses not on good terms with accused should not be relied upon unless corroborated. *(Hilton, J.).* BHARTU *v.* EMPEROR. **30 P.L.R. 582= A. I. R. 1930 Lah. 311.**

———Where the prosecution witnesses are found to be untruthful as to the greater part of their evidence, it is dangerous to convict the accused on the residue without corroboration: 42 Cal. 784, *Foll. (Nanavutty and Raza, JJ.).* GENDAN LAL *v.* EMPEROR. **A.I.R. 1930 Oudh 460.**

———*Agent Provocateur as witness.*

The evidence of an agent provocateur is looked upon with suspicion and should be seldom relied upon in support of a conviction. *(Agha Haidar, J.).* HAZURA SINGH *v.* EMPEROR. **118 I.C. 544= 11 L.L.J. 58= 30 Cr. L. J. 941= 30 P.L.R. 603= 1929 Cr. C. 3= A.I.R. 1929 Lah. 436.**

———*Approver's evidence — Corroboration—Nature of—Mere presence of person at the scene—Whether sufficient.*

The corroboration that is required in connection with the approver's testimony is corroboration of the material facts which go to connect the accused with the commission of the offence. The mere presence of a person in the house is not such a corroboration. *(Beasley, C. J. and Ananthakrishna Iyer, J.).* ABBOI NAIDU *v.* EMPEROR. **1929 M.W.N. 698.**

———*Witnesses relations of co-accused.*

Where four men are suspected and relatives of three try to implicate the fourth alone who is a stranger, they are naturally suspected of bias and the principle universally adopted in the case of co-accused comes into play and a Court should require some independent corroboration before accepting the evidence. *(Barlee, J.C. and Kalumal, A.J.C.).* EMPEROR *v.* PANJAL. **1929 Cr. C. 539= A.I.R. 1929 Sind 245.**

———Butcher without license importing meat in quantities more than required for his personal use and distributing it—No proof of receiving money—Presumption that he actually imported meat and sold it is justified. *(Barlee, J. C. and Kalumal Phalumal, A.J.C.).* MAHOMEDDIN *v.* EMPEROR. **118 I.C. 223= 1929 Cr. C. 318= 30 Cr. L.J. 906= A.I.R. 1929 Sind 150.**

———Conviction should not be based on the evidence of witnesses who are bitter enemies of the accused unless it is supported by the evidence of reliable and disinterested witnesses. *(Shadi Lal, C. J. and Agha Haidar, J.).* DALIP SINGH *v.* EMPEROR. **99 I. C. 75= 28 Cr. L.J. 43= A.I.R. 1927 Lah. 874.**

———In a criminal case Courts are not permitted to proceed upon an assumption that accused actually did what they were required by the rules to do. *(Cuming and Mukerji, JJ.).* PRAFULLA KUMAR ROY *v.* EMPEROR. **91 I. C. 883= 30 C.W.N. 94= 27 Cr. L.J. 147= A.I.R. 1926 Cal. 345.**

———An attempt to fabricate false evidence of *alibi* would be a very strong piece of evidence against the accused if his connection with such

EVIDENCE ACT (1872), S. 114—Criminal trial.

attempt had been established. But where the attempt was proved only against his co-accused no such connection should be presumed. (*Shadi Lal, C. J. and Jai Lal, J.*). MAJHI *v.* EMPEROR.
86 I.C. 344=7 L.L.J. 48=26 Cr. L.J. 760=A.I.R. 1925 Lah. 323.

———*Penal Code, S.* 408—*Servant—Failure to account properly for property entrusted—Presumption of misappropriation.*

It is settled law that where property is entrusted to a servant, it is the duty of the servant to give a true account of what he does with the property so entrusted to him. If such a servant fails to return the property or to account or gives an account which is shown to be false and incredible, it is ordinarily a reasonable inference that he has criminally misappropriated the property so entrusted to him and dishonestly converted it to his own use. In such cases the Courts are entitled to draw hostile inferences and presumptions from the action and statement of the servant. (*Lentaigne, J.*). SONA MEAH *v.* EMPEROR. **84 I.C. 331=2 Rang. 476=26 Cr. L.J. 267=A.I.R. 1925 Rang. 47.**

———*Possession cof cocaine.*

Where cocaine was found in certain pots containing grain in a Bania's shop where the accused who were brothers were serving habitually in the shop.

Held, that they must have been daily handling the pots in question and that therefore the finding that both of them must have been aware of the existence of the cocaine in the pot is justifiable. 20 A. L. J. 162; 77 I. C. 447, *Dist.* (*Boys, J.*). GANESH *v.* KING EMPEROR. **83 I.C. 892=5 L.R.A. Cr. 136=26 Cr. L.J. 188=A.I.R. 1924 All. 776.**

———When a man points out unknown matters to others, one may presume that he is connected with the crime unless he can give some satisfactory explanation as to how he comes by that knowledge. (*Marten and Crump, JJ.*). AHILA MANAJI *v.* EMPEROR. **84 I.C. 643=24 Bom.L.R. 803=47 Bom. 74=26 Cr. L.J. 339=A.I.R. 1923 Bom. 183.**

———*Presumption as to probability.*

Where the accused gave the deceased a beating the previous day and were seen by various persons on the occasion, it is highly improbable that they would murder the person next day so to invite suspicion. (*Scott-Smith and Moti Sagar, JJ.*). SHEO RAM *v.* THE CROWN. **75 I.C. 733=6 L.L.J. 486=25 Cr. L.J. 45=A.I.R. 1923 Lah. 436.**

———An accused was convicted under S. 412, Penal Code, and the Judge, holding that he must be presumed to have known the nature of the dacoity, sentenced him to the maximum punishment,

Held, that the sentence was excessive as the presumption alone would not justify fixing the accused with more than knowledge that the goods recovered from him had been obtained by dacoity. (*Walmsley and Huda, JJ.*). ASIMUDDIN SARDAH *v.* EMPEROR. **59 I.C. 204=22 Cr. L.J. 60=32 C.L.J. 89.**

—S. 114—Custom.

———*Wajib-ul-arz and Riwaj-i-am—Entries in.*

Entries in wajib-ul-arz and Riwaj-i-am relating to questions of custom are presumptive proof of the custom stated therein. It is therefore for the person rebutting it to prove that the statement of the custom in them is incorrect: 18 P. R. 1914; 98 P.R. 1894 (F.B.); 33 P.R. 1903 and 15 P.R. 1904, *Foll.* (*Addison, J.*). ZAMMA KHAN *v.* ABDUL RAHIM. **109 I.C. 59 (Lah.).**

EVIDENCE ACT (1872), S. 114—Documents—Creation of title.

———*Applicability of Hindu Law to Muslims.*

There is a presumption that Muslims are governed by Muhammadan Law, and if a person alleges that Cutchi Memons are governed by Hindu Law by custom, the burden of proving the custom lies on him and the onus will be discharged by proof of actual instances in which the alleged custom has been followed. (*Tyabji, A.J.C.*). TULSIDAS *v.* FAKIR MAHOMED. **93 I.C. 321=19 S.L.R. 376=A.I.R. 1926 Sind 161.**

———Where an agricultural tribe in a village community live by agriculture, a presumption is in favour of custom. (*Martineau, J.*). HIRA NAND *v.* HAYAT MOHAMMAD. **64 I.C. 180=4 U.P.L.R. (Lah.) 6.**

—S. 114—Death.

———*There can be a presumption of death irrespective of S.* 108.

Section 108 provides that in certain circumstances a rebuttable presumption of law arises as to death. It does not follow that if those circumstances do not exist there cannot be a presumption or inference of fact, under S. 114, Evidence Act, as to death. (*Ashworth, J.*). BADAL *v.* SARASWATI. **103 I.C. 329=A. I. R. 1927 All. 687.**

———*Deaths—Order of.*

Where two persons, one aged 18 and the other 60 are found to have died on the same day, but it is not clear as to who died last. A Court is entitled to say that the probabilities are in favour of the younger man surviving the elder. (*Macleod, C. J. and Shah, J.*). Y. N. KULKARNI *v.* LAXMIBAI KESHEO GOPAL. **77 I.C. 117=24 Bom. L.R. 836=47 Bom. 37=A.I.R. 1922 Bom. 347.**

—S. 114—Documents—Consideration.

———When a registered document contains a recital that consideration has passed, it is evidence, against the person executing, of passing of consideration unless rebutted. (*Madhavan Nair, J.*). LAKSHMIDEVAMMA *v.* P. KRISHTIAH. **104 I. C. 518=39 M. L. T. 198=A. I. R. 1927 Mad. 1107.**

—S. 114—Documents—Copy of foreign record.

———True copy of deposition recorded in Court in Cutch Copy certified to be true by a higher officer of the State than the trial Judge, but not by the Political Agent. Presumption arises that the document is true copy.

Held, further, that under S. 114 a presumption would arise that the copy was a correct copy of the record of the deposition as recorded by or under the supervision of the Judge who tried the suit. The fact that the certificate as to its being a true copy is given by a higher officer of the State than the trial Judge would really be an additional reason for accepting its authenticity, and there is no reason to suppose that the mode of certificate, *viz.*, true copy, is not the one ordinarily in use in Cutch just as it is in British India. (*Fawcett, J.*). VALLABHDAS MULJI *v.* PRANSHANKAR NARBHESHANKAR. **113 I. C. 313=30 Bom. L.R. 1519=A.I.R. 1929 Bom. 24.**

—S. 114—Documents—Creation of title.

———*Old document—Conduct of parties may negative creation of title.*

Assuming that a document which is produced apparently from proper custody, was executed, still if, there are circumstances which show that it was

EVIDENCE ACT (1872), S. 114—Documents—Execution.

not acted upon as one would have expected, a document of that nature to be acted upon, the presumption as to the title created by such document falls down. (*Macleod, C.J. and Crump, J.*). (MAHADEO RAMCHANDRA *v.* RAGHOJI JIYAJI RAJE.
77 I. C. 472=A.I.R. 1923 Bom. 293.

—S. 114—Documents—Execution.

———The execution of a pro-note by an illiterate woman was held proved, on the evidence of one respectable witness who was opposed by another witness, where the latter was suspected to be false. (*Sir John Edge.*) BHADRAYYA *v.* KANAKAMMA.
22 M.L.W. 8=A. I. R. 1925 P.C. 47 (P.C.).

—S. 114—Documents—Existence of.

———It is a wrong presumption to hold that the mortgagee has only to allege that the original instrument is lost and if the Court comes to the conclusion that there was a mortgage, the mortgagee is relieved from the duty of affirmatively making out the terms of the contract, because the Court may presume that any contract which they set up is true. (*Venkatasubba Rao and Madhavan Nair, JJ.*). C. AHMAD HAJI *v.* MAYAN. 30 M.L.W. 1045=
A.I.R. 1930 Mad. 65=57 M.L.J. 789.

—S. 114—Documents—Foreign school certificate.

———School-leaving certificate in a State and that in British India are similar. (*Fawcett and Madgavkar, JJ.*). BHANUDAS NARAYANKOA *v.* KRISHNABAI CHINTAMAN. 99 I.C. 307=50 Bom. 716=
28 Bom. L.R. 1225=A.I.R. 1927 Bom. 11.

—S. 114—Documents—Genuineness.

———Where a document is on plain paper unstamped and unregistered and such as has never seen the light of the day till it was filed and it has been shown that there were occasions when if genuine it should have been produced but was not produced the presumption is that the document is not genuine but a forged one. (*Das and Adami, JJ.*). DEONATH SINGH *v.* DEBENDRANATH RAI. 123 I.C. 640=
A.I.R. 1930 Pat. 78.

———*Sale—Contract against covenant for title shows document to be genuine.*

Where after the completion of the sale-deed a proviso was added that, if any one claimed the land and the purchaser was deprived of it, he would not be entitled to a refund of the purchase money from the seller, and would have to bear the expenses of any litigation that may take place,

Held, such a stipulation would not have been added if the sale was not a genuine one. (*Martineau, J.*). DHARAM SINGH *v.* KIRPAL SINGH.
69 I C. 409=A.I.R. 1923 Lah. 31.

—S. 114—Documents—Insured cover.

———The mere fact that a cover insured for a certain amount is sent, raises no presumption in law that that cover contains the necessary amount of Government currency notes. (*Sulaiman, J.*). TULA RAM *v.* EMPEROR. 83 I.C. 993=21 A.L.J. 865=
5 L.R.A.Cr. 15=26 Cr.L.J. 209=
A.I.R. 1924 All. 205.

—S. 114—Documents—Knowledge of contents.

———Ordinarily the presumption is that if a person signs a document, he must be deemed to have agreed to all that is written thereon. (*Jai Lal, J.*). MATHRA DAS *v.* SHAMBOO NATH. 112 I.C. 843=
A.I.R. 1929 Lah. 203.

———An ordinary sane person would have the final terms of a written document read over before accepting the deed and, therefore, when the executants are men of considerable experience it would require very strong evidence to convince a Court that the deed was signed without being read over. (*Carr and Mya Bu, JJ.*). U THA MAUNG *v.* U. AUNG MYAT GYAW. 117 I.C. 566=
A.I.R. 1929 Rang. 39.

EVIDENCE ACT (1872), S. 114—Documents—Possession of.

—S. 114—Documents—Lease of wakf property.

———Where a lessee of a wakf property *prima facie* proves a heritable right in the tenure at a fixed rate an assumption that the grant was originally lawful can be made. (*Viscount Sumner.*) MUHAMMAD MAZAFFARALMUSAVI *v.* BIBI JABEDA KHATUN. 123 I.C. 722=
32 Bom.L.R. 633=34 C. W.N. 462=
1930 A.L.J. 377=51 C. L. J. 345=
A.I.R. 1930 P.C. 103=58 M.L.J. 641 (P.C.).

—S. 114—Documents—Mortgage.

———When it is proved that the executant put his signature in the presence of the attesting witnesses it was almost certain that the attesting witnesses also put their signatures in the presence of the executant. The circumstances of the case warrant the application of the maxim "*Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*" and the deed must be considered as validly attested: 2 N.L.R. 10, *Rel. on.* (*Macnair and Subhedar, A.J.Cs.*). NARAINRAO *v.* SETH HANUMANTRAM. A.I.R. 1930 Nag. 273.

———Mortgagee having option to call in whole amount of principal and interest, in case of default, before due date—Amounts paid towards principal and interest in default, but before due date—Presumption is that mortgagee exercised the option. (*Wallace and Thiruvenkatachariar, JJ.*). RANGASWAMY *v.* KUPPUSWAMY. 107 I.C. 650=
A.I.R. 1928 Mad. 637.

—S. 114—Documents—Order of resumption.

———There is no law which requires a resumption of saranjam to be reduced to writing. The actual order of resumption therefore need not be produced in evidence. Such resumption can be proved under S. 114, Evidence Act and S. 91 will not govern such cases. (*Fawcett, Ag. C. J. and Murphy, J.*). SAYAJI RAO GAIKWARE, BARODA *v.* MADHAV RAO RAGHUNATHA RAO DHAVALE.
115 I. C. 369=30 Bom. L. R. 1463=
53 Bom. 12=A.I.R. 1929 Bom. 14.

—S. 114—Documents—Pedigree.

———Where the name of the common ancestor appears in the pedigree-table and where his sons are found to be in joint possession of the property holding equal shares, the presumption is that the common ancestor held the property: 56 P.R. 1906; 41 P. R. 1914 and A. I. R. 1927 Lah. 847, *Foll.*; A. I. R. 1927 Lah. 477, *Ref.* (*Johnstone, J.*). FATEHMA *v.* JIWAN. 116 I.C. 315=
A. I. R. 1928 Lah. 964.

———The mere mention of a common ancestor in a pedigree table is not of itself sufficient to prove that all the land in the possession of his descendants descended from that common ancestor, 41 P.R. 1914 *Diss.* (*Scott-Smith and Moti Sagar, JJ.*). KARTAR SINGH *v.* LABH SINGH.
74 I.C. 685=5 L. L. J. 190=
A.I.R. 1923 Lah. 355.

—S. 114—Documents—Possession of.

———*Mortgage deed—Possession of by obligor—Discharge—Presumption.*

In a suit on mortgage, defendants set up a case of discharge, relying on the fact that the mortgage-deed had come into their possession and purported to bear an endorsement of discharge by the plaintiffs' father. Plaintiffs alleged that the document was stolen from them. It was found that the defendants had deposited with the plaintiff's father

EVIDENCE ACT (1872), S. 114—Documents—Priority—When date is same.

the title-deeds of the mortgaged property at the time of the mortgage and they were still in possession of the plaintiffs.

Held, that that fact considerably weakened the presumption in favour of defendants arising from the possession of the mortgage document. (*Sir John Wallis.*) ALWAR NAIDU *v.* KOTHANDAPANI NAIDU.
105 I.C. 263=29 Bom. L.R. 1388=46 C. L. J. 292=39 M.L.T. 290=1927 M.W.N. 709 =9 P.L.T. 1=A.I.R. 1927 P.C. 261=53 M.L.J. 295 (P. C.).

—S. 114—Documents—Priority—When date is same.

———*Two documents executed on same day—Purpose of the documents will determine priority.*

Where more documents than one bear date on the same day they are presumed to have been executed in the order necessary to effect the purpose for which they were executed. That is, it might be presumed that persons who are presumed to know the law observed it and that, when two acts are done on the same day, the one necessary to be done first to give the other validity was, in fact, done first.

But where a sale-deed in respect of property under the management of the Collector in execution of a decree, has been executed and deposit in Collector's Court, sufficient to satisfy the decree is made on the same day, but it is found that the sum out of which the deposit was made was obtained at the time of the registration of the sale-deed, it cannot be presumed, in the absence of any reliable evidence to the contrary, that the deposit was made before the sale. (*Jackson, A. J. C.*). RAJESHWAR *v.* AJABSINGH. **118 I. C. 865=12 N.L.J. 86=A.I.R. 1929 Nag. 257.**

—S. 114—Documents—Validity.

———Where a person executing a deed required by law to be registered is of full age when appearing before the Registrar, and admits the execution of the deed, the presumption is that the transaction to which the deed relates is valid. (*Mukerji and Bennet, JJ.*). MOHAMMAD QADIR ALI KHAN *v.* MOHAMMAD GHULAM IMAM KHAN.
A.I. R. 1930 All. 605.

—S. 114—Documents—Will.

———*Female legatee—Use of word 'malik'—Presumption.*

The ordinary meaning of the word 'Malik' in reference to property is 'absolute owner' and if the testator used the word it is to be presumed that he uses it in its ordinary meaning. The fact that the legatee of a Hindu is a woman points to a probability that the testator intended that after her death his property should return to his heirs-at-law, that is his own family. But it is a very weak indication of that probability, not nearly as strong by itself as the indication of the contrary to be found in the use of the word 'malik.' (*Hallifax, A. J. C.*). SUNDRA BAI *v.* JAGANATH. **69 I.C. 286=A.I.R. 1923 Nag. 56.**

———*Will entirely written by testator*—Prima facie *case of genuineness*—Onus *shifts on defendants to establish forgery.*

There is nothing unnatural in a Hindu sonless and not in a good state of health, writing a document by which directions are given to a widow to adopt the testator's nephew. It is certainly extremely improbable that a person wishing to put forward a forged will would run the risk of imitating the handwriting of the deceased or get it imitated by some one else when it would be so easy to attack a forged document when it runs over a folio page and purports to have been written by the testator. The plaintiff has to prove the document on which he relies but when once he has gone as far as putting before the Court a *prima facie* case which bears the signs of being genuine, then it is for the defendant to produce reliable grounds for upsetting the plaintiff's case and satisfy the Court that it is not only improbable but impossible. (*Macleod and Coyajee, JJ.*). IRABASAPPA BIN GANGAPPA DALAL *v.* BHADRAWA KOM DOD BASAPPA PRABHU SHETTI. **80 I.C. 189=A.I.R. 1922 Bom. 296.**

EVIDENCE ACT (1872), S. 114—Human conduct.

—S. 114—Guiding principles.

———*Presumption of some lawful origin explained.*

The presumption of an origin in some lawful title which the Court has so often readily made in order to support possessory rights, long and quietly enjoyed, where no actual proof of title is forthcoming is one which is not a mere branch of the law of evidence. It is resorted to because of the failure of actual evidence. The matter is one of presumption based upon the policy of law but even considered as an inference from proved facts the grant presumed is the thing which may be regarded as likely to have happened. At the same time it is not a presumption to be capriciously made nor it is one which a certain class of possessor is entitled to, *de jure*. In a case such as this where it is necessary to indicate what particular kind of lawful title is being presumed the Court must be satisfied that such a title was in its nature practicable and reasonably capable of being presumed without doing violence to the probabilities of the case. It is the completion of a right to which circumstances clearly point where time has obliterated any record of the original commencement. The longer the period within which and the remoter the time when first a grant might be reasonably supposed to have occurred the less force there is in an objection that the grant could not have been lawful: A.I.R. 1926 Cal. 322, *Affirmed*; A. I. R. 1922 P. C. 163, *Rel. on*; 19 Mad. 485 and A. I. R. 1917 P.C. 6, *Ref.* (*Viscount Sumner.*) MUHAMMAD MAZAFFARALMUSAVI *v.* BIBI JABED KHATUN.
123 I.C. 722=32 Bom, L.R. 633=34 C.W.N. 462=1930 A. L. J. 377=51 C. L. J. 345=A.I.R. 1930 P.C. 103=58 M.L.J. 641 (P.C.).

———Presumption should not be made against but in favour of the existing state of things. (*Lord Phillimore.*) SECY. OF STATE *v.* RAJA JYOTI PRASHAD SINGH. **94 I. C. 974=53 Cal. 533=53 I. A. 100=30 C. W. N. 745=24 A. L. J. 761=A.I.R. 1926 P. C. 41 (P.C.).**

———Presumptions are not made at random. Some connexion must be shown to exist between the fact proving and the fact to be proved, which warrants an inference from the one to the other when the two are brought into proximity. (*Venkatasubba Rao, J.*). THIRUVENKATACHARLU *v.* ALTOO SAHEB. **94 I. C. 458=1926 M. W. N. 344=A. I. R. 1926 Mad. 511=50 M. L. J. 251.**

———Every apparent transaction must be assumed to be real till contrary is proved by party challenging it. (*Das and Ross, JJ.*). ISMAIL ALI KHAN *v.* HAMIDI BEGUM. **62 I. C. 455=2 P. L. T. 658=6 P. L. J. 218=A. I. R. 1921 Pat. 125.**

—S. 114—Human conduct.

———Court would presume a legal origin where there has been a long continued enjoyment of a claim if the claim could have had a legal commencement. (*Ananthakrishna Iyer, J.*). SHIVARAMIYYA *v.* RAJAH OF VENKATAGIRI. **120 I.C. 743=A.I.R. 1930 Mad. 339.**

EVIDENCE ACT (1872), S. 114—Human conduct.

——Court can presume a contract to pay the higher rate and a legal origin and consideration therefor from long continued payment of higher rate : 42 Mad. 475, *Rel.on.* (*Ananthakrishna Iyer, J.*). SHIVARAMAYYA *v.* RAJAH OF VENKATAGIRI. **120 I.C. 743 = A.I.R. 1930 Mad. 339.**

——Concealment of motive gives rise to a presumption under S. 114, that there is one which cannot be avowed. (*Barlee, A.J.C.*). KHETSI PACHAN MINDU *v.* DELA MEGHA MINDU. **121 I.C. 175 = A.I.R. 1930 Sind 135.**

——*Plaintiff's delay in bringing suit—Defendant prejudiced—Presumption.*

Where the long delay of the plaintiffs in bringing the suit has prejudiced the defendants and has prevented them from bringing the best evidence that would otherwise have been available to them, the tendency of the Court must invariably be to make an inference against the plaintiff unless good cause is shown and the Court should attach great importance to such presumption in testing the credibility of the evidence actually given : 14 M.I.A. 67 ; A.I.R. 1924 P. C. 137, *Foll.* (*Sulaiman and Kendall, JJ.*). BRIJ RAJ SARAN SINGH *v.* BASANT SINGH. **118 I.C. 154 = A.I.R. 1929 All. 561.**

——*Deliberate default in payment of revenue.*

Deliberate default in the payment of revenue with the intention that property may be sold free of encumbrances is a common device to defraud mortgagees, and it is obviously essential to the success of that device that the purchaser should be a mere benamidar for the defaulter, since no man is likely to allow his property to be sold for an inadequate price except to himself or to some person representing him. When therefore it is proved that this device has been adopted, there is a fair initial presumption under S. 114 that the purchaser represented the defaulter. (*Heald and Mya Bu, JJ.*). MOHAMAD SALAY *v.* R. M. V. V. M. CHETTIAR. **105 I. C. 258 = 5 Rang. 458 = A. I. R. 1927 Rang. 289.**

——Ordinary care should be deemed to have been taken in every case. Negligence cannot be presumed. (*Kinkhede, A.J.C.*). CHANDRA SHEKHAR *v.* ABIDALLI. **80 I. C. 920 = A.I.R. 1925 Nag. 68.**

——Where a person is at liberty to stop something being done in his house and is proved not to do so the presumption is that he is an accessory to the doing of that thing and he may be held to be in possession of the materials used in the doing of it. (*Ashworth, A. J. C.*). MAI KU *v.* EMPEROR. **86 I. C. 707 = 26 Cr. L.J. 851 = A. I. R. 1925 Oudh 684.**

——*Suit against Railway—Exception not pleaded—Contrary should be presumed.*

Where the plaintiff had expressly described his claim as one of compensation for non-delivery and the defendant had not pleaded that the goods had been lost,

Held, that the plaintiff's case would rest upon the presumption that the goods were still in the possession of the railway company. (*Foster, J.*). EAST INDIAN RAILWAY CO. AND G.I.P. RY. CO. *v.* FIRM SUKHDEO DAS. **74 I. C. 431 = 4 P. L. T. 443 = A.I.R. 1924 Pat. 25.**

——Where the son as reversioner gave consent to a gift by the mother in favour of the grandson after his insolvency the consent was held not to be *bona fide*. (*Piggott and Walsh, JJ.*). HARI HAR PRASAD *v.* UDAY NATH SAH. **74 I. C. 113 = 21 A. L. J. 77 = 45 All. 260 = 4 L.R.A. Civ. 70 = A. I. R. 1923 All. 190.**

EVIDENCE ACT (1872), S. 114—Marriage.

——Where by taking over the sale and paying the full price, a co-owner has waived his own claim to sue such action on the part of the co-owner is presumptive evidence that the sale by another co-owner was not bad for want of necessity. (*Scott-Smith and Fforde. JJ.*). MT. BASANTI *v.* CHANDA SINGH. **77 I.C. 475 = A.I.R. 1923 Lah. 502.**

——Pro-note repudiated by defendant—Suit filed on last day of limitation—Plaintiff alleging to be businessman but not producing account books—Inference must be drawn against plaintiff. (*Sir John Edge*). DATARAM JANI *v.* BASANT MT. KUNWAR. **A.I.R. 1922 P.C. 378 (P. C.).**

——*Laches—Delay in filing suit for dower—Relinquishment cannot be presumed.*

Procrastination is the usual habit of litigants and where the parties are closely related, there must be constant talk and hope of settlement with the interference of relations or neighbours who would like to get credit if not money, by taking sides. These are all circumstances which would lead to delay in filing a suit and it cannot be urged that relinquishment is the only possible inference of delay. (*Daniels, J.C. and Dalal, A.J.C.*). MT. UMMESALMA *v.* SAIYID AMJAD HUSAIN. **66 I.C. 448 = 8 O.L.J. 528 = A.I.R. 1922 Oudh 165.**

——Waiver may be evidenced by conduct inconsistent with the continuance of the rights waived. (*Prideaux, J.*). KAWADJI *v.* GANGARAM. **64 I.C. 461 (Nag.).**

—S. 114—Joint Hindu family.

——*Property standing in wife's name.*

There is no presumption that where a property stands in the name of a Hindu wife, it really belongs to the husband. To uphold such a presumption it is necessary for the person who wants to make out that the property is not the property of the wife in whose name the document stands to establish that the money for purchase came from the husband : 8 Mad. 214, *Rel. on* ; A. I. R. 1925 P. C. 181, *Expl.* (*Krishnan and Venkatasubba Rao, JJ.*). OFFICIAL ASSIGNEE OF MADRAS *v.* NATESA GRAMANI. **98 I.C. 660 = 38 M.L.T. 153 = A.I.R. 1927 Mad. 194.**

——The legal presumption is that a Hindu family is joint and hence it is for the party alleging separation to prove it. (*Gokaran Nath Misra and Raza, JJ.*). MT. JAGWANTI *v.* BICHAND SINGH. **95 I.C. 774 = 13 O.L.J. 744 = A.I.R. 1926 Oudh 511.**

——*Manager.*

The elder of two brothers would as such be presumed to be the head or the manager of the family in the absence of any positive evidence to the contrary. (*Shadi Lal, C. J. and Abdul Qadir, J.*). RAM KISHAN *v.* HIRDE RAM. **71 I.C. 737 = A.I.R. 1923 Lah. 135.**

——Suit to set aside sale by manager of joint family—Nine-tenths of consideration found binding—Court can presume the binding nature of the balance also. (*Schwabe, C.J.*). MEENATCHI AYYAN *v.* RANGACHARLU. **1922 M.W.N. 719 = 16 M.L.W. 595 = A.I.R. 1923 Mad. 120.**

—S. 114—Marriage.

——*Continuous co-habitation.*

The law presumes in favour of marriage and against concubinage when a man and a woman have co-habited continuously for a number of years. (*Lord Shaw.*) MOHABBAT ALI KHAN *v.* MD. IBRAHIM KHAN. **117 I.C. 17 = 1929 A.L.J. 465 = 33 C. W.N. 645 = 31 Bom. L.R. 846 = 6 O.W.N. 517 = 56 I.A. 201 = 50 C.L.J. 89 = 30 M.L.W. 97 = 1929 M.W.N. 676 = 10 Lah. 725 = 31 P.L.R. 1 = A.I.R. 1929 P.C. 135 = 57 M.L.J. 366 (P.C.).**

EVIDENCE ACT (1872), S. 114—Marriage.

———*No presumption.*

Where the status of the man is lower than the woman's and the intercourse between them is admittedly illicit for a large number of years no presumption of marriage arises merely because they lived as husband and wife and were regarded by their neighbours as such : 11 M.I.A. 194 (P.C.) and 32 All. 345 (P.C.), *Rel. on* ; 34 Mad. 277, *Ref.* (*Marten, C.J. and Murphy, J.*). GANGADHAR TUKARAM *v.* RACHAPPA NAGAPPA. **119 I.C. 182= 31 Bom. L.R. 453=A.I.R. 1929 Bom. 246.**

———*No presumption.*

Presumption of a valid marriage from two persons living together as man and woman cannot be drawn where the union is between a man who is an Ahir and a Brahman widow, who cannot *prima facie* contract a valid marriage. (*Jackson, A.J.C.*). GULABCHAND *v.* BHAIYALAL. **119 I.C. 698= A.I.R. 1929 Nag. 343.**

———*Co-habitation and repute.*

A Mahomedan lady lived continuously with another man and had children who were treated by her, her relatives and friends as issues of that man. The latter had absolute power of disposal over her money. The incomes both of the man and the woman were jointly assessed with taxes by the Municipality.

Held, that the reasonable conclusion was that the woman was married to the man. A. I. R. 1916 P. C. 27, *Rel. on.* (*Stuart, C. J. and Wazir Hasan, J.*). ABDUL HALIM KHAN *v.* SAADAT ALI KHAN. **112 I.C. 596=A.I.R. 1929 Oudh 126.**

———Where a man and woman are living together as husband and wife for a large number of years and have always treated each other as husband and wife, have always been looked on as husband and wife, and there is no obstacle to the marriage, the burden is on the person who denies the marriage to prove that it did not take place. 3 M. I. A. 295 (P. C.); A. I. R. 1922 P. C. 159; A. I. R. 1918 P. C. 11 and 31 Cal. 849, *Rel. on.* (*Brown, J.*). MAUNG KYI *v.* MA SHWE BAW. **121 I.C. 718=7 Rang. 777= A.I.R. 1929 Rang. 341.**

———Presumption of marriage arises from long co-habitation. (*Heald, J.*). MAUNG NGWE SAN *v.* MA GYI. **117 I.C. 64=A.I.R. 1929 Rang. 64.**

———*Unmarried woman—Concubinage—No presumption of marriage from co-habitation.*

A presumption of marriage may arise from long co-habitation, but if it is known that the connexion started in mere concubinage this presumption cannot arise. Relations or conditions of persons or things once shown to exist are presumed to continue until the contrary is proved. If it is proved that a certain woman was unmarried at a certain date the presumption is that she continues so until proved to have married and therefore when there is no proof of any marriage but there is a judicial decision that she was not married but was living as a concubine, there can be no presumption of marriage. (*Addison, J.*). MT. INDI *v.* JAIMAL SINGH. **98 I.C. 887=8 L.L.J. 532= 27 P.L.R. 829=A.I.R. 1927 Lah. 43.**

———*Breach of contract to marry—One party interned during the War and unable to communicate with other—Rescission cannot be presumed.*

In certain circumstances, silence, absence, conduct or expressions in letters may be amply sufficient to lead a Court of Law to conclude that a contract of marriage was dissolved by agreement of both parties.

But where circumstances were altogether extraordinary in that the parties were entangled and embarrassed by difficulties not of their making but by war breaking out and one of the party being interned during the war being suspected as German subject,

Held, that even then to prove that this contract was rescinded by mutual agreement is a burden of which the respondent must discharge himself. If he does not so prove he must make amends to the other party. (*Lord Darling*). LUCIA JACOB *v.* DAVID ALEXANDER WILLS. **89 I.C. 824= 2 O.W.N. 695=22 M.L.W. 726=30 C.W.N. 248= A.I.R. 1926 P.C. 194 (P.C.).**

EVIDENCE ACT (1872), S. 114—Murder.

———*Legitimacy when presumed—Co-habitation and repute.*

The presumption of legitimacy cannot be raised without laying the foundation for it under S. 112. In absence of evidence legitimacy cannot be presumed. Under S. 114 the presumption of marriage arises from joint residence for a length of time or recognition as husband and wife by a certain number of persons. (*Odgers, J.*). CHOCKALINGAM PILLAI *v.* SAMI BATTAR. **79 I.C. 623= A.I.R. 1925 Mad. 426.**

—S. 114—Murder.

———*Murder by some dacoits of person running from scene of dacoity—Murder not in furtherance of common intention.*

It can hardly be natural that the common intention of all the persons who took part in the robbery was to murder not only persons who resisted them in the execution of the robbery but also to murder the persons who ran away from the scene of the robbery and therefore a murder of a person running from the scene of robbery cannot be said to be in furtherance of the common intention of dacoits. (*Harrison and Dalip Singh, JJ.*). KARAM DIN *v.* EMPEROR. **115 I.C. 1=30 Cr. L.J. 385= A.I R. 1929 Lah. 338.**

———The trial Judge rejected evidence about three objects, an umbrella, a stick and a bundle said to have been pointed out by the accused, as being in the well where the body of the dead man was found. This was not the exclusive evidence against the accused but there was other considerable evidence also.

Held, that the Judge should not have rejected the evidence. A.I.R. 1926 Mad. 638, *Dist.* (*Coutts-Trotter, C.J. and Walsh, J.*). PUBLIC PROSECUTOR *v.* CHANDAYA SHETTY. **2 M. Cr. C, 56= A.I.R. 1929 Mad. 92.**

———Person knowing of his wife's murder but making no report to police nor trying to find out murderer—His conduct may lead to conclusion that he was murderer. (*Raza and Pullan, JJ.*). BHAGWAN *v.* EMPEROR. **116 I.C. 193= 6 O. W. N. 218=30 Cr. L. J. 567= 12 A.I. Cr. R. 420=4 Luck. 679= A. I. R. 1929 Oudh 190.**

———*Poisoning by members—Presumption when arises.*

A violent presumption that the deceased was poisoned by the members of the family arises, perhaps one of the strongest presumptions known to the law, when a man dies in his own house surrounded by his own family, and poisoned shortly after eating food which must have been prepared for him by his wife, and no explanation is forthcoming from the occupants of the household as to what had happened to him to cause his death, and where, in addition to such violent presumption, the persons accused are proved to have been guilty of persistent lying in an attempt to account for the absence of the deceased, and are

EVIDENCE ACT (1872), S. 114—Murder.

also shown to have hidden the corpse to save themselves, the presumption becomes a certainty. (*Walsh and Pullan, JJ.*). EMPEROR *v.* MT. HAR PIARI. **97 I.C. 44=49 All. 57= 24 A.L.J. 958=27 Cr. L.J. 1068= 7 L.R. A. Cr. 156 = A.I.R. 1926 All. 737.**

———*Charge of murder and theft—Possession of stolen property not explained—Accused cannot be presumed to have committed murder.*

When the charge is that the accused committed murder or theft in a building or both, it is not legitimate to presume that the accused are guilty of the more serious offence of murder because they are unable or unwilling to explain their possession of stolen property, and when the unexplained possession of stolen property is the only circumstance appearing in the evidence against an accused they cannot be convicted of murder unless the Court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered. (*Spencer, J.*). SOGIAMUTHU PADAYACHI, *In re.* **93 I.C. 42=50 Mad. 274= 27 Cr. L. J. 394=A. I. R. 1926 Mad. 638.**

———The possession of the jewels of a murdered woman if unexplained is presumptive evidence that the accused was the murderer as well as that he committed theft. 13 Mad. 426, *Foll.* (*Spencer, J.*). NAINAMALAI KONAN, *In re.* **69 I. C. 377= 14 M.L.W. 418=A.I.R. 1921 Mad. 679.**

—S. 114—Notice.

———*Registered cover—Postman's endorsement of 'refusal' thereon—Effect.*

Where a notice sent by post in a registered cover is returned by the postman with a note that the addressee refused to receive it and the posting of the notice has been proved, there is a presumption under S. 114 that the addressee did refuse to receive it. Where such presumption arises, it is for the party putting forward the plea of want of notice to rebut it. A. I. R. 1926 Lah. 520; 15 Cal. 681; 17 C.W.N 1073 and 23 C.W.N. 319, *Foll.* (*Addison, J.*). RAUNAQ RAM *v.* PRABH DAYAL.

121 I.C. 382=31 P.L.R. 26=A.I.R. 1930 Lah. 439.

———Suit against Railway. Postal acknowledgment with other evidence may be sufficient proof of notice. (*Ryves, J.*). DUKLIS RAM BARAI *v.* B.N.W. RY. **73 I.C. 440=4 L.R.A.Civ. 48= A. I. R. 1923 All. 145.**

———*Notice under Bengal Cess Act—No presumption as to liability.*

No presumption of S. 114, Cl. (c) of Evidence Act applies with respect to notice provided by S. 52 of Cess Act and the person who claims that a right or an obligation such as the payment of cess by a tenure-holder, has accrued, must prove that the liability had been incurred and the things described in the Act had actually been done. The owner of rent-free lands is not bound to pay road cess before the publication of the valuation rolls under S. 52. (*Jwala Prasad and Ross, JJ.*). PITAMBAR CHOWDHURY *v.* SHAIKH RAHMAT ALI. **65 I.C. 138=3 P. L.T. 282= 1922 P. H. C. C. 167=A.I.R. 1922 Pat. 303.**

—S. 114—Possession and ownership.

———Piece of land adjacent to joint property in name of joint owners is presumed to be joint. (*Mya Bu and Baguley, JJ.*). MA BI *v.* MA KHATTAN.

121 I.C. 785=7 Rang. 744=A.I.R. 1930 Rang. 72.

———If possession does not pass under the sale, a presumption is apt to arise straightaway that the sale-deed is a fraudulent one. (*Findlay, J. C.*). BALAJI *v.* PANDURANG. **113 I.C. 884= A.I.R. 1928 Nag. 306.**

EVIDENCE ACT (1872), S. 114—Possession and ownership.

———*Determination of title to waste land—No one proving possession—Court can hold that the land is in possession of rightful owner.*

Under the Record-of-Rights the presumption attaches to the correctness of the entry therein. Under S. 114, in determining a question of fact the Court may presume the existence of certain things. The entry in the Record-of-Rights has only a probative value but the presumption which the Court draws under S. 114 is a presumption of the existence of certain facts, and in determining the title to waste land the Court is entitled to hold that so long as no one else can prove possession and the property is incapable of possession it must be held to be in the possession of the rightful owner. (*Suhrawardy and Graham, JJ.*). NANDA KUMAR *v.* GUNDAD ALI. **98 I.C. 849=44 C.L.J. 265= A.I.R. 1927 Cal. 49.**

———The mere fact that a person chooses to pay somebody else's mortgage debt does not necessarily show that he has some title in the property mortgaged. (*Suhrawardy and Graham, JJ.*). GHULAM SIDHIQUE KHAN *v.* JOGENDRA NATH MITRA. **96 I.C. 199=43 C.L.J. 452=31 C.W.N. 205= A.I.R. 1926 Cal. 916.**

———The mere fact that in the revenue records the sons of a particular person are shown as jointly owning land is not sufficient to raise a certain presumption that that person was the owner of the land. (*Broadway and Coldstream, JJ.*). NATHA SINGH *v.* MOHAN SINGH. **97 I.C. 241= 8 Lah. 30=8 L.L.J. 485=27 P.L.R. 721= A.I.R. 1926 Lah. 659.**

———Where defendants were shown to have been in peaceful possession for more than 60 years,

Held, that it required very strong evidence indeed to prove that the possession was only that of mortgagees. (*Duckworth, J.*). MAUNG PO NI *v.* MA SHWE KYI. **84 I.C. 373=2 Rang. 397= A.I.R. 1925 Rang. 7.**

———Where the vacant plot of land belonged to one party the natural inference would be that it was he who built upon the land at his own expense and *onus* lies heavily on the other party to prove that it was he that did so. (*Raymond and Kennedy, A.J.Cs.*). HARI RAM ISARDAS *v.* MT. HARIDEVIBAI. **A.I.R. 1925 Sind 16.**

———There is no presumption that the gadhi in a village in Berar belongs to the Deshmuk. (*Prideaux, A.J.C.*). ANNAJI *v.* LAXMAN. **75 I.C. 622= A.I.R. 1924 Nag. 199.**

———The mere fact that the deeds are in the possession of the mortgagor does not itself prove that the mortgagee was a mere benamidar for the mortgagor. (*Macleod, C. J. and Crump, J.*). HIRAJI *v.* VISHNU. **79 I.C. 186= A.I.R. 1923 Bom. 429.**

———Where defendant's name was mutated as full owner as per Will and was not challenged for over 12 years,

Held, the presumption was that he was full owner under the Will. (*Le Rossignol and Zafar Ali, JJ.*). LAJJA RAM *v.* SHAMBHU NATH. **79 I.C. 462=5 L.L.J. 14= A.I.R. 1923 Lah. 252.**

———Where possession can be referred to a lawful origin the presumption is that it was acquired lawfully and the burden of proving the contrary is on the party who alleges it, *e.g.*, the burden would

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be on the party who alleges that he held the property as trespasser where he ought to hold as legatee or heir. (*Daniels and Lyle, A. J. Cs.*). KUAR NAGESWAR SAHAI *v.* SHIAM BAHADUR.
9 O.L.J. 262=A.I.R. 1922 Oudh 231.

———*Land submerged under water—Reformation—Party in possession up to the time of diluvion will be presumed to be in possession after reappearance.*

If the plaintiff shows his possession down to the time of the diluvion, his possession is presumed to continue as long as the land continued to be submerged.

Further in the case of land covered by water, the Court may, and generally should, presume, in the absence of evidences to the contrary, that a possession enjoyed by the plaintiff before the twelve years, has continued until within the 12 years. In other words, when the plaintiff has shown that he was in possession of the land at the time of diluvion, it must be presumed that he has continued to be in possession within 12 years of the suit. 9 Cal. 744 (F.B.) and 19 Cal. 660 (P. C.), *Foll.* (*Das and Adami, JJ.*). GAJADHAR PRASAD *v.* DULHIN GULAB KOER. **2 P.L.T. 59= A.I.R. 1921 Pat. 234.**

———*When land is not capable of actual enjoyment in the usual modes previous possession of plaintiff will be presumed to continue till contrary is proved.*

Per *Dawson-Miller, C. J.*—Possession, however, is not necessarily the same thing as user and if the land is of such a nature as to render it unfit for actual enjoyment in the usual modes it may properly be presumed that the previous possession of the plaintiff continued until the contrary is proved. This presumption is a presumption of fact. It is by no means conclusive and whether it should be applied or not must depend upon the facts of each particular case. 9 Cal. 744 (F.B.), *Rel. on.*

Per *Mullick, J.*—In every case the Court may draw a presumption as to possession from title. It is a presumption of fact which the Evidence Act expressly warrants by S. 114. S. 4 of that Act enacts that the Court may regard the fact as proved unless and until it is disproved or may call for proof of it. The discretion of the Court is to be exercised with due regard to the nature of the land and the evidence in the case. 1 P. L. J. 146, *Expl.* (*Dawson-Miller, C.J. and Mullick, J.*). INDER LALL *v.* RAM SURAT KUER. **2 P.L.T 55= 1921 P. H. C. C. 118=A.I.R. 1921 Pat. 158.**

—S. 114—Retracted confession.

———It is not absolute rule of law that retracted confession cannot be accepted without corroborative evidence—But where corroborative evidence does not show beyond reasonable doubt that accused is guilty he should be given benefit of doubt. (*Adami and Scroope, JJ.*). BHAGWAN DAS BHAGAT *v.* EMPEROR. **A.I.R. 1930 Pat. 289.**

———*Rule as to.*

In a proper case a Court may act upon retracted confession alone, but the rule of prudence and safety is to require generally that such confessions should be corroborated in material particulars by some reliable evidence before an accused person is convicted. (*Courtney-Terrell, C. J. and Fazl Ali, J.*). KUNJA SUBUDHI *v.* EMPEROR.
116 I. C. 770=8 Pat. 289=10 P. L. T. 549= 30 Cr. L.J. 675=1929 Cr. C. 62= 13 A.I. Cr.R. 143=A.I.R. 1929 Pat. 275.

———It seems quite beyond question that the retracted confessions practically uncorroborated by anything in the prosecution evidence, do not afford anything like a satisfactory basis for the conviction of the accused. (*Piggott and Walsh, JJ.*). MT. SUKHIA *v.* EMPEROR. **73 I.C. 497= 24 Cr. L.J. 609=20 A.L.J. 669= A.I.R. 1922 All. 266.**

EVIDENCE ACT (1872), S. 114—Statements and affidavits.

—S. 114—Scope.

———Section 114 does not go so far as to enable the Court to presume that a certain state of things existed in the past without any proof from the party who is required to satisfy the Court on the point. (*Suhrawardy and Patterson, JJ.*). BENGAL-NAGPUR RAILWAY COMPANY *v.* MOOLJI SICKA AND CO. **52 C.L.J. 235.**

———The distinction between a mere inference and a presumption of fact is that the latter is an inference under S. 114 and includes a presumption of the nature described in the illustrations. It also includes anything that, in English law, would rank as a presumption of law. (*Ashworth and Kendall, JJ.*). SITA RAM *v.* NANKA.
106 I.C. 250=50 All. 145=25 A.L.J. 833= A.I.R. 1928 All. 16.

———What a party himself admits to be true may reasonably be presumed to be so and until the presumption was rebutted the fact admitted must be taken to be established. (*Wazir Hasan, A. J. C.*). GHULAM SARWAR KHAN *v.* MOHAMMAD ALI KHAN. **65 I.C. 398=8 O.L.J. 609= A.I.R. 1922 Oudh 98.**

—S. 114—Statements and affidavits.

———Where a Court has to choose between two conflicting statements of a witness, by one of which he stands to gain a sum, while by the other he stands to lose a bigger sum, the statement against interest should ordinarily be preferred. (*Courtney-Terrell and James, JJ.*). GOBIND GORHI *v.* BALDEO RAM. **A.I.R. 1930 Pat. 293.**

———When there is a definite allegation in an affidavit which is the only evidence in the case and that allegation is not traversed by the other side, it must be held to be correct. (*Phillips, J.*). C. V. VATHESWARA AYYAR *v.* K.M.R.M.L. KUMARAPPA CHETTIAR.
115 I.C. 247=1929 M.W.N. 139.

———*Contradiction between affidavits on opposite sides—Judge's note about the proceedings is to be accepted.*

Where parties agreed to abide by oath of the plaintiff and the question was what the nature of the agreement was and there was a direct contradiction between affidavits of the two pleaders, which were filed after a long time had elapsed, as to the nature of the agreement,

Held, proper thing to do would be to rely upon the note the Judge made at the time and presume that what took place in the presence of the Judge who must have been aware of the facts and the nature of the agreement was what was agreed to between the parties. The Judge had no interest or motive in supporting the allegations of one side or the other and it must be presumed that he acted properly in administering the oath in accordance with what the parties agreed to. (*Kumaraswami Sastri and Wallace, JJ.*). ARUMUGAM CHETTIAR *v.* DEVARAYA CHETTIAR.
107 I.C. 648=A.I.R. 1928 Mad. 625.

———*Statement after suit is of very little evidentiary value.*

The making of a statement in a document after the suit had been launched and was pending is very different from stating on oath in the witness

EVIDENCE ACT (1872), S. 114—Miscellaneous.

box, and the Court will not attach much weight to the statement even if it is admissible when no question about it has been put to the person making the statement when he was examined as a witness. (*Krishnan and Ramesam, JJ.*). T. LAKSHMI NARASIMHAM *v.* V. RUKMANIAMMA.
A.I.R. 1923 Mad. 225.

—S. 114—Miscellaneous.

———If at the time of booking, the Railway Company is dissatisfied and the person delivering the goods for carriage agrees that the condition of the packages is not satisfactory, it cannot afterwards be made matter of objection in a suit upon the contract that the packages were in good condition. (*Rankin, C. J. and Mitter, J.*). G.I.P. RY. CO. *v.* CHAKRAVERTI, SONS AND CO. 106 I.C. 247=55 Cal. 142=47 C.L.J. 32=32 C.W.N. 53=A.I.R. 1928 Cal. 170.

———*Migration—Personal law—Applicability.*

The ordinary presumption of law is that when a person leaves one district and goes into another where a different custom prevails, he carries his personal law with him and unless there is something to show that he had abandoned his personal law and had adopted the law of his new district, he will continue to be governed by the personal law of his old district. (*Harrison and Dalip Singh, JJ.*). JUGAL DAS *v.* MT. JASODAN BAI.
103 I.C. 170=9 Lah. 110=A.I.R. 1928 Lah. 212.

———*Remittance of money.*

Where money is remitted to a person there is no presumption that the transaction was one of deposit and not of loan: (1916) 1 M.W.N. 206, *Dist.* (*Phillips, J.*). MURUGIAH *v.* PAKKIRIA.
107 I.C. 290=A.I.R. 1928 Mad. 439.

———*Omission to presume is no ground for revision.*

A Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it: but it cannot be taken to be a principle of law that the Court must presume it, and if the Court does not make such a presumption under the circumstances of a case, it is no ground for interfering in revision. (*Pullan, J.*). ADITYA PRASAD SINGH *v.* EMPEROR. 103 I.C. 560=1 L.C. 195=28 Cr.L.J. 704=8 A.I.Cr. R. 414=A.I.R. 1927 Oudh 318.

———*Thing prescribed by statute.*

There is no impropriety in referring a thing as having been done when that thing is required to be done by a section in a statute. (*Walsh, Sulaiman, Mukerjee, Boys and Ashworth, JJ.*). BINDRABAN *v.* G. I. P. RY. CO. 96 I. C. 1039=24 A.L.J. 825=A. I. R. 1926 All. 369 (F.B.).

———*Granting hundi for debt due is presumably only conditional payment and returning of bond for debt due does not rebut presumption.*

It is a question of fact to be decided in each particular case whether the parties intended the subsequent hundi to be an absolute or a conditional payment of the original debt, and the presumption is that the effect of giving or taking of bill or note is that the debt was conditionally paid. This presumption is not rebutted by the fact that previous promissory notes for the original debt were returned: 4 Lah. 151, *Foll.* (*Campbell and Zafar Ali, JJ.*). FIRM BHUDHU MAL *v.* GOKUL CHAND.
92 I.C. 1015=7 Lah. 113=8 L.L.J. 3=27 P.L.R. 75=A.I.R. 1926 Lah. 328.

———*Malicious prosecution — Charge absolutely groundless—Reasonable and probable cause cannot be presumed.*

EVIDENCE ACT (1872), S. 114, Ill. (a)—Grounds for presumption.

In execution of a decree, the officer of the Court went to judgment-debtor's house and attached some articles. The judgment-debtor thereupon filed a complaint of theft against the decree-holder which was found to be groundless. In a suit for malicious prosecution by decree-holder against judgment-debtor,

Held, where on the face of it, the charge brought by defendant against plaintiff is groundless, it can safely be inferred that the defendant had no reasonable and probable cause and the plaintiff cannot be asked to give further evidence directly going to show that there was no reasonable and probable cause. (*Rafique, J.*). BISHUN SARUP *v.* BINDRABAN. 73 I. C. 446=A. I. R. 1923 All. 531.

—S. 114, Ill. (a)—Articles changing hands.

———Where the nature of the articles is such that they may be constantly changing hands, the recovery of such articles more than 5 months after the theft cannot, in law, give rise to a presumption against the possessor, and it is not incumbent upon him to explain how he came by them. (*Abdul Qadir, J.*). HARI RAM *v.* EMPEROR. 62 I. C. 867=22 Cr. L. J. 595=A. I. R. 1921 Lah. 89.

—S. 114, Ill. (a)—Burden of proof.

———*Long lapse of time between theft and discovery of stolen property.*

Where there is long lapse of time between the theft and the discovery of the stolen property (in this case over 15 months), the onus of proving innocent possession should not be cast on the accused. 62 P. L. R. 1916, *Rel. on.* (*Fforde, J.*). NARAIN SINGH *v.* EMPEROR. 108 I. C, 912=29 Cr. L. J. 464=29 P. L. R. 441=A. I. R. 1928 Lah. 687.

———*Criminal case*—Onus *never changes.*

In a criminal case the *onus* is on the prosecution to prove beyond reasonable doubt the guilt of the accused. The *onus* never changes.

Where the Judge stated in his direction to the jury regarding Evidence Act, S. 114, Ill. (a) that if the property was proved or reasonably presumed to be stolen property, the *onus* would shift to the accused to show that he acquired the property in an innocent manner,

Held, that it was a misdirection: 31 C. L. J. 310 and 1914 Cr. App. R. 45, *Foll.* (*Newbould and Mukerji, JJ.*). SATYA CHARAN MANNA *v.* EMPEROR. 88 I. C, 515=52 Cal. 223=26 Cr.L.J. 1155=A. I. R. 1925 Cal. 666.

—S. 114, Ill. (a)—Dacoity.

———*Presumption relates to offence of dacoity also.*

The Presumption not confined to charges of theft but extends to all charges, however penal, not excluding even murder. Consequently where a person charged with dacoity is shown to have been in possession of part of stolen property soon after the dacoity it may be presumed that he was one of the dacoits or he received the property knowing it to have been stolen at the dacoity: 13 Mad. 426, *Ref.* (*Macpherson and Davle, JJ.*). RAMSARUP SINGH *v.* EMPEROR.
A. I. R. 1930 Pat. 513.

—S. 114, Ill. (a)—Grounds for presumption.

———*Accused showing place where stolen property is concealed—When a ground.*

The mere fact that an accused person points out the place in which stolen property is concealed does not give rise to any presumption under S. 114, or justify his conviction of the offence of receiving

EVIDENCE ACT (1872), S. 114, Ill. (a)—Guilty knowledge.

stolen property, still less of the offence of theft or dacoity. But if such property is produced from the house of the accused person a presumption would arise under S. 114, Illus. (a), that the accused was either the thief or had received the goods knowing them to be stolen unless he can account for his possession of the stolen articles: 17 All. 576, *Ref.* (*Mirza and Broomfield, JJ.*). EMPEROR *v.* SHIVPUTRAYA BASLINGAYA. **32 Bom. L. R. 574= A. I. R. 1930 Bom. 244.**

—S. 114, Ill. (a)—Guilty knowledge.

———*Articles of ordinary type found 2½ years after theft—No presumption.*

2½ years before the discovery, at the house of accused, of the articles (four silver ornaments of ordinary type worth Rs. 100) these had been removed from the houses of the two complainants by means of a dacoity. The accused was a goldsmith by caste and profession and when asked, he explained that he himself had made them for his wife. The articles were found, except in one case, on the person of the wife of the accused.

Held, that the accused cannot be presumed to be in possession of the articles with guilty knowledge: 29 All. 138, *Foll.* (*Mukerji, J.*). CHHOTEY LAL *v.* EMPEROR. **85 I. C. 722=26 Cr. L. J. 578= 5 L. R. A. Cr. 199=A.I.R. 1925 All. 220.**

—S. 114, Ill. (a)—Misdirection to jury.

———Before a presumption under S. 114 (*a*) can arise, it must be proved that the goods found in the possession of the accused have been stolen. No such presumption will arise in a case when it may reasonably be presumed that the property in question is stolen property. A direction to the jury that the presence of a reasonable presumption of the property being stolen property is enough to raise the presumption of guilt, is misdirection. (*Newbould and Mukerji, JJ.*). SATYA CHARAN MANNA *v.* EMPEROR. **88 I. C. 515= 26 Cr. L. J. 1155=52 Cal. 223= A.I.R. 1925 Cal. 666.**

—S. 114, Ill. (a)—Nature of possession.

———In order to raise legitimately the presumption of theft, the possession of stolen property should be exclusive as well as recent. (*Rupchand Bilaram and De Souza, A. J. Cs.*). MATARO *v.* EMPEROR. **111 I.C. 732= 29 Cr. L.J. 924=23 S.L.R. 5= A.I.R. 1929 Sind 9.**

—S. 114, Ill. (a)—Possession.

———From the mere fact that the articles were discovered in accused's possession soon after the theft the Judges did not draw the presumption that accused was the thief himself. (*Sulaiman, J.*). YAMINI *v.* EMPEROR. **83 I.C. 705= 5 L. R. A. Cr. 81=26 Cr. L.J. 145= A.I.R. 1924 All. 701.**

—S. 114, Ill. (a)—Possession following theft.

———When a person is found in possession of stolen articles soon after the theft, the law presumes that such person must either be the thief or the receiver of the stolen goods. The identity of the stolen articles being established, the identity of the thief or the receiver of the stolen goods is presumed to be established. (*Raza and Nanavutty, JJ.*). HAZARI *v.* EMPEROR. **7 O.W.N. 527= A.I.R. 1930 Oudh 353.**

———The fact that a person is found in possession of the stolen property shortly after the theft raises the presumption that he took part in the theft. (*Adami and Scroope, JJ.*). KHALIR JAMA KHAN *v.* EMPEROR. **123 I. C. 393= 31 Cr. L.J. 492=1930 Cr. C. 767= A.I.R. 1930 Pat. 385.**

EVIDENCE ACT (1872), S. 114, Ill. (a)—Time limit.

—S. 114, Ill. (a)—Possession not immediate.

———Possession of stolen property 19 months after theft raises no presumption that the holder thereof was either the thief or received the goods knowing them to be stolen: 22 C.W.N. 597; 11 M.L.W. 43 and 22 Cr. L. J. 595, *Foll.* (*Addison, J.*). NAGLI *v.* EMPEROR. **95 I.C. 471= 27 Cr. L. J. 807=A.I.R. 1926 Lah. 528.**

———Where the accused was found possessed of stolen goods several months after the theft and at a place several miles away from the place of occurrence no presumption that he is either the thief or a receiver of stolen property arises and the *onus* is not on the accused to explain how he got the property and the prosecution cannot succeed by proving the defence to be false. (*Campbell, J.*). ALIA *v.* EMPEROR. **91 I.C. 544= 27 Cr. L.J. 112=A.I.R. 1926 Lah. 272.**

———No presumption arises out of mere possession of stolen articles 12 years after they were stolen: A.I.R. 1926 Lah. 528, *Foll.* (*Coldstream, J.*). MANGAL *v.* EMPEROR. **96 I.C. 650= 27 Cr. L. J. 986 (Lah.).**

———*Possession of property 2 years after loss—Refusal to answer as to source—Adverse inference is justified.*

Though usually a Court is not justified in drawing the presumption of guilty knowledge from possession of property such as jewellery nearly two years after the property had been stolen or otherwise lost to the real owner, the Court is always entitled to request the possessor to disclose the name of the person from whom he had obtained the articles and the particulars as to the origin of the possession and the Court is entitled to draw unfavourable inferences, if the accused refuses to disclose such facts or gives an explanation which can be shown to be false. (*Lentaigne, J.*). RAM PERSHAD *v.* KING EMPEROR. **81 I.C. 443= 2 Rang. 80=25 Cr. L.J. 907=A.I.R. 1924 Rang. 256.**

—S. 114, Ill. (a)—Recent possession.

———*What amounts to recent possession depends on facts of each case.*

The question as to what amounts to recent possession sufficient to justify the presumption of guilt in any particular case, varies according as the stolen article is, or is not, calculated to readily pass from hand to hand: A.I.R. 1926 Lah. 528; 11 M.L.W. 43; A.I.R. 1921 Lah. 89 and 22 C.W.N. 597, *Relied on.* But the strength and nature of such presumption must vary according to the seriousness of the offence and the nature of the property involved. (*Kinkhede, A.J.C.*). NECHA *v.* EMPEROR. **109 I.C. 801=11 N.L.J. 104=29 Cr. L.J. 609= 10 A.I. Cr. R. 340=A.I.R. 1928 Nag. 213.**

—S. 114, Ill. (a)—Time limit.

———*No time-limit can be fixed.*

No fixed time-limit can be laid down to determine whether possession of articles is recent or otherwise. But every case must be judged on its own facts. If a few stolen articles were found in possession of a person under circumstances which may give rise to the probability of his coming by them honestly some time after the theft the presumption under the law might not arise against him. (*Suhrawardy and Panton, JJ.*). EMPEROR *v.* EKABBAR. **94 I.C. 361=27 Cr. L.J. 617= A.I.R. 1926 Cal. 925.**

EVIDENCE ACT (1872), S. 114, Ill. (b)—'Accomplice', who is.

—S. 114, Ill. (b).

'Accomplice,' who is.
Corroboration, extent and nature.
'Corroboration,' what is.
Retracted confession.
Value of accomplice's evidence.
Value of approver's evidence.
Miscellaneous.

—S. 114, Ill. (b)—'Accomplice,' who is.

———Witnesses who admittedly had witnessed the crime, who have assisted in concealing the evidence of that crime or at least connived at such being done and who have not attempted to give any information either to the police or to any other person to enable the offender to be brought to justice are in a very little better position than that of accomplices. (*Fforde and Hilton, JJ.*). HAYATU *v.* EMPEROR. **120 I.C. 190=31 Cr. L.J. 50=1929 Cr.C. 87=A. I. R. 1929 Lah. 540.**

———*Witness, accused's paramour and assisting him to put murdered man on bed and covering him with chadar.*

Where the witness was the accused's paramour, and on her own admission accompanied him to the scene of the murder and waited outside the hut while the accused went in and murdered the husband of the witness and then covered him with a chadar and where after that, she returned to the village and shut herself up in her house and gave no information to any one until the next morning when she told one of the P. Ws. privately what had happened,

Held, that in these circumstances she was, to all intents and purposes, an accomplice of the murderer. (*Scott-Smith and Fforde, JJ.*). BAHAWALA *v.* CROWN. **88 I.C. 854=6 Lah. 183=26 P. L. R. 331=26 Cr. L. J. 1238=A.I.R. 1925 Lah. 432.**

—S. 114, Ill. (b)—Corroboration, extent and nature.

———Where the case against accused depends on the view taken as to the corroboration of the approver's story in material particulars, and whether it is such, taken along with the other facts and circumstances, that it can be relied upon as bringing home the guilt for the crime, the corroboration of the approver's story requires most careful investigation upon the question of the identity of the accused persons as participators in the occurrence. (*Pearson and Mullick, JJ.*). MANOHAR MANDAL *v.* EMPEROR. **1930 Cr. C. 657=A. I. R. 1930 Cal. 430.**

———Although it is not illegal to convict on the uncorroborated evidence of an accomplice, a conviction on the uncorroborated evidence of an accomplice is rarely justifiable. The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime, but the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connexion with the crime. (*Raza and Nanavutty, JJ.*). HAZARI *v.* EMPEROR. **7 O. W. N. 527=A.I.R. 1930 Oudh 353.**

———*Several accused—Corroboration as regards each accused—If necessary.*

Per *Staples, A. J. C.*—It is true that an approver's story should be corroborated not only as regards the facts of the case but also as regards the identity of the accused, but where there are several accused and the story of the approver has been confirmed on many points, and as regards the identity of several of the accused, it should not be considered necessary that his story should be corroborated as regards the identity of the remaining accused unless there are reasons for believing that the approver has named those other accused on account of personal spite or for some other reason. The real test of the evidence of the approver is whether it has been believed or not and when it has been corroborated on many points and has not been shown to be false in any particular it should be accepted; and when once it has been accepted as a whole, corroboration as regards the identity of each of several accused should not be demanded. A.I.R. 1921 Nag. 39; 9 All. 528, *Expl.*; *Rex* v. *Baskerville*, (1916) 2 K. B. 658, *Dist.*

(Per *Jackson and Subhedar, A.J.Cs.*).—Even where there are several accused persons, an approver's story to be corroborated as regards a particular accused must be corroborated on some point which implicates that accused. It is not necessary that it should be corroborated on all points relating to him, but there must be some guarantee that his evidence is true as regards that particular accused. A. I. R. 1921 Nag. 39, *Rel. on*; 14 Bom. 331; A.I.R. 1922 Nag. 172; A. I. R. 1925 Nag. 78, *Appl.* (*Jackson, A.J.C. on difference between Staples and Subhedar, A.J.Cs.*). DOULAT *v.* EMPEROR. **120 I.C. 721=31 Cr. L. J. 153=A.I.R. 1930 Nag. 97.**

———It is not all evidence corroborating the accomplice's story, which comes within the rule requiring corroboration. The corroboration indicated in S. 114, Ill. (b), is corroboration in material particulars and these particulars must be such as to connect or identify each of the accused with the offence. [*Rex* v. *Baskerville*, (1916) 2 K. B. 658.] It is not necessary that the accomplice should be corroborated in every material particular. (*Cuming and Lort Williams, JJ'.*). REBATI MOHAN *v.* EMPEROR. **115 I.C. 258=32 C.W.N. 945=56 Cal. 150=30 Cr. L.J. 435=12 A. I. Cr.R. 265=A.I.R. 1929 Cal. 57.**

———The extent of corroboration which a Court demands naturally varies with the circumstances of each case, including the character and antecedents of the approver and the degree of suspicion attached to his evidence. (*Bhide and Johnstone, JJ.*). HAKAM SINGH *v.* EMPEROR. **1929 Cr. C. 626=A.I.R. 1929 Lah. 850.**

———Corroboration need not necessarily consist of direct evidence that the accused committed the crime; it is sufficient even if it consists of circumstantial evidence of his connexion with the crime. *Rex* v. *Baskerville*, (1916) 2 K.B. 658; *Rex* v. *Marks Feigenboum*, (1919) 1 K. B 431, *Rel. on* and *Expl.* (*Bhide and Johnstone, JJ.*). HAKIM SINGH *v.* EMPEROR. **1929 Cr.C. 626=A.I.R. 1929 Lah. 850.**

———*Corroborative evidence itself need not be sufficient to base conviction on—Independent evidence showing in material points that the story of the accomplice is true, is sufficient corroboration.*

The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged and it would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice, that the accused committed the crime, is true not merely that the crime has been committed, but that it was committed by

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the accused. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime.

Corroborative evidence need not be sufficient in itself to base a conviction on. Confirmation of the story of an accomplice does not mean that there should be independent evidence of the accomplice's account of the crime itself. What the law clearly requires is that some relevant and material part of the approver's story incriminating the accused should have support from an independent source. This supplies a test of the truth of the accomplice's narrative as a whole by checking it in some relevant portion. *Rex* v. *Baskerville*, (1916) 2 K. B. 658, *Foll.* (*Fforde, J. on difference between Aga Haidar and Broadway, JJ.*). BAR KATI *v.* EMPEROR. **103 I.C. 49=28 Cr.L.J. 625=8 A.I.Cr. R. 273=A.I.R. 1927 Lah. 581.**

———*Corroboration must go to the guilt of each accused separately.*

An accomplice is unworthy of credit, unless he is corroborated in material particulars. The corroboration must go to the guilt of each of the accused separately. 8 All. 306, *Foll.* It must be such as to satisfy the Court that the approver has not substituted the name of one or more of the accused for that of some other person, possibly a particular friend of his own, who actually took part in the offence. The rule is not absolute: 9 All. 528, *Ref.* But it is only in exceptional cases that the corroboration can be dispensed with. (*Simpson and Gokaran Nath Misra, A. J. Cs.*). SHEO NARAIN SINGH *v.* KING EMPEROR.
89 I.C. 261=12 O. L. J. 429=26 Cr. L.J. 1317=A.I.R. 1925 Oudh 715.

———Where there are more than one accused there should be corroboration of approver's story against each. (*Broadway, J.*). SULEMAN *v.* THE CROWN. **76 I.C. 716=25 Cr L J. 252=A. I. R. 1923 Lah. 385.**

———No hard and fast rules can however be laid down to regulate the extent and nature of such corroboration, this being dependant entirely on the circumstances of each case. The fabrication of a false defence cannot be regarded as sufficient to corroborate an approver. (*Scott-Smith and Broadway, JJ.*). MAHANT NARAIN DAS *v.* EMPEROR.
68 I.C. 113=4 L.L.J. 91=3 Lah. 144=9 P.W.R. 1922=23 Cr. L.J. 513=A.I.R. 1922 Lah. 1.

———*Nature and extent of corroboration required discussed—English and Indian Law on the point do not differ.*

Confirmation (corroboration) does not mean that there should be independent evidence of that which the accomplice relates, otherwise his testimony would be unnecessary. But one accomplice's evidence is not corroboration of the testimony of another accomplice. (1848) 3 Cox C. C. 526 and 531.

Evidence in corroboration must be evidence which implicates the accused, *i.e.*, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.

The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. Were the law otherwise, many crimes which are usually committed between accomplices in secret, such as incest,

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offences with females, etc., could never be brought to justice. *Rex* v. *Baskervlle*, (1916) 2 K. B. 658 at P. 667.

The law in this country regarding corroboration of an accomplice's evidence does not differ from English law. (*Kotval, A.J.C.*). KISAN *v.* EMPEROR.
67 I.C. 343=6 N.L.J. 52=23 Cr. L.J. 391=A.I.R. 1922 Nag. 172.

—S. 114, Ill. (b)—'Corroboration,' what is.

———To use the statement of an approver in such a way as to convict an accused on its strength, care should be taken to see that it is corroborated in material particulars so as to induce one to an inference that the accused were connected with and guilty of the offence. (*Bhide and Fforde, JJ.*). NATHU LABHA *v.* EMPEROR. **114 I.C. 326=30 Cr. L.J. 292=12 A.I. Cr. R. 223=A.I.R. 1929 Lah. 680.**

———An approver's evidence is unworthy of credit unless corroborated in material particulars. And where the only corroborating evidence is that of the approver's son who repeats parrot-like what he is tutored to say, it is not safe to convict a person. (*Zafar Ali and Bhide, JJ.*). MEHR SINGH *v.* EMPEROR. **122 I.C. 91=11 L.L.J. 223=30 P. L. R. 422=1929 Cr. C. 149=A. I. R. 1929 Lah. 587.**

———Where the evidence of an approver is principally on the question of conspiracy and where that evidence is sought to be corroborated by the evidence of the confessing accused, it amounts to this that one tainted piece of evidence is sought to be corroborated by another tainted piece of evidence and would not justify the conviction of co-accused. (*C. C. Ghose and Jack, JJ.*). LATAFAT HOSSAIN *v.* EMPEROR. **116 I.C. 174=30 Cr. L.J. 586=12 A.I. Cr. R. 460=33 C. W. N. 58=A.I.R. 1928 Cal. 745.**

———The evidence of an accused person's conduct may be used as corroboration of an approver's story: *R.* v. *Feigunbaum*, (1919) 1 K.B. 431, *Rel. on.* (*Addison and Coldstream, JJ.*). CHATRU MALIK *v.* EMPEROR. **111 I.C. 435=29 Cr.L.J. 851=10 Lah. 265=11 A I. Cr. R. 171=31 P.L.R. 41=A. I. R. 1928 Lah. 681.**

———The production of stolen property by an accused person even from a place which is not in his own possession may be accepted as material corroboration of the evidence of an accomplice who has deposed that the accused joined him in committing the burglary or theft: A.I.R. 1923 Lah. 335, *Foll.* (*Coldstream, J.*). MUHAMMAD *v.* EMPEROR.
111 I. C. 447=29 Cr. L. J. 863=11 A. I. Cr. R. 198.

———*Approver's story.*

The mere fact that the approver produced a spear and a dang from a field and he stated that the spear was used by the accused is not corroboration of the approver's story: so also the fact that the accused was stained with human blood, does not corroborate the approver's story. (*Fforde, J.*). CHANAN SINGH *v.* KING EMPEROR. **99 I.C. 929=8 L.L.J. 610=28 P.L.R. 39=28 Cr. L. J. 193=7 A. I. Cr. R. 173=A.I.R. 1927 Lah. 78.**

———*Existence of a motive for the offence is not sufficient.*

The existence of general hostility, general enmity and a desire, however strong, or a motive, however effective, to procure the death of another person may be a piece of circumstantial evidence, but is not corroboration of a sworn statement of participation in a particular crime. Corroboration must

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point indubitably to the identification of the person charged with the particular act with which the direct evidence connects him. (*Walsh and Dalal, JJ.*). KALWA *v.* EMPEROR.
95 I.C. 74=48 All. 409=24 A.L.J. 410=7 L.R.A. Cr. 105=27 Cr. L.J. 746=A. I. R. 1926 All. 377.

———Where an approver gave evidence that the deceased had been put to death by the accused and himself for the sake of his ornaments, and a witness deposed that the accused was seen talking to the deceased on the evening on which he disappeared,

Held, that the deposition of the witness did not amount to a material corroboration of the approver's statement. (*Scott-Smith and Zafar Ali, JJ.*). EMPEROR *v.* RAM KARAN. **88 I. C. 453=7 L.L.J. 528=26 Cr. L.J. 1141=26 P.L.R. 295=A.I.R. 1925 Lah. 600.**

———Stolen property being found in possession of accused is sufficient corroboration. (*Zafar Ali, J.*). MAULA DAD *v.* EMPEROR. **86 I.C. 69=26 Cr. L.J. 693=26 P.L.R. 40=A. I. R. 1925 Lah. 426.**

———*Dacoity.*

In a dacoity case, where an approver gives evidence, the fact that on some day previous to the dacoity, the accused were seen together at a place other than that at which the dacoity took place is not such corroboration of the approver's evidence as to justify the conviction of the accused. (*Zafar Ali, J.*). MAULA DAD *v.* EMPEROR. **86 I.C. 69=26 Cr.L.J. 693=26 P. L. R. 40=A.I.R. 1925 Lah. 426.**

———Evidence of motive is not corroboration of any of the incidents of the crime. 130 C. 247, *Ref.* (*Dalal and Cuming, A.J.Cs.*). SHEO AMBAR *v.* EMPEROR. **77 I.C 439=25 Cr.L.J. 391=A.I.R. 1925 Oudh 295.**

———Discovery of articles is sufficient corroboration of approver's statement. (*Broadway, J.*). WADHAWA SINGH *v.* THE CROWN. **76 I. C. 819=25 Cr. L. J. 259=A.I.R. 1923 Lah. 389.**

———*Penal Code, Ss.* 395 *and* 397.

Where some common things were found in the search and some other things found, claimed by the accused to be their own, were not mentioned in the first report and a gun and a sword were found which were proved to belong to complainant but which were concealed because the complainant did not hold a license,

Held, that there was no sufficient corroboration of approver's story to justify conviction. (*Broadway, J.*). SULEMAN *v.* THE CROWN.
76 I. C. 716=25 Cr. L. J. 252=A. I. R. 1923 Lah. 385.

———*Corroboration by other accomplices is useless—Corroboration must be of commission of offence.*

Where the evidence of witnesses relied on to corroborate the approver does not go beyond stating that the accused wanted to kill the deceased and with that object got information from them of the deceased's movements on the night in question,

Held, this is not inconsistent with the possibility that they might depute the approver only to do the foul deed. Even if these statements did furnish any kind of corroboration they cannot be used for that purpose, where the witnesses who corroborate are themselves accomplices, according to their own showing and their evidence would require corroboration before it could be relied upon, especially when they have retracted their statements.

EVIDENCE ACT (1872), S. 114, Ill. (b)—Value of accomplice's evidence.

49 I.C. 607; 13 I.C. 998; 14 P.R. 1894, Cr., *Foll.* (*Shadi Lal, C.J. and Abdul Qadir, J.*). AHMAD NUR *v.* EMPEROR. **68 I.C. 821=23 Cr. L.J. 597=A.I.R 1923 Lah. 76.**

———The discovery of blood in the convict's house and on his finger nails, and his suspicious conduct on the day of murder, furnish an adequate corroboration of the approver's testimony. (*Shadi Lal, C.J. and Moti Sagar, J.*). GHULAM HASSAN *v.* EMPEROR. **4 L. L. J. 405=A.I.R. 1921 Lah. 392.**

—S. 114, Ill. (b)—Retracted confession.

———*Conclusive against himself but is only evidence against other co-accused.*

Where a confession does not appear to have been tutored nor made under the influence of drugs or fear but is one which adds to the knowledge which was then available as to the cause of death in many particulars and has not been contradicted by anything and thus appears to be in the evidence a true confession, it is sufficient, without any corroborative evidence, for the conviction of the maker though retracted. A.I.R. 1927 Oudh 17, *Foll.*

Such a confession is not alone sufficient evidence to justify a conviction of a co-accused but that confession if unrebutted is admissible in evidence against a co-accused. (*Raza and Pullan, JJ.*). SHEO RATAN *v.* EMPEROR.
114 I. C. 771=6 O.W.N. 159=30 Cr.L.J. 360=A.I.R. 1929 Oudh 167.

—S. 114, Ill. (b)—Value of accomplice's evidence.

———Evidence of accomplice requires corroboration. (*Boys, J.*). PARAS RAM *v.* EMPEROR.
A.I.R. 1930 All. 740.

———The statement made by an accomplice should be accepted when it is strongly corroborated in material particulars by clear and cogent evidence for authenticity of which is not open to doubt. (*Young and Sen, JJ.*). MT. KHUBAN *v.* EMPEROR.
120 I.C. 257=31 Cr. L. J. 26=1930 Cr. C. 45=A. I. R. 1930 All. 29.

———Although it is not illegal to convict on the uncorroborated evidence of an accomplice there is a consensus of opinion that a conviction on the uncorroborated testimony of an accomplice is rarely justified. Nature of corroboration that is required indicated. (*Raza and Nanavutty, JJ.*). BACHCHU *v.* EMPEROR. **7 O.W.N. 862=1930 Cr. C. 1079=A.I.R. 1930 Oudh 455.**

———Confession implicating a co-accused requires corroboration if a co-accused is to be convicted on it. 38 Cal. 559; 15 Bom. 66 and 38 Bom. 156, *Ref.* (*Adami and Scroope, JJ.*). KHATIR JAMA KHAN *v.* EMPEROR. **123 I.C. 393=31 Cr. L. J. 492=1930 Cr. C. 767=A.I.R. 1930 Pat. 385.**

———The testimony of a professed accomplice requires to be carefully scrutinized with anxious search for possible corroboration. (*Lord Atkin*). W. C. MACDONALD *v.* FRED LATINER.
112 I. C. 375=29 M.L.W. 155=A. I. R. 1929 P.C. 15 (P.C.).

———The statement of a co-accused is admissible in evidence but according to the usual practice and as a rule of prudence it is unsafe to accept the tainted testimony of an accomplice so long as it is not corroborated in material particulars. The difficulty enhances where the said accomplice does not adhere to his statement. (*Sen, J.*). MAN SINGH *v.* EMPEROR. **121 I.C. 103=11 L.R.A.Cr. 1=13 A.I.Cr. R. 52=1929 Cr.C. 656=31 Cr.L.J. 206=A.I.R. 1929 All. 928.**

EVIDENCE ACT (1872), S. 114, Ill. (b)—Value of accomplice's evidence.

———*Slighter degree—Of corroboration when sufficient.*

Where police officers act in conspiracy with one another to demand and receive illegal gratification and are ready to make use of their official position to enforce such demand, the testimony of accomplices who are really victimised by them into offering them illegal gratification and have not willingly done so requires a much slighter degree of corroboration than would be the case if the accomplices were entirely voluntary accomplices. 33 Cal. 649, *Ref.* (*Mirza and Murphy, JJ.*). EMPEROR *v.* C.E. RING. **120 I.C. 340=53 Bom. 479=31 Bom. L.R. 545=1929 Cr. C. 114=31 Cr. L.J. 65=A.I.R. 1929 Bom. 296.**

———*"May" is not "must" and evidence of accomplice stands on same footing as other evidence.*

Although S. 114, Illus. (b), provides that a Court may presume that the evidence of an accomplice is unworthy of credit, unless corroborated, "may" is not "must" and no decision of Court can make it "must." Therefore in spite of all that has been said to the contrary in law, the evidence of an accomplice stands on the same footing as any other evidence. The Court is not obliged to hold that he is unworthy of credit and must be corroborated. It is for the Court to consider after taking into consideration all the circumstances one of which being that he is an accomplice whether it does or does not rely on the evidence. To entirely rule out the uncorroborated evidence of an accomplice might in many cases lead to miscarriage of justice. (*Cuming and Lort-Williams, JJ.*). EMPEROR *v.* C.A. MATHEWS. **1929 Cr. C. 669=A.I.R. 1929 Cal. 822.**

———*Rule discussed.*

There is no definite rule of law that a person cannot be convicted upon the uncorroborated evidence of an accomplice. But Ill. (b) to S. 114 of the Evidence Act is the rule in such cases and Courts must act up to it. If the suspicion which attaches to the evidence of an accomplice be not removed that evidence should not be acted upon unless corroborated in material particulars. Rule as to corroboration elaborately discussed. (*Scroope and Chatterji, JJ.*). EMPEROR *v.* KAILASH MISSIR. **11 P.L.T. 545.**

———*Uncorroborated testimony.*

Although a conviction is not "illegal" merely because it proceeds on the uncorroborated testimony of an accomplice, the rule of practice is now firmly established that corroboration of such testimony in material particulars connecting each of the individual accused with the crime is necessary to justify his conviction : A. I. R. 1927 Lah. 581, *Ref.* (*Bhide and Johnstone, JJ.*). HAKAM SINGH *v.* EMPEROR. **1929 Cr. C. 626=A.I.R. 1929 Lah. 850.**

———The well-known rule of criminal law that an accomplice is unworthy of credit unless he is corroborated in material particulars, which is formulated in S. 114, Ill. (b), is not absolute as will be evident from S. 114 as to Ill. (b) and S. 133, but it is only in exceptional cases that the corroboration can be dispensed with. A. I. R. 1928 Oudh 430, *Cons.* (*Raza, J.*). LALE *v.* EMPEROR. **118 I.C. 423=6 O.W.N. 441=30 Cr. L.J. 922=1929 Cr. C. 143=A.I.R. 1929 Oudh 321.**

———*Credibility of approver.*

The testimony of one accomplice is of little value as a piece of corroborative evidence in support of the testimony of another accomplice. The testimony of an approver can be used for the purpose of corroboration if the taint attached to it is removed. But this "taint" must be removed to such an extent that the Court is prepared to believe the testimony of the approver in the same way and to the same extent as the testimony of an ordinary witness whom it considers to be worthy of credit. A.I.R. 1923 Lah. 76 and 20 P. R. 1919, *Ref.* (*Bhide and Johnstone, JJ.*). HAKAM SINGH *v.* EMPEROR. **1929 Cr. C. 626=A.I.R. 1929 Lah. 850.**

———*Confession of co-accused.*

Although a confession of one co-accused may be taken into consideration against another under the provisions of S. 30, it would be unsafe, if not illegal, to rely on it without further corroboration in material particulars. (*Harrison and Dalip Singh, JJ.*). KARAM DIN *v.* EMPEROR. **115 I. C. 1=30 Cr. L. J. 385=A. I. R. 1929 Lah. 338.**

———*Confession by co-accused.*

Where there is nothing against an accused person but a confession made by a co-accused from the dock at the trial, a conviction cannot be supported. (*Waller, J.*). GOVINDU NAIDU *v.* EMPEROR. **118 I.C. 512=1929 M. W. N. 391=2 M. Cr. C. 76=30 Cr. L.J. 932=A.I.R. 1929 Mad. 285.**

———Where the accomplice makes his confession and sticks to it, and he actually allows himself to be convicted upon it, no doubt to that extent, there is some sort of guarantee of its truthfulness, but he remains an accomplice with all the suspicion attaching to an accomplice, and his evidence must be viewed with all the suspicion which ordinarily attaches to the evidence of an accomplice. (*Walmsley and Mukerji, JJ.*). EMPEROR *v.* KOMORUDDIN SHEIKH. **A.I.R. 1928 Cal. 233.**

———Although under S. 133, Evidence Act, an accomplice is a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of such accomplice, the rule of caution that such testimony should be supported by extrinsic evidence connecting the accused with the crime as now regarded as a rule of law, and although it is not illegal to convict a person on the uncorroborated testimony of an approver, the Courts in points of facts always insist upon the rule being followed. (*Fforde, J. on difference between Aga Haidar and Broadway, JJ.*). BARKATI *v.* EMPEROR. **103 I. C. 49=28 Cr. L. J. 625=8 A.I. Cr. R. 273=A. I. R. 1927 Lah. 581.**

———In dealing with the evidence of an accomplice the Judge is not bound to rely on such statements only as are corroborated by other reliable evidence. Once a foundation is established for a belief that a witness is speaking the truth because he is corroborated by true evidence on material points, the Judge is at liberty to come to a conclusion as to the truth or falsehood of other statements not corroborated. (*Macleod, C. J. and Crump, J.*). BHIMRAO NARASIMHA HUBLICAR *v.* EMPEROR. **86 I. C. 72=27 Bom. L. R. 120=26 Cr. L. J. 696=A. I. R. 1925 Bom. 261.**

———*Co-accused.*

Confessing co-accused's evidence is practically that of an approver, and must be treated as such especially where the confession was not free from inducement. (*Wazir Hasan and Cuming, A. J. Cs.*). MAHADEO *v.* KING EMPEROR. **10 O. L. J. 230=A. I. R. 1924 Oudh 65.**

———Conviction of accused cannot be based on evidence of accomplices unless such evidence is

EVIDENCE ACT (1872), S. 114, Ill. (b)—Value of approver's evidence.

corroborated in some material and satisfactory manner. (*Das and Bucknill, JJ.*). DHUNNU BELDAR *v.* EMPEROR. 2 P. L. T. 757= A. I. R. 1921 Pat. 406.

—S. 114, Ill. (b)—Value of approver's evidence.

———Numerous persons from area of 50 miles tried for dacoity—Offences continuing for over four years—Consistently correct identification is difficult—Approver failing to identify particular person on one occasion—His evidence becomes weak regarding that man, but he can be convicted if there is strong evidence besides that of approver. (*Stuart, C. J. and Raza, J.*). KHILAWAN *v.* EMPEROR. 112 I. C. 337=5 O. W. N. 760= 29 Cr. L. J. 1009=11 A. I. Cr. R. 273= A. I. R. 1928 Oudh 430.

———The evidence of an approver does not differ from the evidence of any other witness save in one particular respect, namely, that the evidence of an accomplice is regarded *ab initio* as open to grave suspicion. Accordingly, if the suspicion which attaches to the evidence of an accomplice be not removed, that evidence should not be acted upon unless corroborated in some material particular and if the suspicion attaching to the accomplice's evidence is removed then that evidence may be acted upon, even though uncorroborated and the guilt of the accused may be established upon that evidence alone. The law on the point as laid down in Ss. 114, 133 and 134, Evidence Act, gives no countenance to the contention that the uncorroborated testimony of an accomplice is necessarily insufficient to establish a charge against an accused. (*Courtney-Terrell, C. J. and Macpherson, J.*). RATTAN DHANUK *v.* EMPEROR. 113 I.C. 329= 9 P.L.T. 672=8 Pat. 235=30 Cr. L.J. 137= 11 A. I. Cr. R. 41=A.I.R. 1928 Pat. 630.

———It is not safe to base a conviction upon the evidence of such an approver who obviously is deeply interested in putting responsibility for the offence upon shoulders other than his own, unless there is some independent evidence to corroborate his story in material particulars. (*Fforde, J.*). CHANAN SINGH *v.* KING EMPEROR. 99 I C. 929= 8 L.L.J. 610=28 P.L.R. 39=28 Cr. L.J. 193= 7 A.I. Cr. R. 173=A.I.R. 1927 Lah. 78.

———The acquittal of any number of persons for want of corroboration cannot weaken the weight of the testimony of an approver. The matter would be different, if it is shown that even one accused person has been acquitted not for want of corroboration but in virtue of a finding that the accused person was innocent of the crime. (*Dalal and Neave, A.J. Cs.*). MURLI BRAHMAN *v.* KING EMPEROR. 89 I. C. 836=27 O. C, 385= 26 Cr. L.J. 1412=A.I.R. 1925 Oudh 374.

———A person who owns himself to be a scoundrel and in addition to that is also a traitor, is a person whose evidence must be received with caution. Nevertheless the law does not require the total rejection of accomplice's evidence. It is enough if after considering the evidence, the Court is of opinion that the whole body of evidence put together proves the guilt of the accused person. (*Kennedy, J.C. and Aston, A.J.C.*). EMPEROR *v.* SUNDER DAS. 87 I. C. 916=19 S.L.R. 111=26 Cr. L. J. 1028= A.I.R. 1925 Sind 295.

———When an approver makes the contradictory statements that which seems to be pressed cannot be accepted. (*Fforde, J.*). SAUDAGAR SINGH *v.* EMPEROR. 77 I.C. 895=5 L.L.J. 572= 25 Cr. L.J. 495=A.I.R. 1923 Lah. 683.

EVIDENCE ACT (1872), S. 114, Ill. (e)—Acts of Courts.

———The facts, that prior to the making of their statements previous concert between approvers was highly improbable, have to be paid regard to, in connection with illus. (b) to S. 114. (*Scott-Smith and Broadway, JJ.*). MAHANT NARAIN DAS *v.* EMPEROR. 68 I.C. 113=3 Lah 144= 4 L. L.J. 91=9 P.W.R. Cr. 1922= 23 Cr. L.J. 513=A.I.R. 1922 Lah. 1.

———An approver's evidence is in itself tainted evidence though in some cases it may be worthy of belief for various reasons but the uncorroborated statement of an approver taken at the end of the trial is of very little evidentiary value. (*Shadi Lal, C. J. and Wilberforce, J.*). SUNDER SINGH *v.* EMPEROR. 66 I.C. 187=4 Lah. L.J. 284= 23 Cr. L.J. 251.

———In order to support conviction the statement of an approver, especially of one whose initial statement was very long delayed, requires material corroboration connecting each individual accused with the crime committed. (*Harrison, J.*). SARDARE *v.* EMPEROR. 63 I.C. 612=22 Cr. L.J. 676.

—S. 114, Ill. (b)—Miscellaneous.

———Court should exercise judicial discretion and have regard to facts of case in considering whether an accomplice is or is not worthy of credit. (*Courtney-Terrell, C. J. and Macpherson, J.*). RATTAN DHANUK *v.* EMPEROR. 113 I.C. 329= 9 P.L.T. 672=8 Pat. 235=30 Cr. L.J. 137= 12 A.I. Cr. R. 41=A.I.R. 1928 Pat. 630.

———*Accomplice is presumed to be unworthy of credit—Jury must be directed that corroboration is necessary.*

Among the presumptions a Court may make, is the presumption that an accomplice is unworthy of credit, unless he is corroborated in material particulars. That is a direction of law or of practice, which Judges themselves should give to every jury in any case in which they have to direct them upon the law and which in matters of fact they should themselves follow : 29 All. 434, *Dist.*; 4 Cal. 483, *Foll.* (*Walsh and Dalal, JJ.*). KALWA *v.* EMPEROR. 95 I.C. 74=48 All. 409= 24 A.L. J. 410=7 L.R.A. Cr.105= 27 Cr L.J. 746=A.I.R. 1926 All. 377.

———Though Ill. (*b*) is not imperative, the Courts *ex majore cautela* insist upon the corroboration of an approver's evidence in material particulars. A.I.R. 1924 Lah. 357, *Foll.* (*Kincaid, J.C. and Aston, A.J.C.*). FAIZULLAH *v.* EMPEROR. 81 I.C. 881= 19 S.L.R. 183=25 Cr.L.J. 1057= A.I.R. 1925 Sind 105.

—S. 114, Ill. (e)—Acquisition of land.

———Failure of a District Board to prove the actual acquisition and possession and the actual delivery of certain land to it by the Government—Intention of the Government to acquire the land and its taking some necessary steps in pursuance thereof proved—It was held to be not wrong to presume that necessary steps for the acquisition of the land and for the transfer of the same to the public body were taken. (*Suhrawardy and Graham, JJ.*). ANUKUL CHANDRA CHAKRAVARTI *v.* CHAIRMAN OF THE DACCA DIST. BOARD. 113 I.C. 24=32 C.W.N. 396= A.I.R. 1928 Cal. 485.

—S. 114, Ill. (e)—Acts of Courts.

———*Presumption of regularity in official acts—Confession placed on record by Magistrate—Duty of Sessions Judge to presume it was voluntarily made.*

A Court should not disregard S. 114, Illus. (*e*), of the Evidence Act and assume irregularity

EVIDENCE ACT (1872), S. 114, Ill. (e)—Acts of Courts.

in official acts. A Sessions Judge should presume that a confessional statement placed on record by the Magistrate was voluntarily made. (*Jackson, J.*). PUBLIC PROSECUTOR *v.* NAGARAJ.
59 M. L. J. 114.

———There is a presumption that the acts of a Court have been regularly carried out unless the contrary is shown. (*Daniels and King, JJ.*). BAIJNATH *v.* SRI BHAGWAN. **96 I. C. 591= A.I.R. 1926 All. 691.**

—S. 114, Ill. (e)—Batwara proceedings.

———*Presumption of regularity applies only to form and procedure followed and not to representation made to the official concerned.*

Under S. 114 a Court may presume that the official acts have been regularly performed and "Regularly performed" means performed with due regard to the form and procedure.

Where plaintiff produces certain records of *batwara* proceedings and says defendants made certain admissions therein and defendants deny that they made any admissions, the identity of parties who made those admissions must, in the first instance, be established by the plaintiff to the satisfaction of the Court before the plaintiff can rely upon those admissions as against the defendants. The regular performance of official acts does not imply that the representation made to them must be correct, that must be established by the plaintiff. (*Das and Adami, JJ.*). JUGDEO NARAIN SINGH *v.* BULAKI GOPE. **63 I.C. 226= 1921 P.H.C.C. 343=A.I.R. 1921 Pat. 275.**

—S. 114, Ill. (e)—Execution proceedings.

———The presumption is that all proceedings taken by the Court in execution are in proper form and if anybody wants to challenge, he must advance and prove the facts on which he wishes to rely. (*Wallace, J.*). N. M. RAMA RAJA, *In re.*
99 I.C. 33=24 M.L.W. 484= 28 Cr. L.J. 2.

—S. 114, Ill. (e)—Judge.

———If it be the duty of a Court to a particular thing it must be assumed that the Judges of that Court did their duty. (*Abdul Raoof and Harrison, JJ.*). ABDUL KARIM *v.* THE SHOP OF THAKAR RAM. **68 I.C. 740=A.I.R.1923 Lah. 124.**

—S. 114, Ill. (e)—Judgment.

———Where a point is definitely raised in the grounds of appeal and the Court makes no mention thereof in its judgment, it must still be presumed to have performed the judicial act of writing a judgment regularly and properly. (*Harrison and Tek Chand, JJ.*). MT. HARCHARAN KAUR *v.* LACHMAN SINGH. **A.I.R. 1928 Lah. 94.**

—S. 114, Ill. (e)—Judicial proceedings.

———Where a decree was executed as a rent-decree, it must, in the absence of evidence to the contrary, be presumed that the plaint was drawn up in such manner as to warrant a rent-decree and all was properly done. (*Adami, J.*). MOHAMMAD HASIM KHAN *v.* GAYA RAI.
101 I. C. 382=A.I.R. 1927 Pat. 414.

———Where sums are paid before the presiding officer of the Court at the time when a receipt was given for them, the presumption under S. 114 of the Indian Evidence Act is that the ordinary course of business was followed in the case in question. (*Scott-Smith and Fforde, JJ.*). KING EMPEROR *v.* AHMAD SHAH. **A.I.R. 1923 Lah. 566.**

———All judicial proceedings are to be presumed to have been duly performed until the contrary is proved. (*Lyle, A.J.C.*). MUNSHI BABU RAM *v.* BABU RAM. **66 I.C. 620=8 O.L.J. 343= A. I. R. 1921 Oudh 259.**

EVIDENCE ACT (1872), S. 114, Ill. (e)—Orders in Gazette.

———There is a presumption that the proceedings of the Court were regular until the contrary is shown. (*Daniels, J. C. and Dalal, A. J. C.*). MD. MUZAFAR ALI *v.* BHAGWATI PRASAD.
66 I. C. 642=8 O.L.J. 358= A.I.R. 1921 Oudh 176.

—S. 114, Ill. (e)—Non-compoundable case.

———Where there is no evidence that a non-compoundable offence was compounded, it is to be presumed that the criminal Court acted according to law, and the presumption is that the criminal case was withdrawn and not compounded. (*Ashworth, J.*). SUDHO KANDU *v.* MT. JHINKA KUER. **116 I.C. 749= A.I.R. 1929 All. 456.**

—S. 114, Ill. (e)—Official acts.

———Where a Committing Magistrate writes at the foot of the deposition that the cross-examination is being reserved, he does not mean that it is being reserved by him and that the accused has not been given an opportunity for cross-examination. All official acts must be presumed to have been done properly and it is difficult to suppose that Magistrate who must be presumed to have known the law did not give the accused an opportunity of cross-examination to which he was entitled by S. 208, Cr. P. Code. (*Percival, J. C. and Barlee, A.J.C.*). EMPEROR *v.* MAHRAB. **120 I.C. 524= 1930 Cr. C. 70=31 Cr.L.J. 121= A.I.R. 1930 Sind 54.**

———Official acts are to be presumed to be legally performed. Where the jurisdiction of the Assistant Settlement Officer was not questioned in the Trial Court, it was presumed in second appeal, where only the question was raised, that he acted within his jurisdiction in passing the particular order deciding the dispute as to the boundary line. (*Coutts and Ross, JJ.*). BALGOBIND KUMAR *v.* RAI BEHARI LAL MITTER. **66 I.C. 471= 1922 P.H.C.C. 114=3 P.L.T. 617= A. I. R. 1923 Pat. 96.**

—S. 114, Ill. (e)—Official order.

———There is a presumption in favour of any order of an official being legal until the contrary is proved. (*Ashworth, J.*). SHAM SUNDER *v.* EMPEROR.
91 I.C. 56=27 Cr. L.J. 24= A.I.R. 1926 All. 264.

—S. 114, Ill. (e)—Orders.

———*Sheristadar's signing for the Collector with his order is valid.*

The Collector is not bound to sign every order that is issued to third persons and there is nothing wrong in the Collector delegating his power of signing the order to the Sheristadar and such an official act of the Sheristadar is presumed to have been done properly until the contrary is proved: 35 Bom. 243, *Ref.* (*Kumarasawmi Sastri and Ramesam, JJ.*). SUDARSANA CHARYULU *v.* K. SURYANARAYANA. **107 I.C. 130= 39 M. L.T. 628=27 M. L. W. 42= A. I. R. 1928 Mad. 205.**

—S. 114, Ill. (e)—Orders in Gazette.

———*Date of election.*

Where a notification fixing the election is published in the Gazette, it is proof of the order of Government fixing that election under S. 78 and under S. 114, there is a presumption that this act of publication was done regularly, namely, in accordance with the rules. (*Phillips, Ramesam and*

EVIDENCE ACT (1872), S. 114, Ill. (e)—Precautions.

Wallace, JJ.). COMMISSIONER, CORPORATION, MADRAS *v.* EKAMBARA NAICKER. **106 I.C. 144=39 M.L.T. 367=26 M.L.W. 569=A.I.R. 1927 Mad. 980=53 M.L.J. 603.**

—S. 114, Ill. (e)—Precautions.

———It is to be presumed no doubt under S. 114 that every official Act is properly performed but this presumption is hardly sufficient to satisfy a Court that such precaution have been taken as to render an identification truly valuable, *e.g.*, mixing the accused in a large number of men dressed all alike. (*Harrison, J.*). KOLLU *v.* EMPEROR. **67 I.C. 721=4 L. L. J. 448=23 Cr.L.J. 449=A. I. R. 1922 Lah. 31.**

—S. 114, Ill. (e)—Processual law.

———*Mandatory and enabling provisions.*

In the case of mandatory provisions of the processual law, in the absence of any evidence to the contrary, the Court would presume that all rules and legal forms were complied with as a tribunal is presumed not to deviate from the rules and forms laid down for its guidance. But where the provisions are only enabling and not mandatory, such a presumption does not arise. (*Phillips, O.C.J. and Ramesam and Beasley, JJ.*). SONACHALAM PILLAI *v.* KUMARAVELU CHETTIAR.

107 I. C. 625=51 Mad. 128=27 M.L.W. 216=A.I.R. 1928 Mad. 77=54 M.L.J. 8 (F.B).

—S. 114, Ill. (e)—Rules in England.

———Decisions of English Courts as regards the distinction between Courts of Record and other Courts have very little relevancy, in considering the validity of judicial and official acts of Indian Courts and Officers. (*Sadasiva Aiyar and Spencer, JJ.*). NACHIYAPPAN *v.* ALAGAPPA CHETTY.

62 I.C. 87=13 M.L.W. 172=A.I.R. 1921 Mad. 107.

—S. 114, Ill. (e)—Sanction.

———*Name of accused appearing on back of paper.*

While sanctioning the prosecution of accused for an offence under Penal Code, S. 294-A the name of the accused was shown on the back of the paper instead of in the body of the sanction merely because there was not sufficient space left on the front side.

Held: that the initial presumption was that all the official acts were done in a regular manner and hence the sanction was valid. (*Zafar Ali and Bhide, JJ.*). EMPEROR *v.* DIWAN CHAND JOLLY.

124 I.C. 347=1930 Cr. C. 97=A.I. R. 1930 Lah. 81.

—S. 114, Ill. (e)—Scope.

———*Correctness of procedure but not the factum of the act.*

Section 114 authorizes the presumption that a particular judicial or official act which has been performed has been performed regularly, but it does not authorize the presumption without any evidence that the act has been performed. 6 C.W.N. 845 and 32 Cal. 1107, *Foll.* (*Das and Allanson, JJ.*). HIRA LAL *v.* JAGATPATI SAHAI. **111 I.C. 797=8 Pat. 1=9 P.L.T. 523=A. I. R. 1928 Pat. 600.**

———*Official act—Factum of—Proof necessary.*

The meaning of S. 114 is that if an official act is proved to be done it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of it is essential. 32 Cal. 1107, *Foll.* (*Das and Allanson, JJ.*). HITNARAIN SINGH *v.* RAMBARAI RAI. **115 I.C. 196=7 Pat. 733=9 P.L.T. 484=A.I.R. 1928 Pat. 459.**

EVIDENCE ACT (1872), S. 114, Ill. (e)—Service of process.

———*Presumption applies to acts of Courts only and not to sufficiency of evidence.*

The presumption that judicial acts have been regularly performed applies to the acts of the Court alone. Where, therefore, a minor defendant was represented by a guardian *ad litem* it might be presumed that the necessary notices were issued and that a formal order appointing the guardian *ad litem* was drawn up, but not that the person who was named as the guardian *ad litem* was a fit person to be appointed guardian. (*Wazir Hasan and Neave, A.J.Cs.*). RAMESHWAR BAKHSH SINGH *v.* MT. RIDH KUER. **87 I. C. 238=A. I. R. 1925 Oudh 633.**

———*Principle does not apply to acts of private persons.*

Per *Ashworth, A.J.C.*—The principle that everything must be held to have been performed duly and in order may apply to the acts of a Court but it will not apply to the acts of private persons. (*Wazir Hasan, Ashworth and Simpson, A.J.Cs.*). RAGHUNATH SINGH *v.* DHONDHE SINGH. **95 I. C. 680=2 O. W. N. 796=A. I. R. 1926 Oudh 169.**

—S. 114. Ill. (e)—Service of notice.

———When there is nothing to indicate that the Court had not satisfied itself of the service of notice it must be presumed that the Court was so satisfied. A.I.R. 1923 Patna 406, *Rel. on.* (*Tek Chand, J.*). AMAR SINGH *v.* BALA SINGH. **102 I.C. 12=A.I.R. 1927 Lah. 506.**

———*Due service of notice under O. 21, R. 54 (2) should be presumed when record of Court on the point is not available.*

Plaintiff purchased property after attachment and after a prohibitory order was served on judgment-debtors not to sell the same. In the Court auction which followed, a part thereof was purchased by defendant. In a suit by plaintiff three years after the attachment, the record of the Court not being available, it was not proved that service of notice was effected in the other modes described in O. 21, R. 54 (2), C. P. Code.

Held, that the Court below should have applied the presumption that official acts were regularly performed and that in view of the fact that a material portion of the record is no longer in existence the Court was wrong in throwing on the defendant the burden of proving by definite evidence the due service of the notice. (*Daniels and Neave, JJ.*). MOHAMMAD ABDUL *v.* SYED AKRAM HASAN. **83 I.C. 878=46 All. 741=22 A.L.J. 703=5 L. R. A. Civ. 525=A.I.R. 1924 All. 747.**

———*Issue of notice proved—Proper service should be presumed.*

When it is found that the Court after ordering issue of notices did bring on the record representatives of the deceased defendant it must be presumed that they had been properly served. The fact that the order sheet does not specifically mention service having been effected does not mean that it was not so effected. Service of summons is merely a ministerial act. The Judicial act of the Court is the step of bringing the legal representatives on the record and it is to this that the presumption of regularity applies. (*Daniels and Dalal, A.J.Cs.*). BHAGIRATHI *v.* PANDIT ONKAR NATH. **72 I. C. 142=10 O. L. J. 185=A. I. R. 1924 Oudh 17.**

—S. 114, Ill. (e)—Service of process.

———It must be assumed that a process, issued by the Court and accepted by the Court as having

EVIDENCE ACT (1872), S. 114, Ill. (e)—Signing of order.

been duly served, was served in the manner provided by law and with all the formalities laid down for the service thereof. Therefore, the burden of proving that the formalities required by law were not complied with at the time when formal possession was given to the plaintiff is on the defendant and not on the plaintiff. (*Jai Lal, J.*). PIARA RAM *v.* SOHAWA. **109 I.C. 561= A. I. R. 1928 Lah. 910.**

—S. 114, Ill. (e)—Signing of order.

———*Warrant signed by Sheristadar "by order"—Must be presumed to be legal.*

Where a *Sheristadar* signed the warrant by "order" it was held that the statement that appeared on the face of the warrant that the *Sheristadar* signed "by order" can be presumed to be true and that in the absence of anything to suggest to the contrary it was held that he was actually the officer appointed by the Court to sign processes as required by R. 24 (2) of O. XXI, C.P.C. 6 C.W.N. 845, *Dist.* (*Newbould and Suhrawardy, JJ.*). HARISH CHANDRA CHAUDHURY *v.* GIRIDAR SARKAR. **73 I.C. 328=37 C.L.J. 331=27 C.W.N. 1042= 24 Cr. L.J. 584= A. I. R. 1923 Cal. 584.**

—S. 114, Ill. (e)—Wajib-ul-arz.

———In the absence of any reliable evidence it must be held that the public officials engaged in the preparations of a *wajib-ul-arz* did not fail in the discharge of their duty. It must be held that the maxim *omnia presumuntur rite esse acta* applies and the consent of all co-sharers must be presumed to have been obtained in the preparation. (*Wazir Hasan, J. C. and Neave, A. J. C.*). MAQBAL-UN-NISA *v.* BANSIDHAR. **82 I.C 92=11 O.L.J. 319= A.I.R. 1924 Oudh 382.**

—S. 114, Ill. (e)—Warrant of attachment.

———It is in the ordinary course of official business in the Courts of the Central Provinces that a copy of every warrant of attachment is issued for posting in the Office of the Collector, and it is fairly safe to assume that this was done in the present case according to the maxim that all official acts are presumed to have been duly and correctly performed. (*Hallifax, A.J.C.*). JODHEN *v.* KAPIL NATH. **69 I. C. 563= A. I. R. 1923 Nag. 78.**

—S. 114, Ill. (e)—Warrants.

———*Calcutta Police Act—No presumption.*

Section 114, Ill. (e) of the Indian Evidence Act cannot be relied upon in order to presume the regularity of warrants under S. 46, Calcutta Police Act, and unless the law expressly says that proof shall be required, evidence ought to be required in every cases of this description that the essential preliminaries precedent to the issue of such a warrant have been complied with. (*C. C. Ghose and Chotzner, JJ.*). B. WALVEKAR *v.* KING EMPEROR. **96 I.C. 264=53 Cal. 718=30 C.W.N. 713= 27 Cr. L.J. 920= A.I.R. 1926 Cal. 966.**

—S. 114, Ill. (f)—Applicability.

———It is for the Court of fact to determine whether the presumptions referred to under S. 114, Ill. (*f*) of the Evidence Act are to be drawn in a particular case or not. (*Mittra, A. J. C.*). RAMCHANDRA *v.* RAGHOJI. **17 N,L.R. 25= A. I. R. 1921 Nag. 116.**

—S. 114, Ill. (f)—Injunction.

———Where an injunction was granted and the question was whether it was executed or not.

Held, that it should be presumed as executed. (*Kinkhede, A.J.C.*). BHIRAN PRASAD *v.* MAHANT LAXMI NARAYAN DAS. **79 I.C. 609= A. I. R. 1924 Nag. 385.**

EVIDENCE ACT (1872), S. 114, Ill. (g)—Account books.

—S. 114, Ill. (f)—Letter.

———*No presumption of its being sent by the person by whom it purports to be written.*

When a letter is duly posted there may be a presumption that it reaches the addressee in the ordinary course of business. But the mere fact that a letter has been received through post raises no presumption that it was despatched by the person on whose behalf it purports to have been written. If however it were proved that a previous letter was sent through post and a reply thereto was duly received by the sender through post purporting to come from the addressee the Court may under certain circumstances presume that it was a reply despatched on behalf of the addressee though not necessarily in his own hand-writing. (*Sulaiman, J.*). HABIB BUX *v.* SAMUEL FITZ AND CO., LTD. **89 I.C. 22=23 A. L. J. 961=6 L.R.A. Civ. 553= A. I. R. 1926 All. 161.**

—S. 114, Ill. (f)—Presentation of application.

———Where the facts of a particular case can form a foundation for a fair presumption that an application was made, then the Court would be entitled to presume that it was made: 22 Bom. 722, *Rel. on.* (*Macleod, C. J. and Coyajee, J.*). MULCHAND MANAJI MARWADI *v.* JAMANBHAI ABDUL KABIR SAHEB KAJI. **89 I.C. 228=27 Bom. L.R. 671= A.I.R. 1925 Bom. 443.**

—S. 114, Ill. (f)—Registered letter.

———Registered post-card returned to sender—Presumption is either addressee refused it or was not found: 19 C. W. N. 489, *Dist.* (*Mittra, A.J. C.*). RAMCHANDRA *v.* RAGHOJI. **17 N.L.R. 25= A.I.R. 1921 Nag. 116.**

—S. 114, Ill. (g)—Account books.

———Failure by a party to produce account books raises a strong presumption that their evidence would confirm in a conclusive manner the other documentary evidence against him. (*Harrison and Coldstream, JJ.*). KANSHI RAM *v.* SHANKAR DAS. **111 I.C. 596=10 L. L. J. 93= A.I.R. 1928 Lah. 397.**

———If a partner has books of accounts in his possession and will not produce them, an account may nevertheless be arrived at by presuming everything against him. *Walmsley* v. *Walsmley*, 3 Jo. and Lat. 556 and *Gray* v. *Haig*, 20 Beav. 219, *Foll.* (*Aston, A.J.C.*). DIPCHAND GOLOMAL *v.* KISHNIBAI. **108 I.C. 873=23 S. L. R. 313= A. I. R. 1928 Sind 133.**

———Where the account books have not been produced to prove payments of certain sums, and there is no explanation as to why they have not been produced it is a legitimate inference that had these books been produced they would have gone against the party alleging payments: A.I.R. 1925 P. C. 93, *Foll.* (*Wazir Hasan and Misra, JJ.*). HASAN BAQUR *v.* SHEO NARAIN SINGH. **91 I.C. 917=1 Luck. 7=13 O.L.J. 178= 3 O.W.N. 25= A.I.R. 1926 Oudh 81.**

———The non-production of account books by a party when such account books would throw much light on the case, raises adverse presumption. (*Sir John Edge.*) JAG PRASAD *v.* MT. SINGARI RAI. **86 I.C. 122=6 L.R.P.C. 111= 27 Bom. L.R. 760=29 C.W.N. 941= 23 A.L.J. 97=2 O.W.N. 229= A.I.R. 1925 P.C. 93= 49 M.L.J. 162 (P.C.).**

———Where certain parties who were money-lenders did not produce account books,

Held, that it was unlikely that they did not keep account books as they were money-lenders and that the presumption was that if they produced

EVIDENCE ACT (1872), S.114, Ill. (g)—Account books.

them they would have gone against them. (*Wazir Hasan and Neave, A. J. Cs.*). GULJAR SINGH *v.* MADHO RAM. **78 I.C. 547=11 O.L J. 275= A.I.R. 1925 Oudh 11.**

———Withholding of account books—Presumption is that entries therein are contrary to plea of party withholding. (*Moti Sagar, J.*). THE FIRM JAWALI DAS *v.* UTTAM CHAND. **76 I.C. 553= A.I.R. 1923 Lah. 585.**

———Where account books were in the possession of a party and he did not produce it or explain why they were not produced,

Held, that a presumption should be drawn against him to the effect that, if produced, they will be unfavourable to him. (*Dalal and Simpson, A.J.Cs.*). RUP KISHORE *v.* KANHAIA LAL. **74 I.C. 563= 10 O.L.J. 141=26 O.C. 266= A.I.R. 1923 Oudh 227.**

———*Failure to get third persons to produce—Effect.*

It is often impossible for a creditor to compel third parties to produce their account books, to prove that money is actually due to them and the suit cannot fail because the third parties did not produce the account books. (*Das and Adami, JJ.*). CHINTAMANI MAHAPATRA *v.* SATYAPADI KAR. **70 I.C. 226=1 Pat. 715= A. I. R. 1923 Pat. 71.**

———Per *Das, J.*—The inference drawn from the non-production of the books is that, if produced, they would support the other side. (*Dawson-Miller, C.J., Das and Adami, JJ.*). BHONU LAL CHOWDHURY *v.* W.A. VINCENT. **65 I.C. 882= 3 P. L.T. 653= A. I. R. 1922 Pat. 619.**

———Where the creditors of a family *prima facie* established that a purchase by the manager was for the benefit of the family but the defendants asserted that the property was not yielding a proper income and that therefore it was an improvident transaction.

Held, it was for the defendants to establish their case by production of their account books, when they are sought to be suppressed every presumption consistent with facts must be made against the defendants. (*Das and Bucknill, JJ.*). KUMAR KALIKANAND SINGH *v.* SHIVA NANDAN PRASAD SINGH. **63 I.C. 625=3 P. L.T. 149= A.I.R. 1922 Pat. 122.**

—S. 114, Ill. (g)—Accounts.

———*Oudh Rent Act.*

Where in a suit for profits under Oudh Rent Act the *lambardar* failed to file accounts and he was found to be literate, a decree was passed against him on gross rental. (*Simpson, A.J.C.*). MT. JAGRANI *v.* IQBAL NARAIN. **80 I.C. 441= 5 L.R. Oudh 82= A. I R. 1924 Oudh 347.**

—S. 114, Ill. (g)—Criminal Trial.

———*All witnesses not called—Principle explained.*

If the witnesses called by the prosecution are otherwise worthy of credit, the Court is not entitled to disbelieve them simply because some persons, who could have thrown light upon the case, have not been put before the Court by the prosecution. The proposition that it is the duty of the prosecution to call all the witnesses who prove their connection with the transactions connected with the prosecution and who must be able to give important information, and if such witnesses are not called without sufficient reason being shown, the Court may properly drawn an inference adverse to the prosecution, is too wide 16 A. 84. (F.B.) if the police consider a witness to be a false witness or that his evidence is unnecessary, they would be

EVIDENCE ACT (1872), S. 114, Ill. (g)—Examination of party.

justified in not sending up that witness for the prosecution and his absence at the trial ought not to be a reason for disbelieving the prosecution witnesses if they are otherwise worthy of credit. It is of course not for the police or for the Public Prosecutor to champion a particular theory and to suppress the evidence of a reliable witness simply because his testimony is inconsistent with it. (*Mullick and Kulwant Sahay, JJ.*). RANJIT AHIR *v.* EMPEROR. **74 I.C. 705=2 Pat. 309= 1 Pat. L.R.Cr. 236=24 Cr.L.J. 801= A.I.R 1923 Pat. 413.**

———Non-production of witnesses cited by prosecution when their evidence was unnecessary cannot justify adverse inference when there is nothing else on record to justify it. (*Tapp, J.*). JOWAYA *v.* EMPEROR. **120 I.C. 606=1930 Cr. C. 171= 31 Cr.L.J. 131= A.I.R. 1930 Lah. 163.**

———The non-summoning of a witness alleged to have taken part in the proceedings on which the trial is founded raises adverse presumption. (*Young, J.*). MA HT WAY *v.* EMPEROR. **86 I.C. 475= 4 Bur. L.J. 2=26 Cr. L. J. 827= A. I. R. 1925 Rang. 205.**

———Where two eye-witnesses sent up by the police were not heard by the Court

Held, that there must be some limit to the number of witnesses which a Court is asked to hear and no inference favourable to the accused can be drawn from the fact that these two witnesses had not been called. (*Lyle and Ashworth. A. J. Cs.*). KING EMPEROR v. NAROTAM. **74 I.C. 434= 10 O.L.J. 68=24 Cr. L.J. 770= A.I.R. 1923 Oudh 217.**

—S. 114, Ill. (g)—Examination of party.

———*Party not entering witness-box runs great risk.*

The fact that a party does not appear in the witness-box is a circumstance going very strongly against him. He runs a great risk if he does not enter into the witness box and gives evidence in his case upon facts which are directly within his knowledge and which relates to the matter in controversy. (*Tek Chand and Aga Haidar, JJ.*). ALLAH DITTA *v.* MT. BHAGAN. **116 I.C. 555= A I.R. 1930 Lah. 401.**

———*Avoidance of the witness-box.*

Where the plaintiffs are the best persons to give evidence as to the 'interest" possessed by them in a religious institution to prove *locus standi* for the purposes of S. 92, Civil P. C., and they merely put the defendants into the witness-box, their failure to go into the witness box goes strongly against them. A.I.R. 1927 P.C. 230, *Rel. on.* (*Zafar Ali and Bhide, JJ.*). KIRPA SINGH *v.* AJAIPAL SINGH. **11 Lah. 142=31 P.L R. 234= A.I.R. 1930 Lah. 1.**

———Where a party abstains from giving evidence in his own case, the presumption should be that truth lay on the other side. (*Stuart, C.J. and Wazir Hasan, J.*). ABDUL HALIM KHAN *v.* SAADAT ALI KHAN. **112 I.C. 596= A.I.R. 1929 Oudh 126.**

———If the defendant does not choose to go into the witness-box on his own behalf that is a matter for himself to decide, but in an ordinary case, the Court is entitled to consider that as a point against the defendant. One party is not bound to issue a summons to the other, and unless the latter gives evidence on his own behalf so as to give the former an opportunity of cross-examining him, the Court is entitled to infer everything against him. (*Macleod, C. J. and Shah, J.*). RAJMAL RAMNARAYAN *v.* BUDANSAHEB ABDUL SAHEB. **66 I. C. 943= 24 Bom. L. R. 115=A. I. R. 1922 Bom. 81.**

EVIDENCE ACT (1872), S. 114, Ill. (g)—Income-tax proceedings.

—S. 114, Ill. (g)—Income-tax proceedings.

———*On non-production of accounts, presumption can be drawn.*

Where, during the course of the enquiry the Income-tax Officer is not going to make the assessment to the best of his judgment owing to want of materials but proceeds to make an enquiry as regards the truth or otherwise of the allegations made by the assessee in his return there is nothing to prevent the Income-tax Officer from requiring the assessee to produce any evidence including accounts. And on non-production of the account books the case will be governed by S. 114, Illus. (*g*) and (*h*). (*Kumaraswami Sastri, Curgenven and Walsh, JJ.*). SHANKARLINGA NADAR *v.* COMMR. OF INCOME-TAX, MADRAS.

31 M. L. W. 738= A. I. R. 1930 Mad. 209=58 M. L. J. 260 (F.B.).

—S. 114, Ill. (g)—Material witnesses.

———*Non-summoning of.*

Where a witness is not called by the prosecution which it was the duty of the prosecution to call what happens is at the most there arises a presumption that if the witnesses had been called he would not have supported the prosecution case. *Dhavle and Fazl Ali, JJ.*). KRISHNA MAHARANA *v.* EMPEROR. **1929 Cr. C. 379=A.I.R. 1929 Pat. 651.**

———Failure of prosecution to examine a material witness justifies the inference that the witness, if examined, would have deposed against the prosecution. (*Shadi Lal, C. J.*). TAJ MAHAMMAD *v.* EMPEROR. **107 I. C. 100=29 P. L. R. 14= 29 Cr. L. J. 212=9 A. I. Cr. R. 505= A. I. R. 1928 Lah. 125.**

———*Presumption—Rebuttal of.*

If a party wishes not to have a presumption raised against him by the fact that an important witness has not been called; he should exhaust to the utmost of his power every means to bring that witness before the Court. (*Mookerjee and Buckland, JJ.*). JOGENDRA KRISHNA ROY *v.* KURPAL HARSHI AND CO. **68 I. C. 993=35 C. L. J. 175= 49 Cal. 345=A.I.R. 1923 Cal. 63.**

—S. 114, Ill. (g)—Murder case.

———Where a wife, alleging that her husband is dead, fails to produce such evidence as she ought to know a presumption arises against her. (*Macnair, A.J.C.*). KAMPTABAI *v.* UMABAI. **117 I.C. 209= 12 N.L.J. 51=A. I. R. 1929 Nag. 127.**

—S. 114, Ill. (g)—Non-production of documents.

———*Defeasance in it can be presumed.*

Every deed being the best evidence of its own contents, its non-production raises the presumption that it contains some defeasance; in other words, there is some endorsement on the document which the plaintiff does not like. (*Walsh and Pullan, JJ.*). MD. ZAFR *v.* ZAHUR HUSAIN.

97 I. C. 82=49 All. 78= 24 A.L.J. 964=A.I.R. 1926 All. 741.

———Where one of the parties to a suit refuses to produce the documents in his possession though ordered by the Court to do so, whatever suspicion may be cast upon his conduct by this refusal cannot alter conclusions which really turn upon the construction of documents which are before the Court. (*Lord Sumner.*) AHMED KHAN *v.* ALI EBRAHIM. **27 Bom. L.R. 746= A.I.R. 1925 P. C. 177 (P.C.).**

———*Facts existing once are resumed to continue to exist.*

(1) Where relevant documents in possession of a party is not produced, the Court cannot but draw

EVIDENCE ACT (1872), S. 114, Ill. (g)—Non-production of evidence.

an inference adverse to that party. (*Mookerjee and Cuming, JJ.*). SECY. OF STATE *v.* UPENDRA NARAIN ROY. **71 I.C. 849=36 C L.J. 336= A.I.R. 1923 Cal. 247.**

———*Maxim explained.*

It is difficult to distinguish between failure to produce evidence and the non-production of it in time, for the purpose of drawing an inference. To hold that no adverse inference could be drawn against a party who had offered to produce evidence at a late stage would often be tantamount to giving him the advantage of having produced it in time. When documents are not produced in time the Court may infer either that they do not exist or would not support the party who should have produced them. *De non apparentibus et non existentibus eadem est ratio.* (*Ashworth, J.C.*). SHANKAR LAL *v.* MAHBUB SHAH. **70 I.C. 278=25 O. C. 286= A.I.R. 1923 Oudh 59.**

———Non-production of documents affords presumption against the defaulting party. (*Dawson-Miller, C.J. and Jwala Prasad, J.*). (MAHANTH) JAGERNATH DASS *v.* JANG BAHADUR RAI.

71 I.C. 887=4 P.L.T. 285=1923 P.H.C.C. 33= A.I.R. 1923 Pat. 218.

———*Lease.*

Where in a case where the question is whether a lease is a permanent or a temporary one, the lessee does not produce the lease deed though it is in his possession, the inference to be drawn is that the lease was only a temporary one. (*Dawson-Miller, C. J. and Mullick, J.*). BUDHAN TELI *v.* MADAN MOHAN LAL. **68 I.C. 653=3 P L.T. 485= A.I.R. 1923 Pat. 111.**

———*Promissory-note—Loss not accounted for—Adverse presumption.*

Where the plaintiff did not account for non-production of the promissory note on which he sued and the defendant contended that nothing was due under the note and that it contained the endorsement 'excused'.

Held, that under those circumstances the Court could presume that the note if produced would be to the detriment of the plaintiff. (*Kumaraswami Sastri and Reilly, JJ.*). RAHIMATULLA SAHIB *v.* KAMARAJA PANDIYA. **1930 M.W.N. 417.**

———*Original title-deed.*

If the original title-deed of the plaintiff is not produced in the first Court in a suit for recovery of possession the appellate Court may draw an inference adverse to the plaintiff. (*N. R. Chatterji and Panton, JJ.*). HARENDER KUMAR ROY CHAUDHURI *v.* DURGACHARAN SAHA.

62 I.C. 697 (Cal.).

—S. 114, Ill. (g)—Non-production of evidence.

———*Books.*

Where a party does not produce certain books saying that they have been destroyed and the matter dealt by the books could be easily proved by secondary evidence which is admittedly in the possession or power of the party and which it does not attempt to place on the record, the opposite party is entitled to the presumption that these books if produced would have gone against the contentions of the party not producing them. (*Tek Chand and Agha Haidar, JJ.*). SECY. OF STATE *v.* G. T. SARIN & Co. **120 I.C. 615= A.I.R. 1930 Lah. 364.**

———Best evidence not produced though available raises adverse presumption. Inconsistent pleas and not proving pleas raised, indicate falsity of defence.

EVIDENCE ACT (1872), S. 114, Ill. (g)—Non-production of evidence.

(*Lord Blanesburgh.*) RAMESHWAR SINGH *v.* BAJIT HAL PATHAK. **114 I.C. 592=1929 A.L.J. 261=49 C.L.J. 308=33 C.W.N. 430=29 M.L.W. 501=6 O.W.N. 423=31 Bom. L.R. 721=11 P.L.T. 101=A.I.R. 1929 P.C. 95=57 M.L.J. 565 (P. C.).**

———The non-production by the plaintiffs, of all the books which they could be expected to produce raises adverse presumption against them. (*Marten and Fawcett, JJ.*). AMARSANGJI INDRASANGJI *v.* RANCHHOD JETHABHAI. **91 I. C. 265=27 Bom. L.R. 267=A. I. R. 1925 Bom. 294.**

—S. 114, Ill. (g)—Non-production by Government.

———*No presumption against them.*

Where Government had to prove that certain service inam lands were excluded from the zamindari but failed to produce the record of the original settlement it cannot be suggested that it was withheld because it was against the Government: 38 Mad. 620, *Dist.* (*Jackson and Reilly, JJ.*). LAKSHMI VENKAYAMMA *v.* SECY. OF STATE. **117 I.C. 292=A. I. R. 1929 Mad. 399.**

—S. 114, Ill. (g)—Non-production of witness.

———When a fact can be proved by a witness who can be called and is not called, a party is not entitled to rely on an inference which, however plausible and probable, is not the only possible inference. (*Macleod, C. J. and Shah, J.*). BANK OF BOMBAY *v.* FAZLBHAY EBRAHIM. **67 I.C. 761=24 Bom. L.R. 513=A.I.R. 1923 Bom. 155.**

—S. 114, Ill. (g)—Possession of document denied.

———*Old document—No presumption.*

Where the defendants deny that the deed is in their possession and there is nothing to establish that the denial is false:

Held, in the case of a very old mortgage the possibility of its having been lost and being no longer in existence is naturally much greater than in the case of a mortgage of recent date, and under the circumstances it is not safe to draw the inference that the deed is in possession of the defendants and if produced, it would go against them. (*Daniels, J.*). RAMJI DAS *v.* MIHIN LAL. **71 I.C. 654=A.I.R. 1923 All. 441.**

—S. 114, Ill. (g)—Preliminary enquiry.

———*Defence not disclosed in earlier stages—Inference.*

If neither in their examination before the Committing Magistrate, nor in that in the Sessions Court, accused disclose what their exact defence is to be, and they only enter on their defence of alibi, a certain presumption arises against them as to their guilt of offence. (*Findlay, J. C.*). RAMADHIN BRAHAMIN *v.* EMPEROR. **112 I.C. 51=29 Cr. L. J. 963=11 A. I. Cr. R. 302=A.I.R. 1929 Nag. 36.**

———There is no duty cast upon an accused person to disclose his defence in the course of a preliminary enquiry, and no inference can be drawn against the accused for non-disclosure of his defence at that stage. (*Sen, J.*). KUMAR PRASAD *v.* KING EMPEROR. **102 I.C. 899=28 Cr. L.J. 611=8 P.L.T. 656=8 A.I. Cr. R. 297=A. I. R. 1927 Pat. 292.**

—S. 114, Ill. (g)—Scope.

———The presumption indicated in Illus. (*g*) to S. 114 of the Act cannot displace a contrary inference supported by adequate evidence. (*Sir Lawrence Jenkins.*) RAMACHANDRUDU *v.* JANAKIRAMANNA. **63 I.C. 740=13 L.W. 293 (P.C.).**

EVIDENCE ACT (1872), S. 114, Ill. (i)—Theft of document.

—S. 114, Ill. (g)—Thumb impression.

———Where a person was asked in Court whether he was willing to give his thumb impression and he declined,

Held, that the Court was entitled to draw an inference adverse to him upon his denial to do so. (*Mullick and Wort, JJ.*). LAHURI SAHA *v.* EMPEROR. **106 I.C. 212=6 Pat. 623=8 P.L.T. 847=28 Cr. L.J. 1028=9 A.I. Cr. R. 173=A. I. R. 1928 Pat. 103.**

—S. 114, Ill. (g)—Witnesses not examined.

———Failure to examine one's own assistants who might have spoken in one's favour was held to justify the forming of adverse presumptions. (*Lentaigne, J.*). HOLLANDIA PINMEN *v.* HOPPENHEIMER. **84 I.C. 274=3 Bur. L.J. 203=A.I.R. 1924 Rang. 356.**

—S. 114, Ill. (h)—Irrelevant question.

———*No adverse presumption can be drawn from a refusal.*

When the question in issue was whether transfer by one *M* was nominal, he was asked what his income was and how much income-tax he paid. *M* refused to answer.

Held, that the Court need not disbelieve his evidence merely because of those answers; nor need it presume from his refusal to answer the question as to his income, that the answer if given would have been unfavourable to him; it was too much to ask a witness what his income was in a case of this kind. (*Mulla, J.*). K. F. NARIMAN *v.* MUNICIPAL CORPORATION, BOMBAY. **83 I.C. 856=25 Bom. L.R. 689=47 Bom. 809=A .I. R. 1923 Bom. 305.**

—S. 114, Ill. (i)—Burden of proof.

———*Loss of hundies—Obligor pleading discharge.*

Where the plaintiff sued for money due upon hundis but alleged their loss, whilst defendant admitted execution but pleaded payment and subsequent destruction of the documents:

Held: that there is no presumption that the hundies have been discharged. (*Scott-Smith and Martineau, JJ.*). DHIAN SINGH *v.* GURDIT SINGH. **89 I. C. 234=6 Lah. 297=26 P. L. R. 481=A.I.R. 1925 Lah. 521.**

———The strength of the presumption, which might be raised when a document, creating the obligation, is produced by the obligor, varies in different circumstances. The burden shifts as the evidence is developed; and when both the parties produce their evidence, the question on whom the initial onus lay, ceases to be of much importance. 34 All. 511 (P. C.); 19 Cal. 438 (P. C.), *Ref. to*; A.I.R. 1918 P. C. 30, *Foll.* (*Kanhaiya Lal, J. C.*). RAM NATH *v.* RAGHA SAH. **68 I.C. 892=25 O.C. 125=10 O. L. J. 159=A.I.R. 1922 Oudh 211.**

—S. 114, Ill. (i)—Presumption.

———The Court may presume when a document creating an obligation is in the hands of the obligor that the obligation has been discharged. A. I. R. 1928 All. 16, *Rel. on.* (*Addison, J.*). UDEY SINGH *v.* HARI RAM. **121 I. C. 730=12 L.L.J. 21=A.I.R. 1930 Lah. 443.**

—S. 114, Ill. (i)—Theft of document.

———*No presumption of discharge arises when circumstances led to inference of theft.*

The presumption under S. 114 that when a document creating an obligation is in the hands of the obligor the obligation has been discharged is subject to the qualification that when the bond is in the possession of the obligor but the circumstances

EVIDENCE ACT (1872), S. 115—Acquiescence—Abandonment.

of the case are such that he may have stolen it, these circumstances are to be considered by the Court in deciding whether the maxim would apply or not. (*Ross and Kulwant Sahay, JJ.*). KALI PRASAD CHAUDHURY *v.* NARAYAN PRASAD.
103 I.C. 488=A. I. R. 1927 Pat. 417.

—S. 115.

Acquiescence.
Admission.
Alteration of position.
Attestation.
Conduct.
Consent.
Consent decree or order.
Different subject.
Effect of.
Election.
Equitable estoppel.
Execution sale.
Executor.
Fraud.
Ignorance of law.
Inconsistent pleas.
Interpretation.
Judgment.
Laches.
Landlord and tenant.
Minor.
Mistake.
Mortgagor and mortgagee.
None against statute.
None if truth known.
Parties and privies.
Pleadings.
Plea under.
Pre-emption.
Public policy.
Question of law.
Recitals.
Representation.
Scope of.
Silence.
Vendor and purchaser.
Waiver.
Miscellaneous.

—S. 115—Acquiescence—Abandonment.

———*Non-user.*

While mere non-user is not sufficient to amount into to abandonment, it is a fact to be taken consideration with the other facts and circumstances of the case; and it is from all these facts that the Court has to decide, whether or not the clear intention to abandon can be inferred or is indicated. (*Robinson, C.J. and Brown, J*). S. A. CHRISTOPHER *v.* J. A. COHEN. **84 I.C. 1003=3 Bur. L. J. 297=2 Rang. 534=A.I.R. 1925 Rang. 137.**

—S. 115—Acquiescence—Absence of objection.

———Where a tenant without zamindars' permission makes a grave on the *abadi*, the mere fact that the servants of the zamindar stood by and did not object cannot amount to agent's acquiescence so as to estop zamindar from interfering with the grave. (*Ashworth, J.*). KHUDU BUKSH *v.* JAI SHANKAR.
115 I.C. 628=A.I.R. 1929 All. 386.

—S. 115—Acquiescence—Absence of party.

———No estoppel arises when a person builds a house on another's land in his absence. (*Raza, J.*). DWARAKA *v.* SANKATHA. **94 I.C. 307 (Oudh).**

—S. 115—Acquiescence—Acceptance of benefit.

———There is a distinction between performing an award and accepting a benefit under an award.

EVIDENCE ACT (1872), S. 115—Acquiescence—Fraud.

When a benefit is accepted by a party he may be precluded. The acceptance of a benefit even under protest might amount to acquiescence. But a party is not precluded by estoppel or acquiescence from challenging the validity of an award merely because certain payments have been made as directed by the award. (*English cases referred*). (*Aston, A. J. C.*). ISRIBAI *v.* PEVIBAI.
121 I.C. 164=A.I.R. 1930 Sind 195.

—S. 115—Acquiescence—Bona fide belief.

———To determine whether the landlord is estopped by reason of the principle of acquiescence the real issue to be kept in mind is whether the person who acted in contravention of his right had a *bona fide* belief or not that he did possess the right to erect the building.

Where the *wajib-ul-arz* contained the prohibition against building a new building without the permission of the zemindar,

Held, that such a clause may honestly be interpreted not to preclude the alteration of a kachcha mosque into a pakka one. (*Dalal, J.*). MT. BIBI RAMJI *v.* KARIM. **101 I.C. 630=A.I.R. 1927 All. 544.**

—S. 115—Acquiescence—Elements of.

———To constitute acquiescence (1) the tenant must have made a mistake as to his legal rights; (2) he must have expended some money or must have done an act on the faith of such mistaken belief; (3) the landlord, the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the tenant; (4) the landlord must know of the tenant's mistaken belief on his rights; and (5) the landlord must have encouraged the tenant in his expenditure of money or in other acts which he has done, either directly or by abstaining from asserting his legal right: *Willmott* v. *Barber*, (1880) 15 Ch. D. 96, *Foll.* (*Tek Chand, J.*). AMRIT SURYA RAM *v.* DIWAN CHAND. **114 I.C. 70=A.I.R. 1929 Lah. 625.**

———If a party having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. *Duke of Leeds* v. *Lord Amerst*, 2 P. 124, *Foll.*

But acquiescence cannot rehabilitate or render valid a transaction which is *ultra vires* and illegal. Further, estoppel by acquiescence connotes, among other things, that the person estopped in effect has represented to the person who is infringing his right that he is not entitled to complain that his right is being invaded, and that the party relying upon this representation has altered his position to his detriment under a mistaken impression that he was legally justified in acting as he had done. (*Walmsley and Page, JJ.*). GOBINDA RAMANUJ DAS MOHANTA *v.* RAM CHARAN DAS.
89 I.C. 804=52 Cal. 748=29 C.W.N. 931=A.I.R. 1925 Cal. 1107.

—S. 115—Acquiescence—Fraud.

———*Acquiescence which will deprive a man of his legal rights must amount to fraud—Elements necessary to constitute fraud explained.*

Acquiescence which will deprive a man of his legal rights must amount to fraud and the elements necessary to constitute such a fraud are: (1) the party pleading acquiescence must have made a mistake as to his legal rights; (2) he must have expended some money or done some act on the faith of his mistaken belief: (3) the party possessing the legal right must know the existence of his

EVIDENCE ACT (1872), S. 115 — Acquiescence —Fraud.

own right which is inconsistent with the right claimed by the other; and (4) he must know of that other's mistaken belief of his rights and he must have encouraged that other in his expenditure of money or in the other acts done by him. When all these elements exist, there is fraud of such a nature that it will entitle the Court to restrain the possessor of the legal rights from exercising it: A.I.R. 1926 All. 324, *Rel. on.* (*Raza, J.*). MAHOMED HASAN ALI *v.* HARNATH KOER. **110 I.C. 569= A.I.R. 1928 Oudh 470.**

———The acquiescence, which would deprive a man of legal rights, must amount to fraud. (*Raza, J.*). MATA BHIKH *v.* KALADIN. **99 I.C. 894= 8 L.R. A. Rev. 155=A. I. R. 1927 Oudh 135.**

———*Acquiescence to be successfully pleaded, must amount to fraud.*

The acquiescence which will deprive a man of his legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights: *Willmott* v. *Barber*, (1880) L.R. 15 Ch. D. 96 and A.I.R. 1926 All. 324, *Foll.*

The mere fact the plaintiff raised no objection when the building was constructed by the defendant and that there was long delay on her part in enforcing her rights, if any, in respect of the land in dispute, is not sufficient to establish acquiescence when the defendant has never alleged that he had acted in the *bona fide* belief that he was acting within his rights: A. I. R. 1925 Oudh 258, *Dist.* (*Raza, J.*). MUSTAFA HUSAIN *v.* MT. SAIDUL MIAN. **99 I.C. 255=3 O.W.N. Sup. 282= A. I. R. 1927 Oudh 66.**

———*Acquiescence to act as estoppel must be fraudulent—Elements rendering an acquiescence fraudulent indicated.*

The acquiescence which will deprive a man of his legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. The following are the elements or requisites necessary to constitute fraud of that description. In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, as, the doctrine of acquiescence is founded upon conduct with a knowledge of one's legal rights. Fourthly, the defendant, the possessor of the legal rights, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but nothing short of this will do: (1880) 15 Ch. D. 96, *Foll.* (*Mears, C.J. and Lindsay, J.*). JAI NARAIN *v.* JAFAR BEG. **92 I.C. 1017=48 All. 353= 24 A.L.J. 355=A.I.R. 1926 All. 324.**

EVIDENCE ACT (1872), S. 115—Acquiescence—Proof of.

—S. 115—Acquiescence—Grant.

———Where an heir of the grantee enters into possession of the grant after the death of the grantee and the grantor accepts rent from him, the mere acceptance of rent by the grantor should not constitute the heir anything more than a mere tenant-at-will.

The mere assertion of a jagirdari right acquiesced in by the superior landlord cannot be taken to import a claim or an acknowledgment of a larger interest than that of a life-estate. (*Dawson-Miller, C.J. and Jwala Prasad, J.*). PRATAP UDAINATH SAHI DEO *v.* GANESH NARAIN SAHI. **70 I.C. 232=1921 P.H.C.C. 369= A.I.R. 1921 Pat. 218.**

—S. 115—Acquiescence—Knowledge of owner.

———*Knowledge on the part of the person to be estopped not proved—Doctrine of acquiescence does not apply.*

Where the defendants regarded through mistake certain land to be their own and partitioned it among themselves and there was no evidence to the effect that the plaintiff knew that the defendants were partitioning his land as theirs and the plaintiff kept silent knowing that the defendants were likely to be prejudiced by the partition and by a subsequent claim on the part of the plaintiff, the plaintiff has done nothing and is not estopped from setting up his title and possession to the land by the principle of acquiescence: A.I.R. 1926 All. 324, *Appl.* (*Mukerji, J.*). MUBARK HUSAIN *v.* MD. ISHAQ. **97 I.C. 268=8 L.R.A. Rev. 6= A.I.R. 1926 All. 721.**

—S. 115—Acquiescence—Long silence.

———Where a co-parcener has alienated joint property and the alienee improves the same by making heavy expenditure, the other co-parceners cannot impeach the sale if they stand by for a long time and allow without objection the expenditure to be made by the alienee. 177 P. W. R. 1911 and 13 Bom. L.R. 162, *Foll.* (*Broadway and Harrison, JJ.*). DHANPAT RAI *v.* GURANDITTA MUL. **64 I.C. 520=2 Lah. 258=10 P.L.R. 1922= A.I.R. 1921 Lah. 110.**

—S. 115—Acquiescence—Period of.

———Widow making gift of her deceased husband's property to her daughter and daughter's husband jointly—Daughter acquiescing for less than 12 years in the position that her husband was co-owner of that property does not constitute estoppel so as to deprive her reversionary right. 43 Mad. 849, *Appr.* (*Wallace and Madhavan Nair, JJ.*). PAPPAMMAL *v.* ALAMELU AMMAL. **119 I. C. 152= A.I.R. 1929 Mad. 467.**

—S. 115—Acquiescence—Proof of.

———In order to sustain a plea of acquiescence and to raise the bar of an equitable estoppel, it is incumbent upon the party relying on it to show that the conduct of the owner whether consisting in abstinence from interfering or in active intervention was sufficient to justify the legal inference that he had by plain implication, contracted that the right of occupation under which the other party originally obtained possession of the land, should be changed into a perpetual right of occupation. (*Kinkhede, A. J. C.*). BHASIA *v.* THAKUR RAMSINGH. **100 I. C. 855= A. I. R. 1927 Nag. 180.**

———One co-sharer granting lease for planting grove—Tenant planting grove—Other co-sharers suing for injunction and possession—Defence of acquiescence—Defendant should prove his *bona fide*

EVIDENCE ACT (1872), S. 115—Acquiescence—Time of.

belief in his valid right and plaintiff's deliberate abstinence from preventing defendant from spending money. (*Daniels, A. J. C.*). JAGANNATH *v.* DIN MUHAMMAD. **65 I.C. 705=8 O.L.J. 474= A.I.R. 1921 Oudh 231.**

—S. 115—Acquiescence—Time of.

———*Distinction between acquiescence when the act is in progress and acquiescence after the act is done, indicated.*

Acquiescence by the landlord is a question of legal inference drawn from the facts found.

There is a distinction between a case where the acquiescence allowed occurs while the act acquiesced in, is in progress, and another, where the acquiescence takes place after the act has been completed. In the former case, the acquiescence is aquiescence under such circumstances that assent may be reasonably inferred from it. In the latter case, when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter must be determined on very different legal considerations. A right of action has been vested in him, and mere delay to take legal proceeding to redress the injury cannot, by itself, constitute a bar to such proceedings, unless the delay on his part, after he has acquired full knowledge has affected or altered the position of his opponent. 19 C. W. N. 882, *Ref.* (*Kinkhede, A. J. C.*). GHASIA *v.* THAKUR RAMSINGH. **100 I.C. 855= A.I.R. 1927 Nag. 180.**

—S. 115—Acquiescence—Trespasser.

———Trespasser building on site of another in spite of owner's protesting—Owner suing for possession after two years—He has not acquiesced and is entitled to possession. 3 N. L. R. 114, *Dist.* (*Findlay, J. C.*). MAHDEO PATEL *v.* NARAYAN. **104 I.C. 565=A.I.R. 1927 Nag. 348.**

———*Ryots building on waste land without zamindar's permission cannot resist a suit in ejectment against him by zamindar.*

If a raiyat without the permission of the zamindar begins to build upon waste land over which he has no right to build and completes his construction within a few months, the zamindar is not estopped from recovering possession of the site on the ground that he did not intervene at an earlier stage. Unless it could be established that the defendants were making constructions under some *bona fide* mistake of which the plaintiffs were aware and in spite of their knowledge the plaintiffs deliberately refrained from intervening and thereby led the defendants to believe that they were right in their estimation, there could be no estoppel. No one can by merely trespassing upon the land of another and constructing costly building on it claim a right to retain possession or to compel the owner to receive compensation for the land. 21 All. 496 (P.C.) and 12 A. L. J. 1026, *Rel. on.* (*Sulaiman, J.*). ZAHID ALI *v.* SUKHU LONIA. **89 I.C. 509=A.I.R. 1926 All. 87.**

———*Person doing a thing in spite of objection cannot plead acquiescence by other party.*

Defendant encroached upon the *Chabutara* of the plaintiff, and placed beams on her wall more than 6 years ago. Defendant pleaded ownership and old construction. It was found that he was not owner, and that plaintiff had objected to the Municipal Board sanctioning construction. The Municipal Board refused to decide the question of title and the defendant went on making his construction.

EVIDENCE ACT (1872), S. 115—Acquiescence—Wilful—Non interference.

Held, that there was no acquiescence. (21 All. 496. P.C., *Ref.*) (*Gokul Prasad, J.*). MT. KOKLA KUNAR *v.* KALIAN MAL. **76 I.C 585= A.I.R. 1923 All. 452.**

———The defendants having been granted a user of certain land for certain purposes, used it for purposes other than the purpose for which it had been granted, by digging a *baoli* which was used by the public.

Held, there was no question of the owner standing by watching the construction of the *baoli* being made by a person who was under a mistaken belief that the land was his own property, in order to gain an advantage. The defendants could not have believed that the land was their own property and there was nothing to show that the plaintiffs had any sinister motive in abstaining at the time from protest. (*Stuart, J.*). MAULVI MAHOMED *v.* MAHABIR DAS. **70 I. C. 836= A. I. R. 1923 All. 11.**

—S. 115 — Acquiescence — Wilful — Non-interference.

———*Landlord and tenant.*

In 1913 the landlord contracted to grant a permanent lease in respect of certain land. No formal lease was executed under the terms of S. 107, T. P. Act. Pursuant to the contract the tenant obtained possession of the land and erected permanent and costly structures thereon. The landlord was aware of the erection of those structures and must have realized that the tenant would not have constructed such a building unless he was assured of the possession of a permanent right in the land. In December, 1918, the landlord gave notice to the tenant of his refusal to specifically perform the contract. The landlord in 1923 brought a suit for ejectment against the defendant.

Held, that the landlord having allowed the tenant to erect structures on his land would not be allowed to eject the tenant as he acquiesced in tenant's conduct. *Ramsden* v. *Dyson*, (1866) 1 H.L. 129 and *Gregory* v. *Mighell*, (1881) 18 Ves. 328, *Foll.*; 21 All. 496 (P.C.), *Dist.*; 28 Cal. 693 (P.C.) and A.I.R. 1925 P. C. 146, *Rel. on.* (*Mukerji and Graham, JJ.*). G. H. C. ARIFF *v.* JADUNATH MAJUMDAR. **112 I. C. 865=55 Cal. 1090= 33 C.W.N. 333=A.I.R. 1929 Cal. 101.**

———Plaintiff's connivance at defendant's building in plaintiff's land—Defendants having *bona fide* belief that they possess good title to the property—Plaintiff's bringing a declaratory suit—Plaintiff's claim cannot be decreed, on ground of acquiescence. *Willmott* v. *Barbar*, (1880) 15 Ch. D. 96 and A.I.R. 1927 Oudh 66, *Rel. on.* (*Srivastava, J.*). IMAMI *v.* IBRAHIM. **A. I. R. 1929 Oudh 292.**

———Owner standing by and allowing improvement on his land is estopped, but where he objects to do so by a notice, he is not. (*Cuming and B. B. Ghose, JJ.*). HARI BHUSHAN *v.* SHEIK ABDUL. **97 I.C. 441=A.I.R. 1927 Cal. 54.**

———*To create estoppel by conduct, other party must have been led away by the conduct.*

If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land. *Ramsden* v. *Dyson*, 14 W. R. 926. *Foll.*

Per *Venkatasubba Rao, J.*—To create an estoppel the declaration, act or omission must be of an unequivocal and unambiguous character. The essence

EVIDENCE ACT (1872), S. 115—Acquiescence—Wilful—Non-interference.

of estoppel is that the conduct of the other party is the cause of the action of the person invoking the estoppel; and if the act is the result of the reliance upon the representation mere forbidding the act will not prevent the estoppel. (*Phillips and Venkatasubba Rao, JJ.*). ASHTAMOORTHI NAMBUDRIPAD *v.* RAMA MUDALI. **96 I.C. 915= A. I. R. 1926 Mad. 1052.**

———*Person interested in preventing act, acquiescing therein will be estopped.*

Generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done with his previous license. Though mere acquiescence is not equivalent to consent; yet consent need not be by word and may be by act, and if consent can be intimated by conduct as well as by act it is clear that acquiescence may, under certain circumstances be taken to be consent. (*Mukerji, J.*). UMARAM GOGOI *v.* PURUK CHAND OSWAL. **85 I.C. 540= A.I.R. 1925 Cal. 993.**

———If a stranger builds upon the land of *A*, supposing it to be his own, and *A* remains wilfully passive, equity will not allow him to profit by the mistake. If a person having a right and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person who commits the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. (*Wazir Hasan, A. J. C.*). RAFIQ HUSSAIN *v.* BHAYA BISNATH PRASAD. **84 I.C. 511=11 O.L.J. 677= 28 O.C. 114=A. I. R. 1925 Oudh 258.**

———*Owner of land acquiescing in stranger's building on land cannot subsequently sue for land—Acquiescence may be implied—English and Indian law.*

It is well established law in England that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land. This is also the law in India with the exception that the party building on the land of another is allowed to remove the building. *Case-law referred.* (*Hallifax, A. J. C.*). RAMRATAN *v.* SHIODATTARAI. **73 I.C. 187=A. I. R. 1921 Nag. 167.**

—S. 115—Admission.

———An admission in previous suit cannot operate as estoppel in a subsequent suit unless the decision in the previous suit is based upon the admission: 11 M. I. A. 50 (P.C.), *Dist.* (*Mukerji and Mallick, JJ.*). ABDUL GANI *v.* NABENDRA KISHORE ROY. **33 C.W.N. 876=57 Cal. 258= A I.R. 1930 Cal. 47.**

———Where a person admits execution before the Registrar after the document has been explained to him, it cannot subsequently be accepted that he was ignorant of the nature of the transaction. (*Sir John Wallis.*) SENNIMALAI GOUNDAN *v.* SELLAPPA GOUNDAN. **114 I.C. 568= 33 C.W.N. 407=29 M.L.W. 439= A.I.R. 1929 P.C. 81=56 M.L.J. 511 (P.C.).**

EVIDENCE ACT (1872), S. 115—Alteration of position.

———Admissions do not operate as estoppel but they must be explained by persons making them. (*Fforde and Bhide, JJ.*). SECY. OF STATE *v.* MT. VIDYA VOTE. **A.I.R. 1929 Lah. 748.**

———The admission by a mortgagor in a mortgage-deed that the property comprised in the deed belongs to him, in the absence of a strong proof on his side that such property was not really his when he mortgaged it, concludes the matter against him. (*Coldstream, J.*). FAKIR MAHOMED *v.* RAMZAN. **99 I. C. 642=A.I.R. 1927 Lah. 171.**

———Property purchased at execution sale subject to mortgage—Purchaser cannot challenge validity of the mortgage in mortgagee's suit. A.I.R. 1923 Nag. 282 and 47 Cal. 446, *Rel. on.* (*Findlay, O.J.C.*). GOVINDRAO *v.* HIRACHAND. **95 I.C. 563= A. I. R. 1926 Nag. 446.**

———A person is not entitled to give an undertaking to a Criminal Court to abstain from certain action and to go and file a civil suit for declaration that the undertaking given by him was of no effect. (*Neave, J.*). RAM SARAN *v.* THAKUR SEO. **85 I.C. 586=A.I.R. 1925 All. 605.**

———Partition among co-sharer landlords—Admission that certain lands were rent-free precludes contrary contention afterwards. (*Suhrawardy and Chotzner, JJ.*). CHATTRA NATH CHOWDHURY *v.* BABAR ALI. **86 I.C. 835=29 C.W.N. 333= A.I.R. 1925 Cal. 635.**

———Admission in a different proceeding that one had sold the land does not act as estoppel so as to do away with the necessity of registering the document. (*Duckworth, J.*). MAUNG PO YIN *v.* MAUNG TET TU. **86 I. C. 205= 2 Rang. 459= A.I.R. 1925 Rang. 68.**

———Admissions by a Hindu widow that she had acquired the property as heir to her husband does not necessarily involve the legal inference that she was asserting only a limited interest and not her absolute right. 42 All.152, *Foll.*; 14 A.L.J. 913, *Dist.* (*Lindsay and Sulaiman, JJ.*). UMAN SHANKER *v.* MT. AISHA KHATUN. **74 I. C. 869=45 All. 729= A. I. R. 1924 All. 88.**

———Admission in previous compromised suit does not estop party from proving the truth. (*Dhobbey, A.J.C.*). MOHAMAD YUSUF *v.* PIRMOHAMAD. **65 I.C. 368=A.I.R. 1922 Nag. 67.**

—S. 115—Alteration of position.

———Before an estoppel can take place it is necessary for the party to establish that he had been led to do something detrimental to the interest owing to the action of the other party. (*Stuart, C. J. and Raza, J.*). NISAR ALI KHAN *v.* MUHAMMAD ALI KHAN. **119 I.C. 337=6 O.W.N. 549= A.I.R. 1929 Oudh 495.**

———*Change of position on faith of act or omission pleaded is necessary.*

In order that a particular declaration, act or omission of a certain person may constitute estoppel against him, the person pleading estoppel in his favour must show that he, accepting the truth of his declaration and relying upon the truth thereof, has acted upon such belief and changed his position to his detriment: 40 Cal. 378 (P.C.) and A.I.R. 1924 P.C. 213, *Rel. on.* (*Stuart, C. J. and Misra, J.*). AHMAD AZIM *v.* SHAFI JAN. **97 I.C. 897=2 Luck. 335=3 O.W.N. Sup. 102= A.I.R. 1926 Oudh 561.**

———*Inconsistent statements in two suits—Change of position.*

In a previous suit the claim of the plaintiff was based on the ground that certain widows did

EVIDENCE ACT (1872), S. 115—Alteration of position.

not inherit the properties, but that his grandfather inherited them. In the second the plaintiff claimed the properties as reversioner of the very widows,

Held, that the plaintiff was not estopped by the statement made in the previous suit. So far as the plaintiff himself was concerned, there was no doubt that the statements in the second suit were inconsistent with what was stated in the previous suit but there had been no change of position by reason of the statements made by the plaintiff in the first suit. (*Chatterjea and Cuming, JJ.*). NRIPENDRA NATH BHOWMIK *v.* BASANT KUMAR LAHIRI.

89 I.C. 207=29 C.W.N. 861=A.I.R. 1925 Cal. 1195.

———*Causing another to believe that he is one's adopted son—Change in circumstances—Estoppel is created.*

Where a person is treated by another in such a way as leads him to believe that he is the adopted son of that other and on that footing and on account of such acquiescence and by reason of such encouragement he severs his connection with his natural family or undergoes a change of circumstances in such a way that when restored to his natural family his position would be very different from what it would have been if he had never left it the person treating him as described above and those who claim through him will be estopped from questioning the adoption. 14 M.I.A. 67, *Foll.* (*Mukerji, J.*). UMARAM GOGOI *v.* PURUK CHAND OSWAL. **85 I.C. 540=A.I.R. 1925 Cal. 993.**

———*A mere undertaking may operate as an estoppel, though it may not amount to a contract.*

An undertaking may operate as an estoppel, though in the absence of consideration it cannot amount to a contract. A man may be estopped, not only from giving particular evidence, but from doing acts, or relying upon particular arguments or contentions which the rules of equity and good conscience prevent his using as against his opponent.

Where the question was whether the undertaking of a mortgagee, *viz.*, "I shall accept so much in satisfaction of our debt. I release the balance in your favour. You may purchase the equity of redemption" operated as an estoppel against him.

Held, the mortgagee could not turn round and say that he was entitled to claim the full amount of the bond if the other party relying upon the statement had purchased the property which they otherwise would not have done. (*Newbould and B. B. Ghose, JJ.*). SHAILESH CHANDRA GUHA *v.* BECHAI GOPE. **84 I.C. 124=40 C. L. J. 67=A. I. R. 1925 Cal. 94.**

———*'Act on such belief' meaning.*

Where the facts are within the knowledge of both the parties, there is no scope for the doctrine of estoppel. However the language of S. 115, extends to the encouragement of an erroneous belief. But party must have acted on such belief in consequence of the encouragement. The phrase "act upon such belief" means that the party must have altered its position with reference to the subject-matter of the representation.

Where all that the Judge was able to say was 'it may well be doubted whether the plaintiff would have acted in the way he did but for the way in which the defendants had acted',

Held, that was not sufficient. It must be found as a fact that the plaintiff would not have acted as he did. (*Pratt, J.*). WILLIAM JACKS AND CO. *v.* JOOSAB MAHOMED. **82 I.C. 791=48 Bom. 38=25 Bom. L. R. 1170=A. I. R. 1924 Bom. 115.**

EVIDENCE ACT (1872), S. 115—Attestation.

———Transfer of Reversionary interest—Transferee not acting thereon—No estoppel is created. (*Macleod, C. J. and Coyajee, J.*). DAYARAM PREMJI *v.* BECHANDAS DOONGERSEY. **67 I.C. 963=24 Bom. L. R. 351=A.I.R. 1922 Bom. 437.**

———What the law and the Indian statuate mainly regard is the position of the person who was induced to act and the principle on which the law and the statute rest, is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, had induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge of under error, *sibi impulet* it may in the result be unfortunate for him, but it would be unjust, even though he acted under error to throw the consequence on the person who believed his statement and acted on it as it was intended he should do. (*Dawson Miller, C. J. and Miller, J.*) SIR L. E. RALLI *v.* A. H. FORBES.

67 I.C. 744=1 Pat. 717=3 P. L. T. 467=1922 P. H.C.C. 209=A.I.R. 1922 Pat. 258.

———Where a statement is relied upon as constituting an estoppel, it must be proved that the statement caused a change of position of the parties setting up the estoppel. (*Leslie Jones and Moti Sagar, JJ.*). ABDULLA *v.* FATEH MUHAMMAD. **62 I.C. 809=A.I.R. 1921 Lah. 117.**

———The doing of anything will not amount to estoppel when it has not led the other party to change his position. (*Oldfield and Seshagiri Aiyar, JJ.*). VISWANATHA SASTRI *v.* SITALAKSHMI AMMAL. **61 I.C. 979=13 M.L.W. 37=1921 M.W.N. 181=A.I.R. 1921 Mad. 126.**

———The whole principle of estoppel is based on altered circumstances, that is position of the person pleading estoppel must be changed by the alleged representation. (*Das and Ross, JJ.*). SHAIKH ABDUL RAHIM *v.* MT. BAREIRA.

61 I.C. 807=2 P.L.T. 556=6 P.L.J. 273=A.I.R. 1921 Pat. 166.

—S. 115—Attestation.

———Person attesting asserting facts mentioned in document—Attestation is sufficient to prove his knowledge of its contents. (*Jai Lal, J.*). BHAMHA RAM GIRDHARI LAL *v.* RAM PYARA MAL.

116 I. C. 716=A.I.R. 1930 Lah. 217.

———*If creates estoppel.*

Attestation of a deed proves no more than that the signature of an executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed, nor affect him with notice of its provisions. Mere attestation by itself would neither create an estoppel nor imply consent. A.I.R. 1916 P.C. 110, *Foll.* (*Raza and Pullan, JJ.*). SHEO RATAN LAL *v.* SANT BAKHSH.

118 I. C. 93=6 O.W.N. 369.

———*Attestation by itself does not operate as estoppel but it can so operate when coupled with other circumstances.*

Attestation of a deed by itself estops a man from denying nothing whatever except that he witnessed the execution of the deed, and by itself it does not show that he consented to the transaction which the document effects.

But where in addition to the fact of attestation there was evidence to show that the attestor who was managing member of the family consented to

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and acquiesced in the execution of the mortgage by a widow of the family property which was in her possession, and took an active part in the consultations which resulted in the mortgage and after the mortgage was executed entered into an agreement with mortgagee whereby in effect he obtained an option to have the mortgage transferred to him,

Held, that the attestor not only witnessed the execution of the mortgage but also he, in his capacity of managing member of the joint family, consented to and acquiesced in the mortgage being given and could not, therefore, be allowed to challenge its validity. (*Sir Lancelot Sanderson.*) BHAGWAN SINGH *v.* UJAGAR SINGH.

107 I. C. 20=47 C. L. J. 189=30 Bom.L.R 267=32 C.W.N. 538=29 P.L.R. 182=27 M. L.W. 672=26 A.L.J. 553=1928 M. W. N. 933=A.I.R. 1928 P.C. 20=54 M. L. J. 254 (P.C.).

———Mere attestation of deed cannot amount to an estoppel, since attestation does not fix an attesting witness with knowledge of the contents of a document. (*Addison and Johnstone, JJ.*). FEROZE DIN *v.* NAWAB KHAN. **112 I.C. 89=9 Lah. 224=30 P.L.R. 154= A.I.R. 1928 Lah. 432.**

———A reversioner who brings about a mortgage by limited owner and also attests it cannot be allowed to challenge 'that the debt secured by the mortgage was not binding on the reversioner. (*Coutts-Trotter, C. J. and Srinivasa Iyengar, J.*). SRINIVASARAGHAVACHARIAR *v.* E. RAJAGOPLACHARIAR. **1927 M.W.N. 231=A.I.R. 1927 Mad. 438.**

———Award *ultra vires*—Signature thereon does not estop. (*Pullan, J.*). ASHAF ALI *v.* SAKHAWAT HUSAIN. **104 I.C. 394=1 L.C. 311=A.I.R. 1927 Oudh 448.**

———Where thumb marks of witnesses are impressed on a document in token of consent and as attestation and the document is read and explained to them at the time of registration and again their thumb marks are impressed,

Held, that it is not a mere attestation but is a distinct and clear acquiescence which binds the attestors and estops them from questioning the validity of the document : A. I. R. 1922 P. C. 20; A. I. R. 1923 All. 28, *Dist.* (*Harrison, J.*). SUNDAR SINGH *v.* BHANSINGH. **90 I C. 1032=26 P.L.R. 756=A.I.R. 1926 Lah. 62.**

———*Real owner attesting a deed of mortgage by ostensible owner in token of his consent is estopped from claiming ownership.*

The fact that a party attested the deed of mortgage does not by itself estop him from denying that he knew of its contents or that he consented to the mortgage, but there might be circumstances which would show that the attestation was intended to convey something more than a mere witnessing of the execution and was meant as involving consent to the transaction.

Where the owner assured the mortgagees that the title to the estate lay with the transferor, that he had no interest in it, and that with a view to signify that assurance he attested the deed of mortgage.

Held, that the assurance given by the owner as to the title of the property under mortgage was enough to create a belief in the mind of the mortgagees and to act upon it, and if they believed and acted upon that belief, the owner cannot turn round and say that the mortgagees should not have believed him but made further enquiries : A.I.R. 1922 P.C. 20 and *Bloominthal* v. *Ford*, (1897)

EVIDENCE ACT (1872), S. 115—Attestation.

A C. 156, *Foll.* (*Wazir Hasan, A. J. C.*). MD. MAZHAR-UD-DIN HASAN *v.* ZAHUR-UD-DIN KHAN. **90 I.C. 547=A.I.R. 1926 Oudh 131.**

———*Attestation coupled with other circumstances can be "consent."*

Though mere attestation is not sufficient to fix a party with knowledge of the deed attested yet attestation combined with other circumstances may amount to evidence of consent. Where not only did the reversioners attend before the Registrar, identify the executant, and attest the deed, but the debt in respect of which the deed was executed was a debt from the reversioners themselves as principal debtors.

Held, that it was impossible to believe under these circumstances that they were not aware of the nature of the transaction or that their attestation was not meant to indicate their assent to it. 42 Cal. 876 ; A.I.R. 1922 P. C. 20, *Ref.* (*Daniels and Neave, JJ.*). RAM ADHAR *v.* BHAGWAN SINGH. **85 I.C. 580=5 L.R.A. Civ. 644=A. I. R. 1925 All. 209.**

———The attestation of a deed does not by itself estop the person attesting from denying that he knew of its contents or that he consented to the transaction which it effects. A.I.R. 1922 P. C. 20, *Foll.* (*Martineau, J.*). ABDUL AZIZ *v.* ABDULLA. **87 I.C. 652=7 L.L.J. 179=26 P.L.R. 215=A.I.R. 1925 Lah. 413.**

———Attestation does not by itself create estoppel. 49 C. 334, *Foll.* (*Kotval, A. J. C.*). ANANDRAO *v.* DADA. **71 I.C. 43=A.I.R. 1924 Nag. 65.**

———The mere attestation of a deed by a relative does not import concurrence nor does it involve any knowledge of the contents of the deed. (*Jwala Prasad and Foster, JJ.*). JAGDAM SAHAY *v.* RUPNARAIN MAHTON. **84 I.C. 208=5 P.L T. 375= A.I.R. 1924 Pat. 736.**

———*Gift deed—Application for mutation—Attestor of—If can challenge gift.*

A gift of immovable property was made by a report to the Revenue Surveyor. The heirs of the donor signed the report as witnesses to the transaction and possession was given to the donees.

Held, that the heirs could not after many years dispute the right of the donees to the possession of the land, though the donees did not get a legal title to the lands for want of a registered deed. (*Heald, J.*). MA SHIN *v.* MAUNG HAWN. **79 I.C. 579=1 Rang. 651=A.I.R. 1924 Rang. 102.**

———The mere fact of attestation does not raise any presumption that the attesting witnesses were aware of the contents of the document. A plea of estoppel cannot be founded on that fact alone. (*Stuart and Sulaiman, JJ.*). UDAI BHAN SINGH *v.* GAJENDRA SINGH. **70 I.C. 815=A.I.R. 1923 All. 28.**

———*Attestation does not work estoppel.*

The attestation of a deed by itself estops a man from denying nothing whatsover excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the documents and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. (*Lord Buckmaster.*) PANDURANG KRISHNAJI *v.* M. TUKARAM. **65 I.C. 954=24 Bom. L R. 557=35 C. L.J. 409=15 M.L.W. 486=20 A.L J. 305=18 N.L.R. 1=26 C. W.N. 201=30 M. L.T. 249=49 Cal. 334=49 I.A. 16=5 N.L.J. 6=A.I.R. 1922 P C. 20=42 M.L.J. 436 (P.C.).**

EVIDENCE ACT (1872), S. 115—Attestation.

———Merely because a person signed a mortgage bond as an attesting witness, he cannot be held to be bound by the recitals in it. (*Coutts and Macpherson, JJ.*). DHIRA SINGH *v.* MOTI LAL.

63 I.C. 266=2 P.L.T. 614.

—S. 115—Conduct.

Absence of.
Acceptance of benefit.
Admission.
Adoption.
Advantage not taken.
Arbitration.
Change of plea.
Compliance with order.
Compromise.
Consent.
Construction of document.
Contract.
Execution of decree.
Execution proceedings.
Execution sale.
Jurisdiction.
Land acquisition.
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No estoppel.
Notice.
Omission to assets.
Omission to dissociate.
Omission to plead.
Omission to object.
Ordinary course of business.
Promise under inducement.
Recognition of agency.
Representation.
Residing.
Reversioner.
Silence.
Sufficiency of.
Termination of agency.
Miscellaneous.

—S. 115—Conduct—Absence of.

———No litigant has any right to delay or obstruct the proceedings of the Court by absenting himself deliberately and then asking for re-consideration of the matter passed in his absence. (*Shadi Lal, C. J. and Broadway, J.*). GURDITTA SHAH *v.* MUHAMMAD KHAN. **116 I. C. 714 (Lah.).**

—S. 115—Conduct—Acceptance of benefit.

———Where a person obtains a release from a liability upon the understanding of foregoing a definite claim against a third party, that person is estopped from asserting or enforcing the claim to the detriment of the third party. (*Sen and Niamatullah, JJ.*). MT. WAHIDAN *v* NASIR KHAN.

A.I.R. 1930 All. 434.

———Where during the lifetime of the mother, the daughters who were in possession effected a partition of certain properties and the parties enjoyed the properties in pursuance of that arrangement but its validity was sought to be questioned after the death of the mother by the executants themselves.

Held, that they were estopped from doing so. (*Mukerji and Bennet, JJ.*). POKHAR SINGH *v.* DULARI KUNWAR. **125 I.C. 1=1930 A.L.J. 688= A.I.R. 1930 All. 687.**

———Award—Election by party to award by taking benefits under it—Party cannot turn round and say that award is invalid. A. I. R. 1929 Cal. 796, *Ref.* (*B. B. Ghose and Bose, JJ.*). ANANTA LAL *v.* JNANADA SUNDARI. **50 C.L.J. 323= A.I.R. 1930 Cal. 255.**

———*Order for restoration on payment of costs—Acceptance of costs—Effect.*

EVIDENCE ACT (1872), S. 115—Conduct—Acceptance of benefit.

When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another. For instance, if the Court directs that the suit shall be restored on the plaintiff paying the costs of the opposing party, there is no intention to benefit the latter, except on the terms mentioned in the order itself. If the party receives the costs, his act is tantamount to adopting the order. But if a party receives the benefit reserving his right to object to the order, he will not in that case be precluded from attacking it. A. I. R. 1927 Mad. 1009, *Not foll.* (*Case-law discussed*). (*Ramesam and Venkatasubba Rao, JJ.*). VENKATARAYUDU *v.* RAMA KRISHNAYYA.

123 I.C. 337=31 M.L.W. 30=1930 M.W.N. 50= A. I. R. 1930 Mad. 268=58 M.L.J. 137.

———Where Court orders restoration of a suit dismissed for default, on condition that plaintiff pays certain amount to defendant and defendant received that amount, having been under no compulsion to do so, no revision against the order lies at the instance of the defendant. *Tinkler* v. *Hilder*, (1849) 4 Ex. 187, *Foll.*; 12 C.L.J. 556, *Dist.* (*Jackson, J.*). NARAYANAMURTHY SOMAYAJULU *v.* MAHAMMAD AZAM SAHIB. **110 I.C. 528 (Mad.).**

———A co-sharer under a partition decree cannot reprobate the decree after having obtained an advantage to the detriment of the other co-sharer. But if the decree was a nullity it cannot be affirmed by anything that a co-sharer does short of obtaining an advantage under it to the detriment of others. (*B. B. Ghose and Panton, JJ.*). JAMILENNESSA KHATUN *v.* IJJATENNESSA KHATUN.

A. I. R. 1929 Cal. 586.

———*Advantage taken under partition—Party estopped from setting impartibility.*

The father of the plaintiff entered into a partition and the deed was acted upon for over 40 years, the plaintiff asserted his claim to entire property as being entitled by law of primogeniture and estate being impartible, but kept quiet for about 12 years and dealt with his share of the property as having been derived under the deed of partition,

Held, that he cannot reasonably be heard to say that he is entitled to succeed by primogeniture which is the subsisting custom of the family. (*B. B. Ghose and Panton, JJ.*). NARENDRA NARAIN *v.* NAGENDRA NARAIN. **118 I.C. 342= 50 C. L. J. 267=A.I.R. 1929 Cal. 577.**

———Persons acting on general award and accepting benefit under it cannot challenge it. (*Percival, C.J. and Aston, A. J. C.*). KHUBCHAND *v.* JETHANAND. **117 I. C. 153= 23 S.L.R. 417= A.I.R. 1929 Sind 168.**

———*Plaintiff allowed to amend plaint on payment of costs—Defendant accepting payment cannot challenge the order in appeal.*

A party who has adopted an order of the Court and acted under it cannot after he has enjoyed a benefit under the order contend that it is valid for one purpose and invalid for another.

Defendants resisted the suit for rendition of accounts filed by the plaintiffs, pleading *inter alia* that no suit for accounts was maintainable on the facts alleged. The Trial Court upheld that plea and dismissed the suit. On appeal the Court agreed with the trial Court that a suit for accounts was not maintainable on the facts alleged, but allowed the plaintiffs to amend the plaint on payment of Rs. 150 as costs to the defendants, and remanded

EVIDENCE ACT (1872), S. 115—Conduct—Acceptance of benefit.

the case for re-trial. The defendants took the costs but filed a second appeal from the order of remand,

Held, that the appeal was not competent as the defendants acquiesced in the order passed by the Trial Court by accepting the costs awarded to them; 12 C. L. J. 556; 21 C. W. N. 232 and A.I.R. 1927 Mad. 1009, *Rel. on*; 31 P.R. 1907 (F.B.) and A.I.R. 1927 Lah. 771, *Dist.* (*Bhide, J.*). SOHAN LAL *v.* DHARIMAL ISHAR DAS. **109 I. C. 819= 10 L. L. J. 398=A. I. R. 1928 Lah. 813.**

———Person, not included in the cause-title but claiming to be party, and taking steps for securing some relief to himself—He is estopped from contending that he was not made a party. (*Srinivasa Ayyangar and Reilly, JJ.*). SUTHARSANA *v.* SAMARAPURI. **110 I.C. 837=1928 M. W. N. 634= A.I.R. 1928 Mad. 690.**

———Estoppel—Reversioners not succeeding in claiming property on prior occasions, as persons in possession alleged it to be trust property—The latter cannot subsequently deny the character. (*Phillips and Ramesam, JJ.*). PICHAI PILLAI *v.* LINGAM IYER. **108 I.C. 199= A. I. R. 1928 Mad. 268.**

———*Legatee cannot dispute testator's title nor can he set up title different from that contained in the will.*

One who obtains or accepts or retains possession of property under the will and who neither has, nor professes to have, any title thereto except under the will is estopped, as against any remainderman or other person claiming under the same will, from asserting that the testator was not entitled to such an estate in the property as he purported to devise or bequeath and generally from setting up any title to the property in himself which is independent of and adverse to the will, or any interest of a different kind from that which he would have taken if the property had passed by the will as it was impliedly represented by him to have passed. (*Pullan, J.*). MOHAMMAD ALI KHAN *v.* NISAR ALI KHAN. **109 I.C. 835= 1 L.C. 592=A.I.R. 1928 Oudh 67.**

———*Party to decree taking advantage of the decree cannot subsequently go behind it.*

Where a party to a decree passed on award files an execution application to enforce the decree by possession being awarded to him of the lands as provided in the award and obtains possession in execution proceedings of at least a part of that property, the maxim *allegans contrarria non est audiendus* applies and he having taken advantage of the decree by its enforcement cannot be allowed to play fast and loose with justice and go behind the decree: 24 All. 164; 21 C.W.N. 232 and *Tinker* v. *Hilder*, (1849) 18 L. J. Ex. 429, *Rel. on.* (*Wild, J. C. and Rupchand Bilaram, A.J.C.*). GHULLAMALLAH SHAH *v.* PAPURBAI. **112 I.C. 286= 23 S.L.R. 196=A.I.R. 1928 Sind 175.**

———Will—Legatee, having no title to property except under will, accepting the will—He cannot set up that the testator has a defective title nor can he claim title adverse to testator or other legatees. *Board* v. *Board*, L.R. 9 Q.B. 48, *Appl.* (*Mears, C. J. and Lindsay, J.*). GANGA DIN *v.* RAM PRASAD. **106 I.C. 20=26 A.L.J. 62=A.I.R. 1927 All. 642.**

———*Order setting aside* ex parte *decree—Plaintiff accepting costs—Effect.*

Where an order setting aside an *ex parte* decree has been passed and the plaintiff accepts costs and his pleader appears in Courts thereafter the plaintiff should be deemed to have accepted the order setting aside decree and the order will not be interfered with. (*Addison, J.*). S. BURDEN & CO. *v.* ARMY CANTEEN BOARD INDIA, SIMLA. **96 I. C. 782= A.I.R. 1926 Lah. 637.**

———Judgment-debtor requesting decree to be by instalments and acting upon it cannot subsequently object to it: A.I.R. 1923 Lah. 381, *Ref.* (*Jai Lal, J.*). FIELDING *v.* JANKI DAS & SONS. **95 I.C. 243=A.I.R. 1926 Lah. 465.**

———Gift by ostensible owners—Donee cannot afterwards deny right of donors to make gift: 42 Cal. 56, *Dist.* (*Wallace, J.*). K. JANAKI *v.* P. GOVINDAN. **85 I. C. 546=22 M.L.W. 113= A.I.R. 1925 Mad. 990.**

—S. 115—Conduct—Admission.

———Admission of liability under decree does not debar Court of Wards from challenging decree on ground that it was not validly obtained—(*Obiter*). (*Tek Chand and Tapp, JJ.*). PUNJAB COURT OF WARDS *v.* LALA KANWAR BHAN. **A. I. R. 1930 Lah. 798.**

———*Deed of further charge—Recital of earlier mortgages—Effect.*

Where a co-parcener executes a deed of further charge in which he recites earlier mortgage-deeds he should be inferred to have admitted their validity in every respect and he cannot be allowed subsequently to set up that the earlier deeds were for an excessive rate of interest. The rate of interest in any deed cannot be impugned by a co-parcener who was himself a party to that deed or must be deemed by his statements or conduct to have admitted the propriety of the rate. (*Ashworth and Misra, JJ.*). CHANDRIKA PRASAD *v.* NAZIR HUSSAIN. **92 I. C. 681= 13 O.L.J. 396=A.I.R. 1926 Oudh 306.**

—S. 115—Conduct—Adoption.

———Widow adopting with consent of her husband's collaterals—Collaterals not objecting to the adopted son taking his share by partition—Adopted son taking care of the widow till her death and redeeming mortgage by her husband—Collaterals are estopped from challenging adoption. (*Harrison and Dalip Singh, JJ.*). MUHAMMAD YASIN *v.* GHULAM MUHAMMAD. **96 I.C. 777 (Lah.)**

———*Widow recognising adoption by conduct cannot dispute its validity.*

When plaintiff's husband, a boy, was adopted his name and his house name was changed, he took the house name of the first defendant's husband and the name of his adopted father's father, and immediately after the adoption the first defendant performed his Upanayanam ceremony. Some years later the first defendant performed his marriage and also Grahapravesam ceremony and the adopted boy performed the shraddha for the first defendant's husband, and did not receive any of his natural family property, and the first defendant also asserted that she had her husband's authority to adopt at the time of the adoption,

Held, that these circumstances are quite sufficient to constitute an estoppel and therefore first defendant is estopped from denying the adoption. 34 A. 389 (P. C.,) *Foll.* (*Phillips and Venkatasubba Rao, JJ.*). VENKATA SUBBAMMA *v.* VENKAMMA. **77 I.C. 214=19 M.L.W. 83= 33 M.L.T. 191=1924 M.W.N. 1= A.I.R. 1924 Mad. 308=46 M.L.J. 52.**

———*Party can be estopped from denying adoption*

No doubt it is perfectly true that under the Hindu Law an adoption can only be effected by the due performance of certain religious ceremonies;

EVIDENCE ACT (1872), S. 115—Conduct—Advantage not taken.

but the plaintiff in an action can be estopped by his own previous conduct from asserting that such valid and binding adoption had not in fact taken place. (*Rafique and Piggott, JJ.*). UDIT NARAIN SINGH *v.* RANDHIR SINGH. **69 I. C. 971= 20 A. L. J. 945=45 All. 169= A. I. R. 1923 All. 58.**

—S. 115—Conduct—Advantage not taken.

———Even if the compromise is beneficial to a party's interest, but he has not taken any benefit out of or under it, that compromise does not constitute an estoppel debarring him from challenging it. (*Mukerji, J.*). HRIDAY NATH *v.* NIRODA SUNDARI. **108 I. C. 44= A.I.R. 1928 Cal. 334.**

—S. 115—Conduct—Arbitration.

———The Court will not permit a party to lie by or act in an indecisive manner so as to obtain the benefit of an award if it is in his favour and endeavour to set it aside if it is not. (*Rupchand, A.J.C.*). C. & I. ENGINEERING CO. *v.* MALIK THAKURDAS MATHURADAS. **123 I.C. 234= A.I.R. 1930 Sind 79.**

———Where the defendant adduces evidence and acts as if the arbitrator is legally appointed and objects to the award only when it has gone against him he is estopped from questioning the validity of the appointment. (*Mukerji and Niamatullah, JJ.*). GAJADHAR *v.* CHUNNI LAL. **117 I.C. 344= 1929 A.L.J. 868=A.I.R. 1929 All. 559.**

———Agreement to refer not signed by a party but arbitrators' authority accepted by him—There is sufficient satisfaction and the party cannot subsequently challenge the validity of the award. A.I.R. 1926 All. 239, *Dist.* (*Zafar Ali and Jai Lal, JJ.*). KANNAYA LAL *v.* DAULAT RAM. **110 I. C. 302=A.I.R. 1929 Lah. 367.**

———Arbitration—Arbitrators having no jurisdiction—Mere appearance of the parties before them under protest and examining witnesses will not amount to waiver of objections as to jurisdiction or estoppel. (*Marten, C.J. and Blackwell, J.*). CHETANDAS *v.* RADHAKISSON. **104 I.C. 174= 29 Bom.L.R. 1087=A.I.R.1927 Bom. 553.**

———Award accepted and acted upon cannot be challenged. 42 Cal. 801 (P.C.), *Foll.* (*Kanhaiya Lal and Ashworth, JJ.*). KANHAIYALAL *v.* JANGI. **96 I. C. 39=24 A.L.J. 649= A. I. R. 1926 All. 527.**

—S. 115—Conduct—Change of plea.

———Where a person advances one plea and afterwards finds it prejudicial to him, he cannot by giving it up avoid its consequences. (*Devadoss, J.*). CHINNAN CHETTY *v.* V. VILATHAN. **106 I.C. 229=39 M.L.T. 415= 27 M.L.W. 30=A.I.R. 1928 Mad. 27.**

—S. 115—Conduct—Compliance with order.

———The fact that the plaintiffs paid without demur the small *ad valorem* Court-fee in pursuance of the order of an earlier date does not debar them from questioning the validity or illegality of the Court demanding *ad valorem* Court-fee when subsequently the Court demanded a much larger fee since a fresh cause of action accrued to the plaintiffs on the latter date when additional Court-fee was demanded. (*Jwala Prasad and Foster, JJ.*). MANI LAL *v.* DURGA PRASAD. **80 I.C. 657= 5 P.L.T. 425=1924 P. H. C. C. 254= 3 Pat. 930=A.I.R. 1924 Pat. 673.**

—S. 115—Conduct—Compromise.

———Plaintiff compromising suit on defendant's allowing property to be sold on certain conditions —Defendant cannot afterwards say that holding is non-transferable. (*Das and Adami, JJ.*). NIDHI PARIDA *v.* KARUNAKAR PADHAN. **87 I.C. 250= 1 Pat. 153=A.I.R. 1922 Pat. 483.**

EVIDENCE ACT (1872), S. 115—Conduct—Execution of decree.

—S. 115—Conduct—Consent.

———A party cannot approbate and reprobate with knowledge of the facts, and if the husband or the wife once deliberately affirms the marriage, he or she cannot subsequently object to the marriage. Therefore, where a previous petition for declaring the marriage a nullity has been dismissed by consent of parties a second petition is not competent: *Lord Shelborne in G.* v. *M.*, (1885) A.C. 171, *Rel. on.* (*Marten, C.J., Crump and Blackwell, JJ.*). H. *v.* H. **110 I.C. 266=30 Bom. L.R. 523= A.I.R. 1928 Bom. 279.**

—S. 115—Conduct—Construction of document.

———*Document executed with one intention cannot be utilised for another purpose.*

The executant of a document executed with one intention cannot by change of mind utilize that document for a transaction of a wholly different character.

Per *Devadoss, J.*—When a document is executed without the intention of conveying title by one person in favour of another, it cannot afterwards be used for the purpose of conveying the title merely because one of them changes his mind and wants the document to be operative. (*Odgers and Devadoss, JJ.*). KULANDAI VELU PILLAI *v.* VENKATARAYAR. **106 I.C. 652=39 M.L.T. 470= A.I.R. 1928 Mad. 25=53 M.L.J. 808.**

—S. 115—Conduct—Contract.

———After the right to get either rescission or reformation of the contract is barred, it is not competent to a party to a contract enjoying the benefit under it to say that he is not bound by one of its terms. (*Chakravarty, J.*). SASI KANTA ACHARJEE BAHADUR *v.* GENDA SHEIKH. **82 I.C. 970=A.I.R. 1925 Cal. 389.**

—S. 115—Conduct—Execution of decree.

———Decree-holder accepting deposit made in Court under protest—Decree-holder is not estopped from prosecuting appeal: A.I.R. 1923 P.C. 13, *Rel. on.* (*Tek Chand and Dalip Singh, JJ.*). KAIKABAD *v.* KHAMBATTA. **A.I.R. 1930 Lah. 26.**

———*Satisfaction of decree by surrendering a cross-decree—Effect.*

An involuntary act done by a person in pursuance of an order of the Court cannot operate as an estoppel against him and prevent him from enforcing a remedy given to him by law.

Where after filing an appeal the judgment-debtors satisfied the execution of the decree appealed against, partly by payment in cash and partly by surrendering their decree,

Held, that this act of the judgment-debtors does not amount to a recognition of the validity of the decree thus precluding them from impeaching it in appeal: 12 C. L. J. 556; 21 C. W. N. 232 and *Tinkler* v. *Hilder*, 18 L. J. Ex. 429, *Dist.* (*Shadi Lal, C. J. and Agha Haidar, J.*). ISHARDAS DHARAM CHAND *v.* BUTAMAL DURGADAS. **115 I.C. 67= A. I. R. 1929 Lah. 42.**

———Vendee taking out money deposited by pre-emptor does not estop him from challenging pre-emptor's right to pre-empt: 83 P. R. 1912 and 16 P. R. 1907, *Foll.* (*Sulaiman and Banerji, JJ.*). MT. KUDRAT-UN-NISSA BIBI *v.* ABDUL RASHID. **96 I.C. 543=48 All. 616=24 A.L.J. 779= A.I.R. 1926 All. 661.**

EVIDENCE ACT (1872), S. 115—Conduct—Execution of decree.

———*Execution of the claim allowed does not preclude plaintiff from appealing against the claim disallowed.*

When a party has derived any advantage and taken benefit under the order of the Court, he is to be deemed to have acquiesced in it and should not be allowed to challenge it at any subsequent proceeding or by way of appeal: 12 C. L. J. 556 and 21 C. W. N. 232, *Rel. on.* But where plaintiff sues defendant for a certain amount and the defendant admits the liability as regards a part of the amount and denies the rest of the claim and a decree is passed for the amount admitted to be due by the defendant, execution of the decree as regards the amount decreed does not preclude the plaintiff from appealing against the claim dismissed: 12 C.L.J. 556 and 21 C. W. N. 232, *Dist.* (*Suhrawardy and Mukerji, JJ.*). JOGESH CHANDRA *v.* FAZAL ALI. **95 I.C. 10=A.I.R. 1926 Cal. 960.**

———Appellant offering money deposited by respondent in lower Court, as security for costs—No estoppel is created. (*Lord Atkinson*). SARAT-KUMARI *v.* AMULYADHAN. **71 I.C. 632=17 M.L.W. 481=27 C.W.N. 629=25 Bom. L R. 548=37 C. L. J. 501=1923 M. W. N. 392=32 M. L. T. 137=A.I.R. 1923 P.C. 13 (P C.).**

———Execution of a decree has never been held to estop the decree holder from appealing from it so far as it is against bim. (*Wallis, C. J., Krishnan and Venkatasubba Rao, JJ.*). SUBBA RAO *v.* BALUSU BUCHI. **72 I.C. 292=1923 M.W.N. 533=47 Mad. 7=18 M L.W. 61=A. I. R. 1923 Mad. 533=44 M.L.J. 534.**

—S. 115—Conduct—Execution proceedings.

———The parties to execution proceedings are governed by general law of estoppel. They cannot continue to raise the same plea over and over again. But if the plea has never been raised before, the principle of constructive estoppel does not apply to execution proceedings. Hence, the fact that without raising a certain plea of objection a party submitted to prior execution proceedings does not debar him from raising that plea as an objection to later execution proceedings. (*Jackson, J.*). N. C. LAKSHMIKUTTI AMMA *v.* MARIUTHUMMA THIHUMA. **82 I.C. 504=20 M. L.W. 649=35 M.L.T. 118=1924 M.W.N. 771=A.I.R. 1925 Mad. 127=47 M.L.J. 798.**

—S. 115—Conduct—Execution sale.

———Execution—Sale in purchase by decree-holders in lieu of decretal amount—One judgment-debtor entitled to interest in decretal amount—Conduct of parties showing purchase was only for benefit of decree-holders—Judgment-debtor is not entitled to any interest in the property. (*Sulaiman and Ryves, JJ.*). MAKHAN LAL *v.* SOHAN LAL. **87 I.C. 665=23 A.L.J. 257=A. I. R. 1925 All. 331.**

—S. 115—Conduct—Jurisdiction.

———Small Cause suit filed on regular side—Appeal—Want of jurisdiction cannot afterwards be pleaded. (*Dalal, J. C.*). MAHARAJ DIN *v.* BALBAHADDAR PRASAD. **85 I. C. 481=12 O.L.J. 265=2 O.W.N. 8=29 O. C. 14=A.I.R. 1925 Oudh 403.**

———Taking part in partition proceedings by Revenue Court—Party can afterwards deny Revenue Court's jurisdiction to proceed with partition. (*Ross and Sen, JJ.*). GURSAHAI MAHTON *v.* MUHAMMAD SAIYAD. **84 I.C. 151=2 Pat. L.R. Civ. 266=A.I.R. 1925 Pat. 137.**

EVIDENCE ACT (1872), S. 115—Conduct—Negligence.

—S. 115—Conduct—Land acquisition.

———*Declaration as to Government right to quarry for certain purposes—Owner receiving compensation on that basis—Purpose exhausted—Subsequent suit—No estoppel.*

Consequent upon a declaration under S. 6, Land Acquisition Act, 1894, that land was needed for a public purpose, *viz.*, quarries in connexion with certain constructions with an insertion in it of statement under S. 3 (i) under Land Acquisition (Mines) Act, 1885 excluding certain mines and making necessary reservation, the owner of the land claimed compensation for minerals or an express order excluding them from acquisition and the Judge to whom reference was made under S. 18 of the Act held that the minerals had not been acquired. The owner also claimed compensation for a special stone which had high commercial value lying under the land, part of which was leased to a stone company and some part was in the occupation of tenants. The Superintending Engineer made a fair estimate of the quantity of stone available which it would have been profitable to remove to the railway siding, which was made the measure of compensation allowed in the award under S. 11 for the total value of the entire quantity of the available stone. The amount awarded was accepted by the owner. On the completion of the proposed construction the owner gave notice to Government under S. 4 of the Act of 1885 of his intention to work the minerls of the land covered by the declaration. The right of the owner was denied and consequently the owner sued for possession of the sub-soil including stones and other minerals lying in, upon or under the land. The defence was that the compensation already granted included all the value of all minerals and stones lying in, upon or under the surface of the land acquired. It was not denied that the stones were minerals,

Held, that on the construction of the declaration and the subsequent conduct of parties the stones other than those required for construction of the proposed work vested in the owner and he was not estopped from claiming to work them by reason of the course adopted in the proceedings under the Land Acquisition Act. (*Ross and Chatterji, JJ.*). SECY. OF STATE *v.* GYANENDRA CHANDRA PANDE. **8 Pat. 742=A.I.R. 1930 Pat. 112.**

———Claimant is not estopped from showing proper value though he had shown less value in former proceedings of other nature. (*De Souza, A.J.C.*). N.H. MIRCHANDANI *v.* SPECIAL LAND ACQUISITION OFFICER, KARACHI. **101 I.C. 269=A.I.R. 1927 Sind 168.**

—S. 115—Conduct—Negligence.

———Where the plaintiff, by signing the transfer forms, and delivering the same and the share certificates to the brokers, who absconded without paying for the shares to plaintiff, placed them in a position to give a title to defendant, who was a *bona fide* purchaser for value without notice,

Held, whatever right he may have against the absconding brokers, plaintiff is estopped by his act from asserting any right to the shares: 15 A.C. 267, *Foll.* (*Kanga, J.*). FAZAL D. ALLANA *v.* MANGALDAS M. PAKVASA. **66 I. C. 726=46 Bom. 489=23 Bom. L.R. 1144=A.I.R. 1922 Bom. 303.**

EVIDENCE ACT (1872), S. 115—Conduct—No estoppel.

—S. 115—Conduct—No estoppel.

———The mere fact that a person attached the surplus sale proceeds of the execution sale under another decree in order to satisfy any decree obtained by him but did not proceed further cannot preclude him from claiming title to the property. (*B.B. Ghose, J.*). SURENDRANATH *v.* JABED ALI.
85 I.C. 747=A. I. R. 1926 Cal. 420.

———Granting of lease of nazul for building purposes does not estop Municipal Committee from refusing permission to build, (*Findlay, O.J.C.*). MAROTRAO *v.* MUNICIPAL COMMITTEE, NAGPUR. **92 I.C. 796=A.I.R. 1926 Nag. 281.**

———Rent suit—Inclusion of a plot in the suit on objection by defendant—Subsequent suit to eject defendant from the plot—No estoppel is created. (*Das and Adami, JJ.*). RAM PRASAD SINGH *v.* RAMCHANDRA RAI. **81 I.C. 324=4 P.L.T. 730=A.I.R. 1924 Pat. 203.**

—S. 115—Conduct—Notice.

———Where after receiving notice of a previous burden a person takes a mortgage of a property and advances money, he must be considered to have thought the property worth the further advance subject to the previous burden: 28 All. 315, *Ref.* (*Dalal, J.*). BENI MISIR *v.* MAHABIR SUKLA.
A. I. R. 1930 All. 431.

———Railways Act (9 of 1890), S. 77—Claim for damages for loss of goods—Notice given to one of the two railway companies and forwarded by it to the other—Latter company making enquiries in the matter and repudiating its liability—Absence of notice cannot be pleaded by the latter railway company: A.I.R. 1926 Lah. 253; A. I. R. 1922 Mad. 362 (F. B.) and 26 Bom. 663, *Dist.* (*Bhide, J.*) DHANPATMAL LOBHAMAL *v.* AGENT, B. B. & C. I. RY. CO. **110 I. C. 718=A. I. R. 1928 Lah. 438.**

—S. 115—Conduct—Omission to assent.

———*Landlord and tenant.*

The landlord succeeded in his suit for ejectment in the lower Courts and obtained possession. But the High Court reversed the decision on the technical ground that no proper notice to quit was given by the landlord. The tenants however did not claim restitution,

Held, that by accepting the landlord's possession as good the tenants impliedly surrendered the tenancy and by their failure to claim immediate possession they led the landlord into the belief that no proper notice to quit was necessary. They were therefore estopped from pleading that his possession was not lawful. (*Oldfield and Seshagiri Aiyar, JJ.*). PEDDI KAYILAKATH KUNNI *v.* THAYYIL KUNHAI AMMA. **13 M. L. W. 32= A.I.R. 1921 Mad. 144.**

—S. 115—Conduct—Omission to dissociate.

———Where during the pendency of a suit the minor becomes major, but the guardian continues to represent him and the parties continue the old state of affairs the guardian is liable for costs. (*Ramesam and Jackson, JJ.*). YELLAMA *v.* SURYANARAYANAMURTHY. **1929 M. W. N. 545=A. I. R. 1929 Mad. 782.**

—S. 115—Conduct—Omission to plead.

———Where plaintiffs allowed one *S* to join with them in a suit against another person and to obtain a decree as the son of a particular man without denying that he was the son of the man and had no right to sue, they will be estopped from disputing his paternity in a suit by them for possession of the property decreed. (*Martineau and Zafar Ali, JJ.*). SUNDAR SINGH *v.* SHAN SINGH.
80 I. C. 235= A.I.R. 1923 Lah. 630.

EVIDENCE ACT (1872), S. 115—Conduct—Omission to object.

—S. 115—Conduct—Omission to object.

———*Attachment of decree—Rightful owner omitting to object—Other parties acting on such conduct—Effect.*

Where a person did by his omission to object to the attachment of the decree lead another party to believe that the decree was still the property of his judgment-debtor at the time of the attachment and to act on that belief in giving credit for the amount recovered by execution of the decree which he attached and in releasing the other debtors who were jointly liable under the decree in his favour from liability under that decree.

Held, that the person who omitted to raise the objection was estopped from denying that the judgment-debtor was still the owner of the decree attached at the time of attachment. (*Heald, O.C.J. and Chari, J.*). CO-OPERATIVE TOWN BANK OF PADIGON *v.* S. V. K. V. SHUNMUGAM PILLAY.
125 I.C. 365=8 Rang. 223=A.I.R. 1930 Rang. 265.

———*Burden of proof.*

A part accepting the onus without demur cannot object at a late stage saying that burden was wrongly put on them. (*Zafar Ali and Bhide, JJ.*). PAKHAR DAS *v.* THAKUR DAS.
120 I. C. 168=31 P. L. R. 481=A. I. R. 1930 Lah. 213.

———Person, in whose favour three mortgages on same property were executed, assigning second of them to another—Assignee suing making assignor *pro forma* defendant—Assignor not disclosing third mortgage by written statement—He cannot sue auction-purchaser on his third mortgage. (*Boys and Bennet, JJ.*). PITAMBAR DAS *v.* PUNNA.
115 I.C. 633= A.I.R. 1929 All. 511.

———*Admission of additional evidence in appeal.*

In appeal, appellants were allowed to adduce further evidence on an issue of fact. The respondents did not take up their stand on the inadmissibility of such evidence but adduced further evidence to rebut the contention of the appellants,

Held: that the respondents could not complain of the allowing of evidence. (*Page and Mallik, JJ.*). FAZUR BANOO *v.* RAHIM BUX. **115 I.C. 184=32 C.W.N. 1020=A.I.R. 1929 Cal. 26.**

———*Trial of Small Cause suit on original side.*

Where in a suit, instituted in a Small Cause Court, a question of title was raised and the suit was transferred to the original side for trial, and afterwards the issue of title was deleted but the suit was tried on the original side without any objection from the plaintiff, and further the objection was not also raised in the grounds of plaintiff's appeal to the High Court, the plaintiff would not be allowed to raise it at a later stage: A.I.R. 1922 Mad. 352, *Rel. on.* (*Odgers, J.*). RAMANUJA JEER SWAMIGAL *v.* SAMI NADAR.
119 I.C. 386=A.I.R. 1929 Mad. 525.

———*Suit by minor without next friend—Failure to object after notice—Effect.*

If a defendant in a suit instituted by a minor without a next friend is aware or has received notice of the minority of the plaintiff and yet elects to proceed to trial and take his chance of obtaining a decree in his favour on the merits without raising any objection to, or issue upon, the maintainability of the suit and prefers the objection for the first time on appeal when the trial has gone against him he is estopped. 22 Cal. 270 and 19 Mad. 127, *Rel. on.* (*Page and Graham, JJ.*). MT. FULI BITU *v.* KHOKAI MONDAL. **111 I. C. 349=55 Cal. 712=A.I.R. 1928 Cal. 537.**

EVIDENCE ACT (1872), S. 115—Conduct—Omission to object.

———Pre-emption—Sale after notice that co-sharers have a right of pre-emption—Before commencement of sale co-sharer claiming his right without protest by purchaser—Purchaser cannot subsequently resist the claim of the co-sharer. (*Page and Graham, JJ.*). MONORANJAN METRI *v.* FAZLAR RAHMAN. **103 .I.C. 823= A. I. R. 1927 Cal. 925.**

———Person entitled to challenge alienation present at mutation but failing to object is estopped. (*Fforde and Campbell, JJ.*). RAM SARUP *v.* RAM SARAN. **96 I.C. 915=A. I. R. 1926 Lah. 650.**

———Where *P* allowed *S* to act as lambardar, knowing that he was not one, and that under the law he could not become one.

Held, *P* cannot be allowed to disown *S*'s acts by contending that he was not a lambardar at all. (*Prideaux, A.J.C.*). RAMRAO *v.* GHULARAM. **95 I.C. 987=8 N.L.J. 195=A.I.R. 1926 Nag. 188.**

———Where two members of a Hindu joint family mortgaged property and there was a mortgage-decree after which one of the mortgagors died without issue and in the proceeding for final decree one of his brothers not a party to the mortgage had been made a party,

Held, that as it was legally open to him to plead that he claimed under independent title and should not be made a party to the final decree and as he had not done so he was bound by the decree and could not be plaintiff in a subsequent suit to set aside the decree. (*Daniels, J.*). BALAKRAN LAL *v.* MALIK NAMDAR. **78 I.C. 637= 5 L. R. A. Civ. 279=A.I.R. 1924 All. 873.**

———Where a party failed to object to a wrong order of a Court and thus deprived the opponent of certain remedies open to him if the party had objected, he cannot afterwards raise that objection. (*Walmsley and Mookerjee, JJ.*). JOGUNNESSA BIBI *v.* SATISH CHANDRA BHATTACHARYA.
83 I.C. 438=39 C.L.J. 434=28 C.W.N. 559= 51 Cal. 690=A.I.R. 1924 Cal. 633.

———*Agreement—Property divided in pursuance of —Sons of a party to agreement.*

Where the sons of the cousin of *S* contested the validity of an arrangement by which the property of *S* was divided between the cousins and his daughters, and the parties remained in possession for over 14 years under the arrangement,

Held, having been in possession for 14 years after their father's death who was a party to the agreement, the sons were estopped. 40 All. 487, *Foll.* (*Ryves and Gokul Prasad, JJ.*). BAHADUR SINGH *v.* RAM BAHADUR. **71 I.C. 405=21 A.L.J 140= 45 All. 277=4 L.R.A. (Civ.) 105= A.I.R. 1923 All. 204.**

—S. 115—Conduct—Ordinary course of business.

———Estoppel by conduct—Promissory note by Bank not specially providing for compound interest—Bank keeping current accounts at compound interest—Compound interest should be paid by Bank and also by Directors when they guaranteed payment. (*Harrison and Zafar Ali, JJ.*). BHARAT NATIONAL BANK, LTD., DELHI *v.* BANARSI DAS. **83 I.C. 190=5 Lah. 129= A.I.R. 1924 Lah. 531.**

—S. 115—Conduct—Promise under inducement.

———Oral promise of gift of land to Municipality after latter had already constructed road on the land—Donor is not estopped from denying gift. (*Shah and Hayward, JJ.*). KUVERJI KAVASJI *v.* MUNICIPALITY OF LONAVULA. **45 Bom. 164= A.I.R. 1921 Bom. 198.**

EVIDENCE ACT (1872), S. 115—Conduct—Reversioner.

—S. 115—Conduct—Recognition of agency.

———Contract by agent—Principal fully recognising his authority cannot subsequently question it. (*Broadway and Abdul Raoof, JJ.*). MOSSAJEE AHMAD & CO. *v.* ADMR. GENL. OF BENGAL. **60 I.C. 739=3 L.L.J. 265= A.I.R. 1921 Lah. 48.**

—S. 115—Conduct—Representation.

———Plaintiff causing defendant to repair a well on the understanding that defendant should be entitled to use the water of the well as easement—No registered deed executed granting easement—Plaintiff is estopped from questioning defendant's right. (*Shah and Hayward, JJ.*). ANANTHA *v.* GANU. **45 Bom. 80=A.I.R. 1921 Bom. 417.**

—S. 115—Conduct—Resiling.

———*Decision invited on an issue—Jurisdiction cannot be questioned later.*

A party who has insisted upon the trial of an unnecessary issue in a case cannot at the stage of appeal be allowed to get rid of the adjudication on that issue by urging that it should not have been investigated. Neither party who has taken the chance of a favourable decision, when defeated, can ask reversal on the ground that the issue was not properly triable in that action. 33 Cal. 425; 9 N.L.R. 38; 9 W. R. 338 and 3 M. I. A. 229 (P.C.) and A.I.R. 1924 P.C. 144, *Foll.* (*Kinkhede, A.J.C.*). RAGHUBARPRASAD *v.* SAHOO. **89 I.C. 1009= A.I. R. 1926 Nag. 164.**

—S. 115—Conduct—Reversioner.

———Though transfer of his interest by a reversioner is void, he may, by becoming a party to a compromise and by taking the benefit of the compromise, be estopped from claiming as a reversioner: 15 Cal. 556, *Foll.*; A. I. R. 1918 P.C. 70; 33 All. 356 and 41 All. 611, *Ref.*; A.I.R. 1917 P. C. 95, *Dist.* (*Dalal, J.*). NAKCHED CHAUDHARI *v.* SUKHDEO CHAUDHARI. **124 I.C. 714= A. I. R. 1930 All. 430.**

———When a next reversioner relinquishes his rights for consideration, he cannot be permitted to go back upon his relinquishment: A.I.R. 1917 P.C. 95, *Dist.* (*Dalal, J.*). BENI MADHO *v.* SHAMBHU NATH. **114 I.C. 908=9 L.R.A. Rev. 180= A.I.R. 1929 All. 196.**

———Reversioners challenging alienation by widow—Widow living—Reversioners cultivating land under alienee and paying rent to him, taking contribution from him for improvements and keeping silent when he paid a mortgagee of last male-holder—Facts do not amount to admission of alienee's title. (*Harrison and Tek Chand, JJ.*). SULTAN BHAN SAHIB *v.* PIRA. **111 I.C. 247= A.I.R. 1928 Lah. 6.**

———A reversioner, who is a party to and is benefitted by a transaction entered into by a Hindu widow, is precluded from questioning any part of it, and his sons cannot set it aside especially when he did not do so in his lifetime: A. I. R. 1923 Bom. 471, *Affirmed.* (*Lord Sinha.*) RAMGOWDA ANNAGOWDA PATIL *v.* BHANSAHEB.
105 I.C. 708=54 I.A. 396=29 Bom. L.R. 1380= 32 C.W.N. 88=27 M.L.W. 140=39 M.L.T. 250= 1927 M.W.N. 736=4 O.W.N. 876=46 C.L.J. 267= 52 Bom. 1=A.I.R. 1927 P.C. 227= 53 M. L. J. 350 (P.C.).

———Reversioner entering into compromise amounting to settlement of doubtful claim of property to which he has a right of succession is estopped from claiming the property in contravention of the terms of the compromise.

EVIDENCE ACT (1872), S. 115—Conduct—Reversioner.

(*Sulaiman and Boys, JJ.*). MOTI SHAH *v.* GHANDHARP SINGH. **96 I.C. 595=48 All. 637=24 A.L.J. 873=A.I.R. 1926 All. 715.**

———Agreement by next reversioner with the remote reversioners during widow's lifetime and with her consent to divide properties—Possession given under the agreement continuing up to the widow's death—Next reversioner cannot challenge the agreement on widow's death. 40 All. 487, *Appl.* (*Phillips, J.*). SAMI NAIDU *v.* SITARAMAYYA. **91 I.C. 359=22 M.L.W. 716=A.I.R. 1926 Mad. 254.**

———Reversioner accepting a mortgage of the expectancy from other reversioners is not estopped from claiming a share in the property mortgaged to him. (*Raza, J.*). DEO KALI *v.* RANCHOOR BUX. **92 I. C. 19=13 O. L. J. 208=A I. R. 1926 Oudh 253.**

———Joint conveyance by widow and next reversioner of their absolute interest—Reversioner is estopped from challenging the transaction. (*Suhrawardy and Cuming, JJ.*). AMAR KRISHNA DE *v.* RAJENDRA KUMAR DE. **87 I.C. 790=A.I.R. 1925 Cal. 1205.**

———Sale by Hindu widow—Reversioner approving—Widow's daughter succeeding—Daughter transferring her rights to Reversioner as such—Reversioner cannot question sale by widow. (*Venkatasubba Rao, J.*). KAMA SASTRI *v.* T. KANNAMMA. **88 I.C. 765=1925 M.W.N. 495=A.I.R. 1925 Mad. 638=48 M.L.J. 284.**

———Reversioner acting as the widow's attorney and attesting deed by her will be estopped from disputing it. (*Le Rossignol and Wilberforce, JJ.*). ARORA *v.* SHIVDEO SINGH. **4 L.L.J. 45=A.I.R. 1922 Lah. 61.**

———Limited owner making family arrangement—Reversioner obtaining possession of portion of estate—Reversioner is estopped from claiming as such afterwards. (*Lindsay, J. C.*). JOGESHAR *v.* BHUSHAN. **24 O. C. 5=A.I.R. 1921 Oudh 134.**

—S. 115—Conduct—Silence.

———Co-sharer standing by and allowing purchaser to think that sale is free from incumbrances—He cannot later on assert that it was not so (*Greaves and Cuming, JJ.*). JABED ALI *v.* SURENDRANATH. **90 I. C. 333=42 C. L. J. 477=A. I. R. 1926 Cal. 351.**

—S. 115—Conduct—Sufficiency of.

———No actual verbal representation is necessary to give rise to estoppel. It is quite enough that the conduct of the party leads another to act in the belief that he asserts no claim to the property. 19 I.A. 203, *Foll.* (*Raymond and Madgavkar, A.J.Cs.*). AZIZULLAH KHAN *v.* GHULAM HUSSAIN. **80 I. C. 994=17 S. L. R. 63=A. I. R. 1924 Sind 97.**

———Verbal representation is unnecessary to give rise to estoppel. It is enough that the conduct of the party leads another to act in the belief that he asserts no claim to the property. (*Raymond and Madgavkar, A. J. Cs.*). AZIZULLAH KHAN *v.* GHULAM HUSSAIN. **80 I. C. 994=17 S.L.R. 63=A.I.R. 1924 Sind 97.**

—S. 115—Conduct—Termination of agency.

———After a principal has refused to indemnify an agent in the future in a speculative business committed to that agent, that principal cannot be heard to say that the agency subsisted. *Keech* v. *Sandford* and Ch. L. C. 635 and 19 Beavon 356; 19 Ves. 144, 13 L. J. Ch. 238; De Gm. and Cr. 787, *Dist.*; McNaughten's Select Cases in Ch. 29; 1900 A.C. 293 and 2 H. and T. W. 224, *Foll.* (*Dawson-Miller, C.J., Mullick and Foster, JJ.*). HARIHAR PRASAD SINGH *v.* MAHARAJ KESHO PRASAD SINGH. **93 I. C. 454=5 P. L. T. Sup. 1=A. I. R. 1926 Pat. 68 (F.B.).**

EVIDENCE ACT (1872), S. 115—Consent.

—S. 115—Conduct—Miscellaneous.

———*A party cannot take advantage of an event brought about by his own act or omission.*

A person who has deliberately brought about a state of affairs, should not be allowed to take exception to that state of affairs and use that changed state for his own advantage.

In the Articles of Association of an Insurance Company, it was provided that the meeting of the policy-holders was to be held in the registered office of the company. The directors of the company refused permission to hold the meeting in company's premises. The meeting was then held at another place,

Held, that the meeting was perfectly regular the change of venue in this case having been caused by the company itself: *New Zealand Shipping Co.* v. *Scciety des Atellierz*, (1919) A. C. 1 and *Queshel Forks Gold Mining Co., Ltd.* v. *Ward*, (1920) A. C. 222, *Foll.* (*Beasley, J.*). SUBRAMANIA IYER *v.* UNITED INDIA LIFE INS. CO. **114 I.C. 636=A.I.R. 1928 Mad. 1215=55 M.L.J. 385.**

———A person who deliberately, by his own act, got the name of another entered as owner of half the property cannot subsequently plead that he was the owner of the whole property. (*Ryves and Daniels, JJ.*). MATHURA PROSAD *v.* MT. ANANDI KUNWAR. **74 I.C. 911=21 A.L.J. 498=4 L.R.A. Civ. 555=A.I.R. 1924 All. 63.**

—S. 115—Consent.

——— *Adoption.*

Where, in a dispute regarding family property, settlement was effected between *B* and *W* (a female member) and property was partitioned between them and *B* agreed that *W* would be at liberty to adopt any person as her son and in pursuance of the compromise between them *W* adopted a son,

Held, that whatever the legal position as regards the validity of the adoption may be, *B* is estopped from questioning the adoption by *W*. 34 All. 398 (P.C.) and 15 Mad. 486, *Rel. on.* (*Bhide, J.*). MT. ICHHNUN *v.* BANWARI LAL. **114 I.C. 711=A.I.R. 1929 Lah. 16.**

———*Civil case.*

Irregular mode of recording evidence can be validated by consent—Party consenting is estopped. (*Dalip Singh, J.*). YUSAF ALI HAKIMJI *v.* MD. DIN & SONS. **99 I. C. 681=A.I.R. 1927 Lah. 132.**

———Contract—One party agreeing to abide by the decision of the other—He must accept the decision unless it is arbitrary or unjust. 5 Mad. 173, *Rel. on*; (*Rupchand Bilaram and Lobo, A.J.Cs.*). BURMA OIL CO. *v.* NARAINDAS DAYALSING. **104 I. C. 185=A. I. R. 1927 Sind 253.**

———When a person appeared at the time of the mutation in respect of the sale in dispute and expressed his consent to it he cannot subsequently come forward and impugn it, (*Shadi Lal and Martineau, JJ.*). MAHOMED UMER *v.* WALI. **99 I.C. 752=2 L. L. J. 306.**

———By consenting to the order of reference to arbitration and extension of time, the party is not estopped from objecting to the continuance of the proceedings *ad infinitum* or after they have proved themselves incorrigible. (*Rankin, J.*). ROBINDRA DEB MANNA *v.* JOGENDBA DEB MANNA. **80 I.C. 459=27 C.W.N. 420=A. I. R. 1923 Cal. 410.**

EVIDENCE ACT (1872), S. 115—Consent.

———Lease—Lessor's consent to allow permanent construction—Will estop him from subsequently disputing the permanent nature of the lease. (*Dawson-Miller, C. J. and Miller, J.*). SIR L. E. RALLI *v.* A. H. FORBES. **67 I. C. 744= 1 Pat. 717= 3 P. L T. 467= 1922 P.H.C.C. 209= A.I.R. 1922 Pat. 258.**

———The doctrine of estoppel applies to the case of a Ghatwal who has himself granted a permanent lease and he cannot allege that the *ijara* did not create a permanent right. (*Coutts and Macpherson, JJ.*). KANGALI CHARAN MUKERJI *v.* SURJA NARAIN SAH. **65 I. C. 303=1922 P.H.C C. 90= 6 P. L. J. 687= A. I. R. 1922 Pat. 161.**

—S. 115—Consent decree or order.

———A consent order raises an estoppel as much as a decree passed *in invitum*. 36 Bom. 283, *Foll.* (*Adami and Chatterji, JJ.*). DEO LAL *v.* BINDESHWARI NARAYAN. **120 I. C. 776= 10 P. L. T. 469= A. I. R. 1929 Pat. 440.**

———*Petition of compromise in probate Court—Admissions in—Regular suit for possession—No estoppel.*

Held, that a probate Court has no jurisdiction to deal with title to property covered by a testamentary instrument, that at the worst the plaintiff abandoned her claim to the estate of her husband but that abandonment, whether orally stated or recited in the petition, could not destroy her title, nor can estop her from filing a suit for possession of her husband's share in the joint property. (*Mookerjee and Rankin, JJ.*). SRIMATI HARIDASI DEBI *v.* P. B. MOOKERJEE. **78 I. C. 14= A. I. R. 1924 Cal. 905.**

———A compromise as to possession in proceedings under S. 145, Cr. P. C., could not be deemed to have the effect of estoppel. (*Banerji and Gokul Prasad, JJ.*). GOPI DASS *v.* MADHO LAL. **76 I. C. 527= 20 A. L. J. 932=45 All. 162= A. I. R. 1923 All. 77.**

—S. 115—Different subject.

———*Hindu Law—Adoption—Agarwalla adoption—Brahminical adoption falsely set up—Acts and representations regarding former cannot create estoppel as to latter.*

The parties were Agarwallas and the adoption was made in the manner customary among the Agarwallas. The story of a regular Brahminical adoption of the same boy previous to the Agarwalla adoption was invented with the object of giving to latter adoption the rights of collateral succession. The acts and representations of the plaintiffs which were set up as estopping them from questioning the adoption related to the Agarwalla adoption,

Held, that the plaintiffs were not estopped from questioning the adoption and denying that the adopted son acquired any rights of collateral succession by the adoption. 19 W.R. 12 (P.C.), *Foll.* and 34 All. 398 (P.C.), *Dist.* (*Mr. Ameer Ali.*) DHANRAJ *v.* SONI BAI. **87 I.C. 357=1925 M.W.N. 602= 30 C.W.N. 601=23 A.L.J. 273=2 O.W.N. 335= 21 N.L.R. 50=52 Cal. 482=6 L.R P.C. 97= 27 Bom. L.R. 837=52 I.A. 231= A.I.R. 1925 P.C. 118=49 M.L.J. 173 (P.C.).**

———Occupancy holding—Portion sold under mortgage decree—Raiyat is not estopped from objecting to sale under money-decree. (*Das and Adami, JJ.*). DEWAN RAM CHOUDHURY *v.* AHIL MUNDER. **62 I.C. 55=2 P.L.T. 341=6 P.L.J. 202= 1921 P.H.C.C. 197= A.I.R. 1921 Pat. 4.**

—S. 115—Effect of.

———*Rule of estoppel is personal—Adopted son does not get a status merely by this doctrine.*

EVIDENCE ACT (1872), S. 115 — Equitable estoppel.

A rule of estoppel is purely personal against the person estopped and cannot create any substantive right *in rem* except against the person estopped or his personal representative. By the operation of this rule, no status arises in favour of the defendant as an adopted son for all purposes under the Hindu law. (*Sen and Niamatullah, JJ.*). DHARAM PRAKASH *v.* MT. KALAWATI DEVI. **110 I.C. 665=50 All. 885=26 A.L.J. 1106. A.I.R. 1928 All. 459.**

———Estoppel being simply a principle of the law of evidence, it creates no substantive rights of an absolute character, but can only operate to close the mouths of certain people who have acted in a certain way from setting up what may be true facts of the case. (*Coutts-Trotter, C.J.*). J. PARASURAMAYYA *v.* J. VENKATARAMAYYA. **103 I.C. 855= 1927 M.W.N. 311= A.I.R. 1927 Mad. 777.**

—S. 115—Election.

———*Double remedy open to creditor—One chosen—Creditor is not estopped from re-electing his remedy.*

Where the creditors have a double remedy open to them and they intentionally elect their remedy against the joint estate of the firm, there is nothing to estop them from re-electing their remedy against the separate estate of the individual partners. *Ex-parte Adamson, In re. Collie*, (1878) 8 Ch. 807, *Rel. on.* (*Rupchand Bilaram, A.J.C.*). AHMAD HAJI *v.* MACKENZIE STUART & CO. **105 I.C. 366= A.I.R. 1928 Sind 40.**

———*Election—Remedies — After election second remedy is lost.*

When a plaintiff has the choice of suing two persons on the same cause of action it may happen that if he elects to sue one and obtain a decree he is estopped from suing the other but if he obtained a decree on a mortgage under the belief that his mortgagor acted in a personal capacity but afterwards finds he was acting in a fiduciary capacity he is not debarred from suing the right person. (*Ramesam and Jackson, JJ.*). AMMAKANNU AYI *v.* MURUGAYYA ODAYAR. **83 I.C.324= 20 M.L.W. 207=1924 M.W.N. 623= 47 Mad. 850= A.I.R. 1924 Mad. 716= 47 M.L.J. 85.**

———*Election of remedies.*

Person taking recourse to special procedure cannot fall back upon general one but must conform to the special only. (*Kinkhede, A. J. C.*). LABHUA SAO *v.* CHETAN. **79 I.C. 161= 20 N. L. R. 145= A.I.R. 1924 Nag. 275.**

—S. 115—Equitable estoppel.

———Donor's heirs challenging gift on the ground of insanity of donor—Donor and donee both made defendants and they successfully contesting suit—Subsequent suit by donor to cancel gift on the same ground is not barred nor does equitable estoppel arise. Civil P. C., S. 11. (*Iqbal Ahmad, J.*). KAMPTA PRASAD MISIR *v.* BHULAI MISIR. **100 I.C. 527= A.I.R. 1927 All. 365.**

———Person without right building in spite of remonstrance by owner—Equitable Estoppel laid down in 21 A. 490 (P. C.) does not apply. (*Daniels, J.*). MAOLA *v.* BAHORU. **A.I.R. 1923 All. 567.**

———*Essentials.*

It is not enough for the defendants to show that the plaintiff landlord stood aside and allowed the structures to be erected. One of the essential elements of equitable estoppel is that the person who sets up that estoppel must have acted in good faith and must have been under the belief that he

EVIDENCE ACT (1872), S. 115—Execution sale.

had a right to put up the buildings. (*Lindsay, J.*). MT. DULARI KOER *v.* SALIG RAM. **66 I.C. 603= A.I.R. 1922 All. 210.**

—S. 115—Execution sale.

———In connexion, with the sale of immovable property subject to an incumbrance the auction-purchaser is entitled to contest the factum and the validity of the incumbrance. There is no rule of estoppel which can prevent him from impeaching the charge on the property : 31 All. 583 (P.C.) ; A. I. R. 1921 All. 79 and 33 Bom. 311 and 35 Bom. 275. *Ref.* (*Shadi Lal, C. J. and Hilton, J.*). MT. MANKAUR *v.* ISHARDAS. **120 I.C. 162=11 Lah. 90= 31 P.L.R. 358=A.I.R. 1930 Lah. 40.**

———Landlord and Tenant—Suit for rent by landlord co-sharer against tenant—Money-decree passed—Decree executed as rent decree and holding sold without objection—On partition holding allotted to another co-sharer—Suit by co-sharer for recovery of possession alleging purchaser to be landlord's *benamidar*—Co-sharer judgment-debtor is not estopped from setting up that decree was only money-decree and could not be executed as rent decree. (*Das and Fazl Ali, JJ.*). BHAGWANDUTT SINGH *v.* LACHMI NARAYAN SINGH.

119 I.C. 882=A.I.R. 1930 Pat. 150.

———Judgment-debtor not objecting to low price advertised in proclamation cannot complain of it after sale. (*Wallace and Madhavan Nair, JJ.*). RAMANATHAN CHETTIAR *v.* RAMANATHAN CHETTIAR. **117 I.C. 705= 30 M. L.W. 995=A.I.R. 1929 Mad. 275.**

———*A decree-holder, failing to mention charges in his favour is estopped from setting up such charges.*

Where a decree-holder fails to mention in the sale proclamation, as required by O. 21, R. 66, any encumbrances or charges in his favour, he is estopped from denying that the property was sold free from such charges : 15 Mad. 412, *Foll.* ; see also 47 Cal. 446. (*Curgenven, J.*). GIRIYA SHETTI *v.* ANANTHAMMA. **100 I.C. 493=38 M.L.T. 49= A.I.R. 1927 Mad. 1142=52 M.L.J. 222.**

———Where the owner of a property sold in execution as the property of the judgment-debtor, stands by and allows the purchaser to buy it, he cannot question the sale and claim the property as his own. (*Campbell, J.*). JHANDA SINGH *v.* HARMAN SINGH. **94 I.C. 75=27 P. L.R. 260= A.I.R. 1926 Lah. 415.**

———*Sale proclamation—Omission to mention encumbrance—Knowledge of auction-purchaser — No estoppel.*

Where a property subject to a mortgage is sold in Court auction, and the auction-purchaser has knowledge of the mortgage but through Court's mistake the sale proclamation does not mention that the property is subject to the mortgage, the mortgagee is not estopped from enforcing his mortgage as against the auction-purchaser. Further, where the mortgage is one with possession, possession itself is sufficient notice to everybody concerned of the incumbrance and if the auction-purchaser is to be deemed in law to have had notice of the mortgage, no plea of estoppel can be sustained. It is a settled rule of law that if a person either knows a certain fact, or is presumed in law to know a certain fact, the principle of estoppel cannot apply. 30 Cal. 539, *Ref.*; 22 Bom. 686, *Dist.*; 36 C. 323, *Ref.* (*Misra, J.*). TULLO *v.* INDAR KUNWAR. **93 I.C. 873=13 O.L.J. 154= 3 O.W.N. 346=A.I.R. 1926 Oudh 330.**

———Where a person purchases certain property in execution of a money decree expressly subject to a mortgage on it and admits the existence of the mortgage it is not subsequently open to him to challenge the mortgage in a suit, on the mortgage, by the mortgagee. A I.R. 1923 Nag. 282 and 47 Cal. 446, *Rel. on.* (*Findlay, Offg. J.C.*). GOVINDRAO *v.* HIRCHAND. **95 I.C. 563=A.I.R. 1926 Nag. 446.**

———Execution of decree—Decree-holder's agent endorsing that property, need not be sold—Decree-holder is not estopped from executing, against the property. (*Jackson, J.*). PARTHASARADHI APPA RAO *v.* MD. ABDUL WAHEB SAHEB. **82 I.C. 434= A.I.R. 1925 Mad. 270.**

———*Failure to object.*

A judgment debtor who might have raised objections to a sale in execution of a decree against him but has refrained from doing so or who might have appealed against the order for sale, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable. 29 All. 612 and 28 Bom. 125, *Foll.* (*Kanhaiya Lal, J.*). MUKAT SINGH *v.* MISRA PARAS.

79 I.C. 106=A. I. R. 1924 All. 726.

———*Purchaser at execution sale is bound by the estoppel against judgment-debtor.*

Where there was a sale in execution of a mortgage decree in 1907 but there was a clerical error in the description of the properties both in the mortgage as well as in the decree, and there was a sale of the same properties in 1908 in execution of a money decree.

Held, (i) that the mortgagor would be estopped from denying the title of the mortgagee and could not take advantage of the clerical error to nullify the security granted by him (ii) that the purchaser in execution of the money decree purchased only the right, title and interest of the judgment-debtor and is in no better possession than the judgment-debtor, and was bound by the estoppel against him. (*Mookerjee and Cuming, JJ.*). NANDI LAL AGRANI *v.* JOGENDRA CHANDRA DUTTA. **70 I.C. 960= 36 C.L.J. 421=A.I.R. 1923 Cal. 53.**

———Mortgage pending attachment notified in sale proclamation—No notice to decree-holder—Latter is not estopped from contesting validity of mortgage. (*Stuart and Sulaiman, JJ.*). ROSHAN LAL *v.* LALLU. **68 I.C. 790=44 All. 714= 20 A.L.J. 722=A.I.R. 1922 All. 443.**

———Property sold in execution as belonging to one judgment-debtor—Others not objecting, cannot afterwards sue for their share in the same they are estopped. *T. R. Arunachellem Chetti* v. *V. R. R.*, 16 A. P. 171 ; 12 Mad. 19 ; *M. A. R. Arunachellam Chetti and Olpherts* v. *Mahabir Prasad Singh*, L.R. 10 I.A. 25 ; 9 Cal. 656, *Foll.* (*Lyle, A.J.C.*). ABDUL RAZAK *v.* MUHAMMAD HAJJAM.

67 I.C. 797=9 O.L.J. 131=A.I.R. 1922 Oudh 11.

———Mortgagee bringing property to sale in execution of simple money decree without disclosing mortgage—He is estopped from setting up mortgage against auction-purchaser. (*Brown, A.J.C.*). MAUNG KYIN PEW *v.* MA. PWA ME.

64 I.C. 953=4 U.B.R. 62.=A.I.R. 1922 U.B. 1.

———C. P. Tenancy Act (1883), S. 42, requiring express words for passing *sir* rights—Express words not used, by agreement between the parties who wanted the question to remain open—Vendor cannot plead the statute as objection to vendee's claiming those rights. He is estopped. (*Lord Buckmaster.*) GULAB SINGH *v.* BALLABHDAS.

61 I.C. 769=48 Cal. 591=48 I.A. 220= 19 A.L.J. 361=34 C.L.J. 1=26 C.W.N. 938= 14 M.L.W. 228=1921 M.W.N. 310=17 N.L.R. 84= A.I.R. 1921 P.C. 13=40 M.L.J. 418 (P.C.).

EVIDENCE ACT (1872), S. 115—Executor.

—S. 115—Executor.

———An executor who has entered upon his duties as such is estopped from pleading immunity from his obligation as executor, on the ground that no probate has been taken out by him. 34 M. 211, *Ref. to.* (*Ramesam and Cornish, JJ.*). NAMBERUMAL CHETTI *v.* VEERAPERUMAL PILLAI. **59 M.L.J. 596.**

—S. 115—Fraud.

———Fraud committed upon creditors—Judgment-debtor cannot claim ownership of house (subject of fraud) or equitable interest in sums spent for building it. (*Ramesam and Jackson, JJ.*). SUBHA RAO *v.* VEERANJANEYASWAMI. **A.I.R. 1930 Mad. 298.**

———*Fraud upon registration land.*

Where the parties intended to hoodwink the Sub-Registrar by entering a piece of property within his jurisdiction in the sale-deed, in order to give that officer jurisdiction, the parties contemplated a fraud on the law of registration and so should not be granted any relief in a Court of justice. (*Mukerji, J.*). RAM KRISHNA *v.* ANAND KRISHNA. **118 I.C. 589=A.I.R. 1929 All. 578.**

———It is not open to a party to plead his own fraud against another, not a party to the fraud. (*Sulaiman and Kendall, JJ.*). RAM LAL *v.* HARPAL. **115 I.C. 113=1929 A.L.J. 423=A. I. R. 1929 All. 237.**

———A participator in fraud, when the fraud is effected, cannot impeach the transaction on the ground of such fraud. 6 Bom. 703 and 11 Bom. 708, *Ref.* (*Fawcett, Ag. C.J. and Murphy, J.*). KONDI RAVJI *v.* CHUNI LAL RUPCHAND. **113 I.C. 229=53 Bom. 75=30 Bom. L.R. 1539=A. I. R. 1929 Bom. 1.**

———Party giving a particular form to a document for avoiding stamp duty cannot take aid of the principle that deeds and contracts of the people of India ought to be liberally construed. 40 P.R. 1913, *Dist.* (*Tek Chand, J.*). MATU MAL *v.* BANARSHI DAS. **108 I.C. 593=A.I.R. 1928 Lah. 678.**

———Unless a person is found guilty of either an overt act or of an act of omission which is likely to induce the other side to believe that he is entitled to commit the particular act complained of, there can be no question of estoppel. Plea of estoppel can be maintained only if the conduct of the person against whom estoppel is alleged, is found to be fraudulent. 21 All. 496, (P. C.); 30 Cal. 539 (P.C.), *Foll.*; A.I.R. 1927 Oudh 66, *Rel. on.* (*Gokaran Nath Misra, J.*). RAM DATT *v.* CHHOTAK. **106 I.C. 244=3 Luck. 133=4 O.W.N. 1019=9 L.R.A. Rev. 336=A.I.R. 1928 Oudh 23.**

———*Collusive decree.*

Where a person permits a collusive decree to be passed against him he and his representatives cannot thereafter be able as against the decree-holder, to assert the invalidity of such decree, although the decree is open to be impeached by a creditor. 11 Bom. 708, *Foll.* (*Mears, C. J. and Dalal, J.*). DARHARI LAL *v.* MAHBUB ALI MIAN. **101 I.C. 513=49 All. 640=25 A.L.J. 497=A. I. R. 1927 All. 538.**

———*Fraud of the mortgagor.*

It is no answer to an innocent plaintiff, seeking to recover money which has been paid by him through deceit by which the plaintiff was induced to enter into an invalid transaction, to say that the transaction being invalid, no action lies. Such a suit is not based upon the transaction. It is based upon the fraud of the defendant and is bound to succeed. (*Walsh and Pullan, JJ.*). SHAHZAD SINGH *v.* NARAIN KURMI. **101 I.C. 257=25 A.L.J. 37=A.I.R. 1927 All. 190.**

EVIDENCE ACT (1872), S. 115—Inconsistent pleas.

———*Party to fraud.*

Where the plaintiff succeeded in carrying out the fraud by executing a sale-deed of his property he is precluded from putting forward his own title to the property by taking advantage of his own fraud. 36 C. 551 (P.C.), *Foll.* (*Gokul Prasad, J.*). LACHMAN DAS *v.* MULCHAND. **71 I.C. 441=A.I.R. 1923 All. 411.**

———*One cannot take advantage of his own wrong or that of his predecessor.*

Where it is necessary for a party who wishes to establish a certain state of things, in order to do so to set up his own wrong doing, he will not be allowed to do so. An adopted son who merely takes from the adoptive father can be in no better position than the adoptive father himself and he will not be allowed to set up that his adoptive father's consent was obtained by a promise of corrupt payment. The principle *Nemo allegans tur pitudinem suam est adiendus* is applicable in India. 32 M.L.J. 484 and 31 Bom. 305, *Foll.* (*Schwabe, C. J. and Coutts-Trotter, J.*). PARTHASARATHY REDDI *v.* KANDASAMI REDDI **73 I.C. 954=18 M.L.W. 156=32 M.L.T. 349=1923 M.W.N. 423=A.I.R. 1923 Mad. 711=45 M.L.J. 161.**

———Transfer of Property Act, S. 53—Conspiracy between mortgagor and mortgagee—Object to defraud latter's creditor—Payment of mortgage falsely established—Mortgagee cannot sue for mortgage-money afterwards. (*Ryves and Stuart, JJ.*). MUHAMMAD SHAFI *v.* NANHE. **63 I. C. 921=19 A.L.J. 454=A. I. R. 1921 All. 140.**

—S. 115—Ignorance of Law.

———No estoppel can arise from ignorance of the law which both parties are supposed to know. (*Heald and Chari, JJ.*). MA MA GYI *v.* U. CHIT PE. **95 I.C. 879=5 Bur. L.J. 56=A.I.R. 1926 Rang. 131.**

———No estoppel can arise in favour of party misled only by his own ignorance of law. (*Wazir Hasan and Ashworth, A. J. Cs.*). AMJAD KHAN *v.* ASHRAF KHAN. **87 I.C. 445=2 O.W.N. 83=28 O.C. 265=A. I. R. 1925 Oudh 568.**

———Where the defendants, transferees of certain tenures were ignorant of the fact that the tenures were inalienable and liable to forfeiture on alienation but the landlord was in no way responsible for such ignorance,

Held, that this cannot raise any estoppel against him nor can the fact that he did not exercise his right of enforcing forfeiture prior to the suits bar him from doing so now or raise any estoppel against him. If the tenures, the defendants purchased, are forfeitable ones, they must take the consequence and cannot complain even if they paid full value. (*Ayling and Krishnan, JJ.*). ZAMORIN RAJU *v.* SAMU NAIR. **15 M.L.W. 164=A.I.R. 1922 Mad. 290.**

—S. 115—Inconsistent pleas.

———*Appeal — Objection to forum — Subsequent change of contention—Estoppel.*

A preferred an appeal to the Commissioner from an order rejecting certain objections to the confirmation of a sale. The appeal was opposed by *B* on the ground that the case was governed by the new Tenancy Act and that the appeal should have been filed in the High Court. The appeal was returned and presented to the High Court. *B* then changed

EVIDENCE ACT (1872), S. 115—Inconsistent pleas.

his position and contended that the case was not governed by new law but by old law and no appeal lay to the High Court.

Held, that *B* wae estopped from raising any question of jurisdiction inasmuch as it was on his own insistence that the appeal was returned by the Commissioner. By his objection he had accepted the jurisdiction of the High Court as the proper forum of appeal. (*Sulaiman and Pullan, JJ.*). RAM KHELAWAN SINGH *v.* MAHARAJAH OF BENARES. **120 I.C. 125=1930 A.L.J. 224= A.I.R. 1930 All. 15.**

———*Scope of.*

Where the tenants of a holding take up a position in proceedings under S. 105, Ben. Ten. Act, that the application does not lie and the application is withdrawn, they will not be allowed to say in subsequent proceedings in suit that the application operated as a bar to it. The principle is that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponents and that this wholesome doctrine applies not only to successive stages of the same suit but also to another suit other than the one in which the position was taken up provided the second suit grows out of the judgment of the first. A.I.R. 1924 Cal. 600, *Foll.* (*Mukerjee and Bose, JJ.*). HEMANTA KUMARI DEVI *v.* PRASANNA KUMAR DATHI. **120 I.C. 249= 56 Cal. 584=A.I.R. 1930 Cal. 32.**

———A party having claimed on basis of investment in commercial speculations cannot claim on another basis when he finds that the first basis is prejudicial to him. (*Viscount Sumner.*) HARIRAM SEROWJEE *v.* MADAN GOPAL BAGLA.

114 I.C. 565=1929 A.L.J. 406=49 C. L.J. 335= 33 C.W.N. 493=31 Bom. L.R. 710= 1929 M.W.N. 422=30 M.L.W. 835= A.I.R. 1929 P.C. 77=57 M.L.J. 581 (P.C.).

———Where plaintiff has obtained a decree on the representation that a Court had jurisdiction, subsequently he cannot go back upon it and urge want of jurisdiction. (*Fawcett, Ag. C. J. and Murphy, J.*). KONDI RAVJI *v.* CHUNI LAL RUPCHAND. **113 I. C. 229=53 Bom. 75= 30 Bom. L. R. 1539=A. I. R. 1929 Bom. 1.**

———Consignor taking delivery of goods on strength of bill-of-lading and basing his suit on it—He cannot say he is not bound by its terms. *Glyn* v. *East and West India Dock Co.*, (1882) 7 A. C. 591, *Rel. on.* (*Mukerji and Bose, JJ.*). EZEKEIL *v.* BRITISH INDIA STEAM NAVIGATION CO., LTD. **117 I. C. 851=33 C. W. N. 169= A.I.R. 1929 Cal. 260.**

———Where a party got a revision dismissed on the ground that an order could be attacked in appeal, he is estopped from raising a plea in appeal that the proper remedy was by way of revision because that order could not be attacked in appeal. (*Dalip Singh, J.*). MATHRA DAS AND SONS *v.* KAUSHI RAM. **120 I. C. 594 (Lah.).**

———Where a person has successfully opposed an application under S. 47, Civil P. C., on the ground that that section did not apply, he cannot subsequently raise a plea in a suit brought by the applicant that the suit was barred by S. 47. (*Kinkhede, A. J. C.*). UTTAMCHAND *v.* SHALIGRAM. **117 I. C. 285=A. I. R. 1929 Nag. 79.**

———A decree-holder filed a suit against a son of his judgment-debtor for ousting him from possession, which he had acquired as a stranger under

EVIDENCE ACT (1872), S. 115—Inconsistent pleas.

O. 21, R. 100, in a previous execution proceedings. The decree-holder contended that the son was separate and was not the legal representative of his father and succeeded in getting possession of part of the property. He next started execution proceedings with respect to the rest alleging that the son as a legal representative was bound by the decree.

Held, that the decree-holder cannot be allowed to come forward on his new and entirely inconsistent allegations with his previous one, there being no provision either of law or equity to justify the extraordinary volte face. (*Findlay, J.*). SETH KISANLAL *v.* BAJIA TELI. **113 I. C. 146 (Nag.).**

———Appeal rightly filed in Revenue Court dismissed on respondent's objection to jurisdiction—Appeal subsequently filed in Civil Court—Respondent cannot plead want of jurisdiction of Civil Court. 3 O. C. 32 and 2 O. C. 188, *Foll.* (*Gokaran Nath Misra and Srivastava, JJ.*). SAIRA BIBI *v.* CHANDRA PAL SINGH. **114 I.C. 120= 5 O.W.N. 897=4 Luck. 159= 10 L.R.A. Rev. 211=A.I.R. 1928 Oudh 503.**

———Where a person claims a certain property by challenging a certain trust deed, he cannot, on failure of the claim, claim the property under the trust deed. (*Wallace and Madhavan Nair, JJ.*). SIVARAMA KRISHNAIER *v.* SIVAKAMI ACHI. **100 I.C.648=A.I.R. 1927 Mad. 498.**

———*Contrary plea cannot be allowed in appeal so as to place opponent at a disadvantage.*

A litigant who has all along maintained a position in support of one branch of his suit cannot be permitted when he fails upon this branch to withdraw from the position and assert the contrary more especially when he thereby places his opponent at a great disadvantage. (*Lord Salvesen.*) PUSPHAVATI ALAKH NARAYAN GAJPATIRAJ *v.* SECY. OF STATE. **94 I.C. 501=49 Mad. 249= 53 I.A. 64=43 C.L.J. 378=28 Bom. L.R. 865= 24 M L.W. 9=1926 M.W.N. 583= A.I.R. 1926 P.C. 18=50 M.L.J. 391 (P.C.).**

———Suit filed in Small Cause Court—Defendant contending suit is not small cause—Plaint returned and refiled in ordinary Court—Defendant estopped from contending that suit is small cause. 13 A. L. J. 854, *Rel. on.* (*Daniels, J.*). KARTAR SINGH *v.* NANDA. **95 I.C. 846=A.I.R. 1926 All. 664.**

———*Valuation of suit—Acceptance by defendant—Plaintiff cannot re-open the same in P. C. application.*

On an application by the defendant for leave to appeal to the Privy Council against the appellate decree in a suit where the suit was for declaration without consequential relief falling under Sch. II, Cl. 17 of the Court Fees Act, the value given in the plaint for purposes of jurisdiction must be held to be the market value of the subject-matter of the suit, and where it has been stated to be Rs. 10,000 the defendant having accepted the valuation so given, it is not open to the plaintiff to show that the value of the subject-matter is less than Rs. 10,000. (*Ramesam and Venkatasubba Rao, JJ.*). CHELASANI RATTAYYA *v.* ANNE BRAHMAYYA. **91 I.C. 572=A.I.R. 1925 Mad. 1223=49 M.L.J. 309.**

———*Joinder of parties.*

Where defendants in a redemption suit opposed plaintiffs' application for joining other part-proprietors of the land in suit, and the Court therefore rejected plaintiff's application.

EVIDENCE ACT (1872), S. 115—Inconsistent pleas.

Held, defendants afterwards cannot attack the decree on the ground of non-joinder of parties. (*Dawson-Miller, C.J. and Mullick, J.*). SRI KANTA PRASAD *v.* JAG SAH. **84 I. C. 293=3 Pat. 818=6 P.L.T. 237=A.I.R. 1925 Pat. 57.**

———Statement in the pleading would be a bar to a different averment in the course of the proceeding. (*Sanderson, C.J. and Richardson, J.*). BURN AND CO., LTD. *v.* H. H. THAKUR SAHIB SHREE LAKHDIRJEE. **83 I. C. 260=28 C.W.N. 104=A. I. R. 1924 Cal. 427.**

———*Admission as to valuation by a party will bind him.*

Defendants who accept the value of property for purposes of jurisdiction cannot be heard to question that value subsequently. The value of the property is a question of fact. It is not proper for a party by an admission as to a lower valuation to suffer an appeal to be heard by a single Judge and then to claim a higher valuation for the purpose of obtaining an appeal to the Privy Council. (*Ashworth and Simpson, A.J.Cs.*). BHAGWATI PRASAD *v.* ACHHAIBAR SINGH. **74 I.C. 214=9 O.L.J. 531=26 O.C. 24=A.I.R. 1923 Oudh 93.**

—S. 115—Interpretation.

———"*Permitted another person to believe a thing*" —*Meaning.*

By the words "permitted another person to believe a thing", etc., the section contemplates that not merely may there be active inducement on the part of the declarant for a belief in the mind of another person but it is enough if the declaration is such by which the declarant in the ordinary course permits somebody else to believe in the truth of the declaration and to act on that belief. (*Mukerji and Mullick, JJ.*). BARKAT ALI *v.* PRASANNA KUMAR. **33 C. W. N. 873=A. I. R. 1929 Cal. 819.**

—S. 115—Judgment.

———*Recitals in—If operates as estoppel.*

Where a dispute between parties in a suit is referred to arbitration and one of the parties alleges partition, which is subsequently mentioned in the award, the other party is not estopped from denying the partition in a subsequent suit. (*Rupchand and Wild, A. J. Cs.*). UTAMCHAND *v.* SAJANDAS. **123 I.C. 698=A.I.R. 1930 Sind 182.**

———A party to a decree creating a charge on his property is estopped from saying that he is not entitled to create the charge or mortgage on the property. 10 Bom. 342 and A. I. R. 1923 Bom. 276, *Dist.* (*Patkar and Murphy, JJ.*). SHANKAR KONDAPPA *v.* GANPAT SHANKARSHET. **119 I.C. 186=31 Bom. L.R. 439=A.I.R. 1929 Bom. 227.**

———It is a well-known rule of law that where a party has asserted a certain position in a previous litigation he cannot re-agitate the matter on the assumption of fresh facts against persons who were parties whether as plaintiffs or defendants in the previous suit. (*Dalip Singh, J.*). BHOLA *v.* SHEOCHAND. **106 I.C. 484 (Lah.).**

———*Estoppel by record.*

Estoppel by record operates as an estoppel to the whole right and not to a fragment of it which might be given effect to or repealed by the decree of Court. *Badar Bee* v. *Habib Merican Noordin*, (1909) A.C. 615 and *Jones Brothers, Ltd.* v. *Woodhouse*, (1923) Ch. D. 117, *Foll.* (*Wazir Hasan and Raza, JJ.*). DURGA PRASAD *v.* JAGAT GIT SINGH. **112 I.C. 169=3 Luck. 487=5 O.W.N. 265=A.I.R. 1928 Oudh 359.**

EVIDENCE ACT (1872), S. 115—Laches.

———Symbolical possession given by Court though actual possession should have been given—Judgment-debtor is bound by the order—Principle of estoppel applies. (*Jai Lal, J.*). HARBHAGWAN *v.* TAZA. **89 I. C. 596=26 P.L.R. 546=A. I. R. 1926 Lah. 35.**

———Case decided by appellate Court on one ground—Other grounds though relied on by lower Court are not estoppel by record. (*Rankin and Mukerji, JJ.*). CHITPORE GOLABARI CO., LTD. *v.* GIRIDHARI LAL SEROGI. **78 I. C. 353=A.I.R. 1925 Cal. 530.**

———Civil P.C., Sch. 2, Para 14—Parties representing whole property to be theirs—Third persons interested in the property but arbitrator unaware of the fact and deciding the dispute—Party to reference are estopped from challenging award. (*Mullick and Kulwant Sahay, JJ.*). SHAIKH MUHAMMAD KHALIL *v.* SHAIKH ABDUL RAHIM. **93 I.C. 261=4 Pat. 670=7 P.L.T. 644=A.I.R. 1925 Pat. 810.**

———A plea unnecessarily raised by a party and decided by the Court also equally unnecessarily does not estop the party from putting the same in a later suit. (*Campbell, J.*). SOHAN SINGH *v.* JAWAL SINGH. **73 I. C. 854=A. I. R. 1923 Lah. 248.**

———Estoppel can be proved by a judgment given by consent as by a judgment given after opposition. In either csse the estoppel consists of the establishment of facts by order of the Court either by an agreed statement by the parties, or by the adjudication of the Court upon the controversy being fully heard. (*Lord Buckmaster.*) STEPHENS & CO. *v.* ALLEN. **A.I.R. 1921 P.C. 231 (P.C.).**

———*Party not bound by the judgment cannot plead.*

Per *Kumaraswamy, J.* —Estoppel must be mutual and it is difficult to see how a party not bound by a judgment can set it up in bar against a party to it.

Whatever would estop or bar persons whose title is set up must also bar the person pleading *jus tertii* whether the estoppel is by record, deed or *in pais.* (*Wallis, C.J., Spencer and Kumaraswami Sastri, JJ.*). SECY. OF STATE *v.* AHMAD BADSHA. **67 I.C. 971=44 Mad. 778=14 M.L.W. 128=14 M. L. W. 188=1921 M. W. N. 576=A. I. R. 1921 Mad. 248=41 M.L.J. 223=41 M.L.J. 278 (F.B.).**

—S. 115—Laches.

———The delay of nearly five years prior to the suit for rescission of contract on the grounds of defect in title of plaintiff's vendors and onerous covenants is highly prejudicial to the defendants-vendors, especially when the plaintiff was previously seeking to enforce the contract against his vendees notwithstanding the defects. Plaintiff's conduct in enforcing the contract against his vendee and laches of five years work out an estoppel against him and equally debar him from enforcing his claim. (*Rupchand, Ag. C. J.*). SORABJI MUNCHERJI BILLIMORIA *v.* TARACHAND GHANSHAMDAS. **A I. R. 1930 Sind 66.**

———Length of delay and nature of acts done during the interval are material for estoppel. (*Baguley, J.*). MAUNG KAJAING *v.* P. L. T. A. R. CHETTIAR FIRM. **116 I. C. 470=6 Rang. 643=A. I. R. 1929 Rang. 17.**

———A mere delay in filing a suit does not *per se* constitute acquiescence. 1 All. 82, *Foll.* (*Findlay, J.C.*). NARAYAN *v.* RAJA LAXAMAN RAO. **105 I.C. 286=A. I. R. 1927 Nag. 400.**

EVIDENCE ACT (1872), S. 115—Laches.

———*Length of delay and nature of acts done during interval are material.*

Thus the doctrine of laches in Courts of equity is not an arbitrary or technical doctrine. In a case in which it would be practically unjust to grant a remedy either because the party has by his conduct done that which might fairly be regarded as tantamount to a waiver of the remedy or where, he has by his conduct and neglect, though perhaps not waived the remedy yet has rendered the situation of the other party such as it would not be reasonable to render it, in both these cases, lapse of time and delay are most material if afterwards the remedy is asserted by the party making delay. (*Schwabe, C. J. and Coutts-Trotter, J.*). W. BRUNTON *v.* JOHN E. C. BRUNTON. **78 I C. 299= A.I.R. 1925 Mad. 360.**

———*Proof of.*

The plea of laches on the part of the plaintiff as barring his right to enforce some remedy must be established by evidence of facts amounting to waiver, abandonment or acquiescence on the part of the plaintiff and such evidence must be plain and unambiguous. (*Kinkhede, A.J.C.*). NARAYAN *v.* MT. TULSHI. **80 I.C. 607= A.I.R. 1925 Nag. 104.**

———Lessee entitled to renewal not asking for same but continuing in possession and willing to do his part of agreement is not guilty of laches. (*Abdur Rahim and Oldfield, JJ.*). T. PICHI NAIDU *v.* C. JEFFERSON. **60 I.C. 591=44 Mad. 230= 1921 M.W.N. 31= A.I.R. 1921 Mad. 541= 41 M.L.J. 94.**

—S. 115—Landlord and tenant.

———A *purchasing non-transferable occupancy holding in execution of mortgage-decree against tenant—On landlord proceeding to execute rent-decree by sale of holding* A *depositing decretal amount —Withdrawal of deposit by landlord—Acceptance of deposit even under protest held to amount to recognition of* A's *tenancy.*

A purchased a non-transferable occupancy holding in execution of a mortgage decree against the original tenants. The landlord of the holding obtained a rent decree against the original tenants and proceeded to sell the holding in execution of the decree. *A* put in an application praying to deposit the decree-holder's dues under S. 170. The Court after making a remark, " Heard pleaders on both sides " permitted the deposit. The landlord withdrew the deposit, but after *A* instituted a suit for declaration of his title contended that the withdrawal was made under protest and did not amount to recognition by him of *A's* tenancy.

Held, that the fact of the withdrawal of the deposit by the landlord amounted to a recognition by him of the tenancy of *A*.

Held also : that from the remark of the Court, " Heard pleaders on both sides ", it could not be assumed that the withdrawal had been made on protest.

Held further that assuming there was a protest by the landlord the acceptance of the deposit by him amounted to recognition of tenancy on the principles of estoppel. 6 C. L. J. 601 ; 7 I. C. 477 ; 28 I. C. 343, *Rel. on* ; 30 I. C. 83 and A. I. R. 1926 Cal. 1215, *Dist.* (*Mitter and Patterson, JJ.*). CHHOTA MURARI MOHAN PANDA *v.* PROTAP NARAIN PANDA. **A. I. R. 1930 Cal. 745.**

———A tenant cannot refuse to pay the rent, because the landlord for a number of years made no claim for rent for the land occupied by the tenant. (*Mohiuddin, A. J. C.*). KAMPTA PRASAD *v.* RAM SARAN SINGH. **117 I.C. 287= A.I.R. 1929 Nag. 123.**

EVIDENCE ACT (1872), S. 115—Landlord and tenant.

———Where the tenancy under the plaintiff is once denied, the tenants would not be entitled to claim on a future occasion that the tenancy under the plaintiff was subsisting. (*Suhrawardy and Mullick, JJ.*). HATIMULLAH *v.* MAHOMED ABJU. **113 I.C. 13=32 C.W.N. 391= A.I.R. 1928 Cal. 312.**

———Tenant is not estopped from disputing landlord's title if he executed the *kabuliyat* through fraud or mistake. (*Cuming and Chakravarti, JJ.*). CHENGTU SARKAR *v.* JAHERUDDIN MONDAL. **91 I.C. 669= A.I.R. 1926 Cal. 720.**

———Acceptance of rent by landlord from mortgagee of tenancy—Landlord is not estopped from contending that mortgage was invalid. (*Dalal, J.C.*). HARI KISHEN DAS *v.* MAIKU LAL. **87 I.C. 959= A.I.R. 1926 Oudh 37.**

———A claim for rent is a recurring claim and it is open to the tenant at any time to take an objection on the ground that the claim contravenes the provisions of the law. (*Dawson-Miller, C. J. and Mullick, J.*). W. H. MEYRICK *v.* DIPA PANDEY. **84 I.C. 361=3 Pat. 825=6 P.L.T. 537= A.I.R. 1925 Pat. 185.**

———*Acceptance of rent.*

There is no peculiarity in the law of estoppel in India as distinguished from that of England. The law of India is compendiously set forth in S. 115 of the Indian Evidence Act, Act 1 of 1872. Taking of a rent each year under a mistaken belief may bar by estoppel the owner from any claim for mesne profits during the particular year or years for which such rent was received. It would estop the owner from maintaining that the person who paid the rent possessed the property with a liability to account or possessed on any other or further terms than on payment of the rent made and taken. In cases of estoppel the onus of establishing the facts and circumstances from which estoppel arises rests upon the person pleading it. (*Lord Shaw.*) MITRA SEN SINGH *v.* MT. JANKI KUAR. **82 I. C. 946=46 All. 728=51 I. A. 326= 23 A.L.J. 172=6 L.R. P.C. 12= 26 Bom. L.R. 1134=40 C L J. 468= 20 M.L.W. 566=1924 M.W.N. 703= 35 M.L.T. 247=27 O. C. 208=29 C.W.N. 533= 3 P.L.R. Civ. 169= A.I.R. 1924 P.C. 213= 47 M.L J. 591 (P.C.).**

———Where in a lease, lessor stated that description of land by acreage was conjectural and subsequently in the transaction with a third party the acreage was determined, lessor is not estopped as against lessee from adhering to his statement in the original lease. (*Das and Foster, JJ.*). MESSRS. LINTON MOLESWORTH AND CO. *v.* JAGANNATH SUPAKAR. **77 I.C. 403=1 P. L. R. 377= 5 P.L. T. 437= A.I.R. 1924 Pat. 226.**

———Where the lessees had a right to build on the land, but they did not produce the lease deed in their possession which will show under what terms they had such a right, the mere fact that the landlord stood by while the tenants built on the land will not estop the landlord from pleading that the lease was only a temporary one. (*Dawson-Miller, C. J. and Mullick, J.*) BUDHAN TELI *v.* MADANMOHAN LAL. **68 I.C. 653=3 P.L.T. 485= A.I.R. 1923 Pat. 111.**

———Where the entry in the *Thakbust khasra* has been made in fraud of the owner, the withholding of the rent collected by the *thikadar* of the proprietor does not create an estoppel or destroy the

EVIDENCE ACT (1872), S. 115—Landlord and tenant.

relationship of landlord and tenant. (*Mr. Ameer Ali.*) JAGDEO NARAIN SINGH *v.* BALDEO SINGH.
71 I.C. 984=1923 M.W.N. 361=27 C.W.N. 925=3 P.L.T. 605=49 I. A. 399=36 C.L.J. 499=32 M. L. T. 1=2 Pat. 38=A.I.R. 1922 P. C. 272=45 M.L.J. 460 (P.C.).

———Person suing another for rent is estopped from questioning tenancy afterwards. (*Das and Bucknill, JJ.*). JITAN MAHTON *v.* BHAGWAN SAHAI.
64 I.C. 262=2 P.L.T. 780=A.I.R. 1921 Pat. 470.

—S. 115—Minor—Applicability.

———The rule of estoppel is a rule of evidence and it must be taken subject to the Contract Act, and it is doubtful whether S. 115 of the Evidence Act applies to infants.

In order to support the plea of estoppel in the case of infants, fraud operating to deceive must be found as a fact. 25 Cal. 616, *Foll.* (*Das and Adami, JJ.*). GANGANAND SINGH *v.* RAMESHWAR SINGH BAHADUR.
102 I.C. 449=6 Pat. 388=8 P.L.T. 730=A.I.R. 1927 Pat. 271.

—S. 115—Minor—Attestation by.

———The law relating to estoppel must be read together with, and subject to other laws in force, such as those relating to contract and transfer of property, and that where such laws declare an infant to be free of liability in respect of a particular transaction, he cannot be made liable by virtue of an estoppel, for an estoppel cannot alter the law.

Attestation of a sale-deed by minor does not estop him from subsequently claiming the property sold. 26 Cal. 381, *Rel. on.* (*Duckworth, J.*). MAUNG TIN *v.* MA LUM.
99 I.C. 148=5 Bur. L.J. 141=A.I.R. 1927 Rang. 108.

—S. 115—Minor—Description as.

———Minor becoming major one month before suit and having common interest with the other plaintiff, his brother, and taking active part in prosecuting the case, is estopped from challenging the validity of the decree passed in such suit. 20 All. 90 and A.I.R. 1924 All. 54, *Dist.* (*Daniels and King, JJ.*). BINDA *v.* MANGALA.
96 I.C. 606=48 All. 661=24 A.L.J. 847=A.I.R. 1926 All. 673.

—S. 115—Minor—False representation.

———When a contract has been entered into by a minor, representing himself to be a major the contract is void as against him and he is not estopped from pleading minority: A. I. R. 1928 P. C. 152, *Foll.*; 21 Bom. 198; 41 Bom. 480; 46 Bom. 137; A.I.R. 1923 Bom. 169: 64 I. C. 457, *deemed overruled.* (*Madgavkar, J.*). BALANGOWDA BHIMANGOWDA *v.* GADIGEPPA BHIMAPPA.
118 I.C. 698=31 Bom. L.R. 340=A.I.R. 1929 Bom. 201.

———A contract entered into by a minor is void and the minor is not estopped from pleading his minority as a bar to a contract entered into by him even though he had falsely represented himself to be of age and thereby induced the other party to enter into the contract: 15 N. L. R. 149, *Foll.*; *Levene* v. *Brougham*, (1909) 25 T. L. R. 265; *R. Leslie Ltd.* v. *Shiell*, 3 K. B. 607, 26 Cal. 381; 30 Cal. 539; 38 Mad. 1071; 37 Mad. 38; A.I.R. 1927 Rang. 108; A. I. R. 1927 Pat. 271, *Ref.*; 21 Bom. 198; 41 Bom. 480; A. I. R. 1923 Bom. 169, *Not foll.*; A. I. R. 1928 Lah. 609 (F. B.), *Appr.*; 1 Lah. 389; 59 I. C. 393, *Overruled* by A. I. R. 1923 Lah. 609 and 15 C. W. N. 239, *Diss. from in* 20 C. W. N. 418. (*Staples, A. J. C.*). GULABCHAND *v.* SETH CHUNNILAL.
25 N.L.R. 83=A.I.R. 1929 Nag. 156.

EVIDENCE ACT (1872), S. 115—Minor—Returned of benefit.

———Where an infant has induced a person to contract with him by means of a false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract. Though S. 115, Evidence Act, is general in its terms, it must be read subject to the provisions of the Contract Act declaring a transaction entered into by a minor to be void: 59 I. C. 393; 1 Lah. 389 and 60 I. C. 267, *Overruled.* (*Shadi Lal, C. J., Broadway, Harrison, Tek Chand and Dalip Singh, JJ.*). KHAN GUL *v.* LAKHA SINGH.
111 I.C. 175=9 Lah. 701=10 L.L.J. 413=30 P.L.R. 60=A.I.R. 1928 Lah. 609 (F.B.).

———Section 115 of the Evidence Act is no more than a rule of evidence and a rule of evidence cannot be so construed as to nullify the express provisions of S. 11 of the Contract Act.

In a suit upon a promissory note executed by the defendant while he was a minor, although he misrepresented his age to the plaintiff, the defendant is not estopped from pleading his minority in defence to the suit: 8 A.L.J. 1058, *Foll.* (*Prideaux, A. J. C.*). PUNDLIK *v.* BHAGWANTRAO.
96 I.C. 893=A.I.R. 1926 Nag. 491.

—S. 115—Minor—No estoppel.

———*Sale by guardian—Minor's letter stating necessity—If operates as estoppel.*

Where at the time of sale of property by a guardian of a minor, the latter signed a letter which stated in detail that necessity for sale existed and where the object of taking the letter from the minor was not to assure the vendee that necessity existed but was to prevent the minor from bringing a suit to set aside the sale, the minor in a suit for possession of property is not estopped from denying the existence of legal necessity as he is not shown to have caused or permitted the vendee to believe that necessity existed. (*Macnair, A. J. C.*). SITARAM *v.* MULCHAND.
115 I.C. 175=A.I.R. 1929 Nag. 221.

———*Contract Act S. 11.*

A deed executed by minors is a nullity and incapable of founding a plea of estoppel. (*Lord Salvesen.*) NAWAB SADIQ ALI KHAN *v.* JAI KISHORI.
109 I.C. 387=26 A.L.J. 685=47 C.L.J. 628=32 C.W.N. 874=5 O.W.N. 547=28 M.L.W. 17=30 Bom. L.R. 1346=A.I.R. 1928 P.C. 152=55 M.L.J. 88 (P.C).

———Principle of estoppel cannot be applied to an infant who is incompetent to contract under S. 11 of the Contract Act. 43 I.A. 256 (P.C.); 15 A. L. R. 149, *Foll.* (*Hallifax, A. J. C.*). GOKULDAS *v.* GULAB RAO.
89 I.C. 143=A.I.R. 1926 Nag. 108.

———No estoppel against statute—Minor is not estopped from pleading minority. (*Kennedy, J.C., Raymond and Kemp, A. J. Cs.*). MT. HURI *v.* ROSHAN KHUDABUX.
71 I.C. 161=16 S.L.R. 112=A.I.R. 1923 Sind 5 (F.B.).

—S. 115—Minor—Representative of.

———Guardian and Wards Act, S. 30—Mortgage without permission—Later sale with permission—Vendee undertaking to pay mortgage is not estopped from contesting validity of mortgage: 8 A. L. J. 754, *Rel. on.* (*Ashworth and Iqbal Ahmad, JJ.*). MAKSUD ALI *v.* SHEIKH ABDULLA.
108 I.C. 723=50 All. 218=25 A.L.J. 1017=A.I.R. 1928 All. 77.

—S. 115—Minor—Returned of benefit.

———Where a minor representing himself as of age executes a mortgage-deed, the mortgage is void and he is not estopped from pleading minority but the Court can on equitable grounds order restitution

EVIDENCE ACT (1872), S. 115—Minor—Returned of benefit.

of benefit received by himself if the circumstances of the case so require : A. I. R. 1928 Lah. 609, *Foll.* (*Tek Chand and Hilton, JJ.*). BUDHA SINGH *v.* LAKHMI CHAND. **30 P.L.R. 584= A.I.R. 1929 Lah. 880.**

———Minor between 18 and 21 is not estopped from pleading his minority—Court may relieve the other party on general principles of equity. (*Dalal, J.*). RADHA KISHAN *v.* BHUREY LAL.
110 I. C. 373=50 All. 862=26 A.L.J. 837= A. I. R. 1928 All. 626.

———But the minor, in equity is required to return the benefit he has received by making a false representation as to his age, if he wants to challenge his own act : A. I. R. 1928 Lah. 609 (F.B.), *Foll.* (*Shadi Lal, C.J. and Johnstone, J.*). NAGASH MUHAMMAD *v.* FATEH MUHAMMAD.
111 I. C. 344=29 P.L.R. 608.

———Where a minor selling his property dishonestly represents to the vendee that he is a major and that vendee believes that representation and acts on it in taking the sole-deed from the minor as a major, the minor is not estopped under S. 115 from denying that he was a major at that date. [*Leslie* v. *Shiell*, (1914) 3 K. B. 607 *Dist.*; A.S. No. 89 of 1920, *Foll.*] But if he claims a declaration that the sale is void under S. 41 of the Specific Relief Act that relief may be granted to him on the condition that he makes such compensation to defendant as justice may require : 7 L. W. 124, *Ref.* (*Reilly, J.*). VENKATARAMAYYA *v.* PUNNAYYA.
94 I. C. 853=23 M.L.W. 521= A.I.R. 1926 Mad. 607.

—S. 115—Minor—Rule applies.

———The language of S. 115 is comprehensive enough to include a minor: 26 Cal. 381, *Diss. from.* (*Shadi Lal, C.J., Broadway, Harrison, Tek Chand and Dalip Singh, JJ.*). KHAN GUL *v.* LAKHA SINGH. **111 I.C. 175=9 Lah. 701= 10 L.L.J. 413=30 P.L.R. 60= A.I.R. 1928 Lah. 609 (F.B.).**

———Pro-note by—Mis-representation as to age—Minor may be estopped from pleading minority. (*Macleod, C.J. and Shah, J.*). JASRAJ BASTIMAL *v.* SADASHIV MAHADEO WALEKAR.
64 I.C. 457=46 Bom. 137= 23 Bom. L.R. 975=A.I.R. 1923 Bom. 169.

———The word "person" as used in S. 115 should not be narrowed down to exclude an infant. *Nelson v. Stocker*, (1859) 4 De G. & J. 458 and 25 Cal. 371, *Foll.* Other cases discussed. (*Chevis, A.C.J. and Le Rossignol, J.*). WASINDA RAM *v.* SITA RAM.
59 I.C. 393=1 Lah. 389=51 P.W.R. 1920= 50 P.L.R. 1921=A.I.R. 1921 Lah. 312.

———If a minor obtains a loan on the representation that he is of age, he cannot plead his infancy as defence to a suit on the loan. (*Le Rossignol, J.*). HARJI MAL *v.* ABDUL HALIM. **60 I.C. 267 (Lah.).**

—S. 115—Mistake.

———Vendor and vendee both advised by same solicitors—Both sharing same mistake as to vendor's title due to solicitor's advice—Vendee paying purchase money and vendor utilising it to obtain transfer—Defect in title of vendor discovered—Vendee is not estopped from claiming back purchase money as vendor did not act on faith of vendee's representation. (*Shah, Ag. C.J. and Kincaid, J.*). MEGHJI MOORJI *v.* TYEBALLI KAMRUDDIN. **90 I.C. 189=26 Bom. L.R. 1019= A I.R. 1925 Bom. 64.**

———*Wrong statement as to one's rights—No estoppel is created.*

EVIDENCE ACT (1872), S. 115—Mortgagor and mortgagee.

Plaintiff made a statement in mutation proceedings in the Court of Assistant Collector that he and his nephews were heirs of one *Mt. R* and that mutation of one-sixth of the property may be made in his favour and of the rest in the names of the defendants,

Held, the statement did not prevent the plaintiff from asserting his right to the entire property in a Civil Court subsequently. (*Dalal, A.J.C.*). RAM RATAN *v.* BINDU. **72 I.C. 832= A.I.R. 1924 Oudh 168.**

———*Execution sale.*

A decree-holder brought up his own properties for sale as belonging to appellant,

Held, the fact that respondent was himself under a mistake when he filed his sale application will not prevent an estoppel. Unless it is found that appellant was not in fact misled, respondent must be held to be estopped. (*Ayling, Offg. C. J. and Odgers, J.*). RAMASAMI KONAN *v.* KULANDAIVELU PILLAI. **70 I.C. 569=1922 M.W.N. 121= 15 M.L.W. 272=A.I.R. 1922 Mad. 63.**

———A person is always entitled to prove if he can, that there was a mistake in the accounts and that he signed them as correct by mistake. (*Batten, J.C.*). SETH BHOJRAJ *v.* PANDA SHANKARNATH.
71 I. C. 45=A.I.R. 1922 Nag. 265.

———The intention mentioned in S. 115 of the Evidence Act does not exclude an intention which is based on a mistake. 20 Cal. 296, *Foll.* (*Hallifax, A.J.C.*). RAMPRASAD *v.* MT. IMRAT BAI.
65 I.C. 477=18 N.L.R. 27=A.I.R. 1922 Nag. 79.

—S. 115—Mortgagor and mortgagee.

———An usufructuary mortgagee cannot deny the title of the mortgagor and set up adverse possession unless he actually leaves the holding and enters under a different status. (*Ashworth, J.*). JAI NANDAN TEWARI *v.* UMRAY KOERI. **119 I.C. 568= 10 L.R.A. Rev. 289=A.I.R. 1929 All. 305.**

———The mere fact that the mortgagee brought a suit against purchaser of mortgaged property to have the sale set aside does not estop mortgagee from instituting a suit to enforce his mortgage claim against the mortgage property. (*Mullik and Garlick, JJ.*). RASIK CHANDRA *v.* JAGABANDHU.
113 I. C. 904=A. I. R. 1929 Cal. 392.

———Where a mortgagor refused possession when according to the terms of the contract he was bound to give possession, the mortgagor is precluded from asserting that the property is not liable to sale in satisfaction of the mortgage debt. 41 Mad. 259 (F.B.), *Rel. on.* (*Dalip Singh, J.*). GHULAM MAHOMMED *v.* MD. HUSAIN. **116 I.C. 214= A.I.R. 1929 Lah. 289.**

———Mortgagor and mortgagee—*A* suing on his mortgagee joining his co-mortgagee *B* as defendant —*B* not oppearing in Court and decree passed exclusively in favour of *A*—*A* executing decree receiving money and giving discharge—*B* cannot urge that this position was not legally available to *A*. (*Misra and Pullan, JJ.*). JAGMOHAN DAS *v.* INDAR PRASAD. **115 I. C. 97=6 O.W.N. 133= 4 Luck. 597=A.I.R. 1929 Oudh 160.**

———Equitable mortgagee entering into possession with consent of mortgagor—The former leasing the property to a third person—Auction-purchaser of the equity of redemption is bound by the mortgagor's consent and his suit for rent and damages against the third person is not maintainable. (*B.B. Ghose and Page, JJ.*). H. R. CHAMARIA & CO. *v.* SONATAN PAL. **107 I.C. 72=46 C.L.J. 515= A. I. R. 1928 Cal. 158.**

EVIDENCE ACT (1872), S. 115—Mortgagor and mortgagee.

———Mortgagor not raising issue of limitation as to personal remedy at the hearing cannot raise it after sale when the proceeds are found insufficient and mortgagee applies under Civil P.C., O. 34, R. 6. (*Shadi Lal, C.J. and Broadway, J.*). RALIA RAM *v.* HIRALAL. **111 I.C. 808= A.I.R. 1928 Lah. 653.**

———Where the mortgagee is let into possession by the mortgagor, the former is estopped from denying the title of the latter at the commencement of his possession, though he is not debarred from showing that the title has since determined. 18 All. 329, *Rel. on.* (*Iqbal Ahmad, J.*). DALIP SINGH *v.* TILAK SINGH. **99 I.C. 561= A.I.R. 1927 All. 270.**

———If after a preliminary decree for foreclosure has been passed the mortgagee enters into possession before the day appointed for payment has arrived, the mortgagor would certainly have a right to demand a fresh account and the appointment of a further day for payment: but if he allows many years to pass before making his application, it must be considered that he acquiesced in the mortgagee holding the property as his own and induced him to believe that it was no longer necessary either to execute the decree he had obtained or to obtain an order absolute for foreclosure. (*Macleod, C.J. and Coyajee, J.*). VASANT RAO *v.* MANA BHAI. **94 I.C. 96=28 Bom.L.R. 347= A.I.R. 1926 Bom. 273.**

———Mortgagor estopped from denying consideration of the mortgage—Transferee from mortgagor is also estopped. (*Wallace and Madhavan Nair, JJ.*). NARAYANASWAMI *v.* VENKATARAMA. **95 I.C. 264=23 M.L.W. 749=1926 M.W.N. 315= A.I.R. 1926 Mad. 808=50 M.L.J. 511.**

———*Mortgage suit—Agreement entered into by mortgagor before final decree to pay higher interest to get extension of time.*

Held, the mortgagor was estopped, in an application by the mortgagee for execution of the agreement, from contending that the agreement could not be enforced in execution. 2 I. A. 219 and 5 C. 27, *Rel. on.*

The question whether such an agreement does or does not violate the rule, that a Court cannot add to its decree, becomes under the circumstances one which the Court will not enter into, the party who seeks to raise such question being estopped by his own conduct and the action of the Court taken thereunder. (*Ramesam and Jackson, JJ.*). SUBRAMANIA PILLAI *v.* CORERA. **86 I.C. 723= 1925 M.W.N. 86=A.I.R. 1925 Mad. 457= 48 M.L.J. 121.**

———Assignee of mortgagee not giving notice of assignment to mortgagor—mortgagor continning to pay the old mortgagee—Assignee cannott refuse to give credit for such payments. (*Kinkhede, A.J.C.*). BASANTRAO *v.* NARAYAN. **78 I.C. 127= A.I.R. 1924 Nag. 401.**

———*Mortgagor though trustee is estopped from setting up trust.*

Even where the mortgagors are trustees acting in a public capacity and not for their own benefit, they are estopped from denying their title and cannot set up as a defence against the mortgagee that the property so mortgaged is trust property which the mortgagors had no right to mortgage. Where the mortgage deed clearly and unmistakeably purports to be executed by the mortgagor as the proprietor of the property in his own interest, he is estopped from denying the interest which he represented as his own proprietary right in the deed. (*Dawson Miller, C.J. and Foster, J.*). BRIJI RATAN DAS *v.* RAGHUNANDAN GIR. **71 I.C. 944= 1923 P.H.C.C. 49=1 P.L.R. 225= 4 P.L.T. 457=A.I.R. 1923 Pat. 203.**

EVIDENCE ACT (1872), S. 115—None against statute—Duty of Court.

———If a person professes to have an interest in a property whatever interest he may have is bound by the mortgage and must be enforced against him and he cannot claim that a personal decree should have been passed. (*Lord Phillimore.*) BHOLANATH SEN *v.* BALRAM DAS. **70 I.C. 932= 27 C.W.N. 607=18 M.L.W. 48= 1923 M.W.N. 525=31 M.L.T. 306= A.I.R. 1922 P.C. 382=47 M.L.J. 258 (P.C.).**

———Even though a mortgage by a tenant-at-will is not binding on the landlord, it is open to him to recognise it as valid. Such a mortgage is not *ab initio* void. A mortgagee cannot go behind his mortgage and dispute the mortgagor's right to enforce redemption. (*Kanhaiya Lal, J.C.*). BHAIRON *v.* BALAK. **68 I.C. 558=9 O.L.J. 331= A.I.R. 1922 Oudh 287.**

—S. 115—None against statute—Acquiescence.

———The doctrine of acquiescence cannot be invoked to defeat a clear statutory provision. (*Ashworth and Misra, JJ.*). MUNICIPAL BOARD, LUCKNOW *v.* DEBI DAS. **99 I.C. 643=1 Luck. 444= 13 O.L.J. 553=3 O.W.N. 514= A.I.R. 1926 Oudh 388.**

—S. 115—None against statute—Assessment.

———Section 31, Act 31, 1858 empowers the Government either to add the revenue assessed upon the alluvial increment to the jumma of the parent estate and enter into a new engagement with the proprietor for the payment by the latter of the aggregate amount, or to make a separate settlement for the alluvial increment and to make this increment as a separate estate accordingly. Although on previous occasions the Government chose to exercise their right in the manner first described, they are not under any obligation to exercise their discretion in the same way on a subsequent occasion when a fresh survey is made of all the accretions. (*Sir John Wallis.*) SECY. OF STATE *v.* PARVATI CHARAN SHAHA. **110 I.C. 8= 32 O.W.N. 906=48 C.L.J. 163=55 I.A. 289= 55 Cal. 1037=A.I.R. 1928 P.C. 193 (P.C.).**

—S. 115—None against statute—Contract.

———An estoppel cannot operate to override an express provision of law. Where under the Agra Tenancy Act an agreement to pay enhanced rates had to be by registered instruments but the tenant paid the enhanced rent in the absence of such an agreement,

Held, that he was not estopped in a subsequent proceeding for rent from asserting that rent was payable only on the old scale. (*Oakden, S. M. and Smith, J. M.*). BADAM *v.* ABDUL HAMID KHAN. **13 R.D. 859.**

———There cannot be any estoppel against a statute, nor can the parties contract themselves out of any statute. (*Suhrawardy and Cuming, JJ.*). JNANENDRA NATH ROY *v.* NALINI MOHAN GHOSE. **87 I.C. 565=A.I.R. 1925 Cal. 1262.**

—S. 115—None against statute—Duty of Court.

———No Court can enforce as valid, that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties, or by a failure to plead or to argue the

EVIDENCE ACT (1872), S. 115—None against statute—Jurisdiction.

point at the outset. (*Lord Sumner.*) SURAJMULL *v.* TRITON INSURANCE CO. **86 I.C. 545= 27 Bom. L.R. 770=29 C.W.N. 893= 23 A.L.J. 105=52 I.A 126=1925 M.W.N. 257= 6 L.R.P.C. 66=A. I. R. 1925 P.C. 83= 49 M. L. J. 136 (P.C.).**

—S. 115—None against statute—Jurisdiction.

———A party to a submission to arbitration through Court can question the validity of the arbitration proceedings on the ground that the Court had no jurisdiction to refer to arbitration. (*Suhrawardy and Cuming, JJ.*). T. WANG *v.* SONA WANGDI. **87 I.C. 633=29 C. W. N. 886=52 Cal. 559= 42 C. L. J. 26=A.I.R. 1925 Cal. 812.**

—S. 115—None against statute—Stamp Act.

———It being the duty of a Court to give effect to a statute in spite of the conduct of the parties, there can be no estoppel against a statute (*e.g.*, the mandatory provisions of S. 36, Stamp Act). 38 Mad. 519; 38 Mad. 374 and 37 M. L. J. 65, *Rel. on.* (*Madhavan Nair, J.*). VENKATESWARA IYER *v.* RAMANATHA. **119 I. C. 472= A. I. R. 1929 Mad. 622.**

—S. 115—None against statute—Succession.

———Buddhist Law (Burmese) — Succession—Agreement by father and son to enjoy property equally—Survivor to succeed excluding heirs—Agreement is invalid as defeating the law, and son's widow is not estopped from questioning the agreement. (*Heald and Chari, JJ.*). MA MA GYI *v.* U. CHIT PI. **95 I. C. 879=5 Bur. L. J. 56= A. I. R. 1926 Rang. 131.**

—S. 115—None against statute—Transfer of property.

———The sale of an occupancy holding is contrary to law and absolutely void and no estoppel arises against a statute. A person resisting suit for possion of an occupancy on the ground that it has been sold to him cannot raise the plea of estoppel. (*Pullan, J.*). GOPAL SAHU *v.* NAND KUMAR SINGH. **123 I.C. 53=7 O.W.N. 438= A. I. R. 1930 Oudh 300.**

———The Nawab of Murshidabad executed a lease to the defendants of certain lands and premises to which the Murshidabad Act 15 applied for a term of 21 years in consideration of the sum of rupees five lacs as advance of the total rent payable for during the said term of 21 years. The Nawab then sued to recover possession of the demised property and mesne profits, upon the ground that the lease was null and void by reason of the provisions of condition (1) of the Murshidabad Act, 15 of 1891.

Held, that the lease contravened condition (1) of the Act and was therefore null and void,

Held, further that as the Nawab was a person under disability, he was not estopped from denying the validity of the lease. *Jeffries* v. *Alexander*, 8 H.L.C. 594; *Batiman* (*Lady*) v. *Faber*, (1898) 1 Ch. 144; *Leslie* v. *Sheill*, (1914) 3 K. B. 607; 36 Cal. 920; A.I.R. 1928 Cal. 537 *and other cases discussed.* (*Page, J.*). NAWAB OF MURSHIDABAD *v.* BILAS ROY CHOUDHURI. **118 I.C 561=56 Cal. 252= A.I.R. 1929 Cal. 433.**

——— An estoppel cannot have the effect ofmaking a void transfer valid (*Wazir Hasan, Ag. C. J. and Misra, J.*). BINDESWARI SINGH *v.* HAR NARAIN SINGH. **6 O. W. N. 233=4 Luck. 622= A.I.R. 1929 Oudh 185.**

———*Estoppel.*

Transfer which is void cannot be validated by recourse to ordinary doctrine of estoppel. (*Kin-*

EVIDENCE ACT (1872), S. 115—None against statute—Miscellaneous.

khede, A.J.C.). MAROTI SURYABHAN *v.* RAIWANT RAO. **107 I.C. 897=A.I.R. 1928 Nag. 262.**

———Where sanction of the Court was obtained to sell the properties for a certain amount to pay off the debts due from the estate but the administratrix mortgaged the properties for the amount as fixed for sale at a high rate of interest, *viz.*, 15 p.c., while properties were really worth less than the mortgage amount,

Held, that permission of sale could not be utilized for mortgaging the properties and the administratrix could successfully plead want of sanction, in a suit by the mortgagee to enforce the mortgagee. (*Marten, C. J. and Percival, J.*). CHANDRI AYAL *v.* ABDUL KARIM. **98 I. C. 915=51 Bom. 16= 28 Bom. L.R. 1360=A. I. R. 1927 Bom. 49.**

———No estoppel exists on a point of law—Grantor can derogate from grant if transaction is expressly forbidden by statute: 12 N. L.R. 100 and 44 Bom. 488, *Foll.* (*Baker, J. C.*). KESAR BAI *v.* JAMADAR. **82 I.C. 126=20 N.L R. 162= A. I. R. 1925 Nag. 125.**

———Representation by disqualified proprietor of his competency to transfer cannot create an estoppel against him. (*Neave and Kendall, A.J.Cs.*). LALA HARI KISHUN DAS *v.* CHAUDHRI MOHAMMAD SAFI. **80 I.C. 800=11 O.L.J. 502= 28 O.C. 34=A. I. R.1924 Oudh 438.**

—S. 115—None against statute—Void contract.

———Where a particular act is declared to be void and unlawful by statute a party cannot by representation, any more than by other means, raise against him an estoppel so as to create a state of things, which he is under a legal disability from creating. (*Shadi Lal, C.J., Broadway, Harrison, Tek Chand and Dalip Singh, JJ.*). KHAN GUL *v.* LAKHA SINGH. **111 I.C. 175= 9 Lah. 701=10 L.L.J. 413=30 P.L.R.160= A.I.R. 1928 Lah. 609 (F.B.).**

———A contract which is void cannot create estoppel: 31 Bom. 165, *Foll.* (*Wazir Hasan and Neave, A. J. Cs.*). DWARKA PRASAD *v.* NASIR AHMAD. **78 I.C. 850= 11 O.L.J. 219= A. I. R. 1925 Oudh 16.**

———*Hundi invalid under S.* 26, *Paper Currency Act.*

There can be no estoppel against a clear injunction of a statute and therefore the endorser of a hundi drawn on him which is invalid under S. 26 of the Paper Currency Act is not estopped from denying the validity of the instrument. *Seshagiri Aiyar, J.*, in 42 Mad. 470, *Not foll.*; 40 Mad. 585, *Foll.* (*Abdur Rahim and Oldfield, JJ.*). ALAGAPPA CHETTY *v.* ALAGAPPA CHETTY. **60 I. C. 130= 44 Mad. 187=A.I.R. 1921 Mad. 382.**

—S. 115—None against statute—Miscellaneous.

———There can be no estoppel against an Act of Parliament or against an Act of legislature and the principle of estoppel cannot be invoked to defeat the plain provisions of the statute: 38 Bom. 709; 36 Cal. 920; 38 Cal. 512 and 42 Cal. 455, *Ref.* (*Patkar and Baker, JJ.*). AHMED BHOUDDIN *v.* BABU DEVJI ZUJANI. **122 I. C. 113=53 Bom. 676= 31 Bom. L.R. 778=A.I.R. 1930 Bom. 135.**

———There is no estoppel against a statute. (*Subhedar, A. J. C.*). MADANLAL *v.* RIPUSUDANPRASAD. **A.I.R. 1930 Nag. 191.**

———There can be no estoppel contrary to a statutory enactment. (*Sulaiman and Banerji, JJ.*). BHAGWAN SINGH *v.* TASADDUQ HUSSAIN. **115 I.C. 642=1929 A.L.J. 889= A.I.R. 1929 All. 549.**

EVIDENCE ACT (1872), S. 115—None against statute—Miscellaneous.

———An estoppel cannot be invoked to defeat an express provision of law. (*Ashworth and Misra, JJ.*). CHANDU *v.* MURLIDHAR. **92 I.C. 732= 13 O.L.J. 138=A.I.R. 1926 Oudh 311.**

———There cannot be any estoppel against a statute and a statutory defence not set up in a prior suit can be set up in a subsequent suit. (*Suhrawardy and Cuming, JJ.*). NAFAR CHANDRA PAL CHOWDHURY *v.* BHUSI MOLLA. **65 I.C. 581 (Cal.).**

—S. 115—None if truth known.

———Where the statement relied on is made to a party who knows the real facts and is not misled, there can be no estoppel: 30 Cal. 539, *Foll.* (*Fawcett, J.*). VALLAB DAS MULJI *v.* PRANSHANKAR NARBHESHANKAR. **113 I.C. 313= 30 Bom. L.R. 1519=A.I.R. 1929 Bom. 24.**

———When both parties are equally conversant with the true state of the facts it is absurd to refer to the doctrine of estoppel. (*Devadoss, J.*). SWAMINADHA AIYAR *v.* SWAMINADHA AIYAR. **99 I.C. 772=38 M.L.T. 32= A.I.R. 1927 Mad. 458.**

———The mere fact that the reversioners stood by and asked another person to purchase the property from the female holder, would not in any way estop them from setting up a claim to the property where the purchaser knew that the holder had only a life-interest in it. (*Devadoss, J.*). S. R. SWAMINATHA AIYAR *v.* SWAMINATHA AIYAR. **99 I.C. 772=38 M.L.T. 32= A.I.R. 1927 Mad. 458.**

———There can be no estoppel where parties are aware of the facts. 6 O. C. 331, *Foll.* (*Raza, J.*). DEBI PRASAD SHUKLA *v.* BAJI NATH. **95 I. C. 585=A.I.R. 1926 Oudh 506.**

———Both parties knowing true state of facts—No estoppel arises. (*Raza, J.*). NANHEN KHAN *v.* FIDA HUSAIN. **93 I.C. 279=13 O.L.J. 463= A. I. R. 1926 Oudh 361.**

———No estoppel exists where the other party knows the truth. (*Spencer and Kumaraswami Sastri, JJ.*). MOLLAYYA PADAYACHI *v.* KRISHANASWAMI IYER. **85 I.C. 855=21 M.L.W. 336= A.I.R. 1925 Mad. 95=47 M.L. J. 622.**

———But where the truth of the matter is known to both parties there can be no estoppel. 30 Cal. 539 (P. C.), *Foll.* (*Wazir Hasan and Neave, A. J. Cs.*). DWARKA PRASAD *v.* NASIR AHMAD. **78 I. C. 850=11 O. L. J. 219= A. I. R. 1925 Oudh 16.**

———There is no estoppel in favour of a man who knew all the facts of the case, so a co-signatory to a mortgage-deed is not estopped in a suit for contribution by the other executant to deny that the latter alone mortgaged his property and that he (the defendant) mortgaged none. (*Walsh, A. C. J. and Sulaiman, J.*). GAYA PANDI *v.* AMAR DEO. **85 I.C. 498=22 A. L. J. 855= 5 L. R. A. Civ. 673=A.I.R. 1924 All. 787.**

———A false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy. 162 P. R. 1919, *Foll.* (*Broadway. J.*). BISHAN SINGH *v.* BISHNA. **69 I. C. 543=A.I.R. 1924 Lah. 294.**

———Registration Act, S. 28—Mortgagor is estopped from pleading want of title unless mortgagee knew real facts—Non-existence of property indicates fraud of both parties. (*Kinkhede, A. J. C.*). TULSIRAM *v.* TUKARAM. **78 I. C. 398= A.I.R. 1924 Nag. 363.**

———A person who knows the truth can hardly be allowed to rely upon an estoppel arising from a false representation. No estoppel can arise where the truth is known to the party who claims the estoppel, (30 I. A. 114, *Ref.*) nor unless it is shown that the party claiming estoppel ever intended to do a thing and was prevented from doing so by the act or assertion of the other person. (*Krishnan and Ramesam, JJ.*). VENKATACHALA *v.* ARUNTHAVATHACHI. **72 I. C. 548=17 M. L. W. 755= 1923 M. W. N. 225=A.I.R. 1923 Mad. 568.**

EVIDENCE ACT (1872), S. 115—Parties and Privies—Party bound.

———There can be no estoppel where the other side knows the full facts and even a representation on a matter of law, *i.e.*, as to the validity of an adoption creates no estoppel. (*Ayling and Odgers, JJ.*). RAJAMBAL AMMAL *v.* SHANMUGA MUDALIAR. **70 I. C. 653=1922 M. W.N. 481= A.I.R. 1923 Mad. 11.**

———There is no estoppel where both parties knew the actual facts but chose to act on the supposition that the facts were otherwise. (*Ashworth, A.J.C.*). MT. MAHESHA *v.* RAMESHAR. **74 I.C 295= 10 O.L.J. 24=26 O.C. 329= A.I.R. 1923 Oudh 173.**

———Where the truth is known to both the parties there is no case of estoppel. (*Das and Kulwant Sahay, JJ.*). JAGDIP PRASAD *v.* MT. RAJO KUER. **75 I.C. 1022=4 P.L.T. 531= 1923 P.H.C.C. 177=2 Pat. 585= A.I.R. 1923 Pat. 464.**

———Where a party has not been misled by the representation made by another, that other is not estopped. (*Chatterjee and Pearson, JJ.*). JYOTI PRASAD *v.* DASARATH GHOSH. **63 I.C. 109= 36 C.L.J. 73=A.I.R. 1921 Cal. 453.**

—S. 115—Parties and Privies — Auction-purchaser.

———Although a person holding a ganti interest in the land and granting a permanent lease of the same land will be estopped from asserting his right as a ryot, the purchaser of that interest at an auction sale, who obtains a new title from the landlord at an increased rent, will not be so estopped. (*B. B. Ghose and Roy, JJ.*). JALADHAR MONDAL v. AMRITA LAL. **105 I.C. 641= A.I.R. 1928 Cal. 87.**

———An execution purchaser is the representative of the judgment-debtor so as to bring him within the rule of estoppel and the principle of *res judicata*: A. I. R. 1922 Pat. 63, *Foll.* (*Das and Foster, JJ.*). MAHARAJA BAHADUR SINGH *v.* A. H. FORBES. **97 I. C. 205=1926 P. H. C. C. 249= A. I. R. 1926 Pat. 478.**

—S. 115—Parties and Privies—Father and son.

———Consent of father and grandfather to an adoption does not bind the son or grandson. (*Harrison and Dalip Singh, JJ.*). ZOLI *v.* KHAJANA. **96 I. C. 749=8 Lah. 48=A. I. R. 1926 Lah. 654.**

—S. 115—Parties and Privies — Husband and wife.

———A widow claiming through her husband cannot impeach a settlement come to by her husband with other members of the family whereby he released by necessary implication the interest which he had in the property. (*Lord Phillimore.*) DADABHOY *v.* COWASJI DORABJI. **94 I. C. 535= A.I.R. 1925 P. C. 306 (P.C.).**

—S. 115—Parties and Privies—Party bound.

———When a lease, purporting to be of a permanent character, is granted by a person who, on the face of the document, confesses to have a higher status than that of a raiyat, the grantee may invoke the doctrine of estoppel against the grantor and the persons claiming through him.

EVIDENCE ACT (1872), S. 115—Parties and Privies—Party bound.

The question of invalidity of the lease may be raised by the landlord or a person claiming through him or by some one who has a permanent title, but notby the grantor or any one claiming through him. A. I. R. 1921 Cal. 451 (F.B.), *Foll.*; 13 C.L.J. 649 and 17 C.W.N. 59, *Ref.* (*Cuming and Roy, JJ.*). JOGENDRA CHANDRA *v.* MONMOHINI DEBI.

105 I. C.290=A.I.R. 1928 Cal. 156.

———A person represented that a lady was full owner of a certain property, and accepted a transfer of a portion of it from her.

Held; that he could not be allowed to deny the truth of the representation in a suit between himself and the representatives of the lady. This is exactly the kind of estoppel defined in S. 115, Evidence Act. (*Dalal, J. C. and Neave, A. J. C.*). MOHAMMAD HASAN *v.* ALI HAIDER. **85 I. C. 509= 12 O.L.J. 1=28 O. C. 8=A.I.R. 1925 Oudh 337.**

—S. 115—Parties and Privies—Representative.

———Estoppel is purely personal and will not affect others in so far as they claim a title otherwise than through the person estopped primarily. 14 Cal. 401, *Foll.* (*Mukerji, J.*). UMARAM GOGOI *v.* FURUK CHAND OSWAL. **85 I.C. 540= A.I.R. 1925 Cal. 993.**

———An estoppel available to a certain person will be available to his transferees in respect of the interest transferred. (*Dalal, J.C. and Neave, A.J.C.*). MOHAMMAD HASAN *v* ALI HAIDAR.

85 I. C. 509=12 O. L. J. 1=28 O.C 8= A. I. R. 1925 Oudh 337.

—S. 115—Parties and Privies—Reversioners.

———No act or omission by presumptive reversioners can amount to estoppel against actual reversioners. (*Sulaiman and Sen, JJ.*). MUHAMMAD ABDUL KARIM KHAN *v.* BISHAN SAHAI.

121 I. C. 387=1929 A. L. J. 741= A. I. R. 1930 All. 9.

———Probate obtained by widow on the nearest reversioner's withdrawing objections—A remote reversioner can contest proceedings and he is not estopped. 27 C. L. J. 320, *Appl.* (*Greaves and Mukerji, JJ.*). SHAMA CHARAN DE *v.* REEBALA DASSI. **96 I.C. 682=30 C.W.N. 567= A.I.R. 1926 Cal. 792.**

—S. 115—Parties and Privies—Third parties.

———Mere fact that son's widows of original mortgagees lived in ancestral house and meddled with outstanding debts does not estop heirs from suing for possession of mortgaged land of which the widows give discharge. (*Johnstone, J.*). SARUPA *v.* MT. DHUNDAN. **122 I.C. 89=11 L.L.J. 219= A.I.R. 1930 Lah. 286.**

———*Co-sharers—Recognition of tenancy by one co-sharer landlord—Effect.*

In order that a recognition of tenancy by a co-sharer landlord may be effective against a third party such an admission must have been, at the time when it was made, against the interest or capable of affecting the interest of the person making it, and so recognition of a tenancy by a co-sharer landlord after the property has been allotted to another co-sharer in the collectorate partition is not binding upon the latter co-sharer. (*Das and Rowland, JJ.*). PARMESHARI PRASAD SINGH *v.* RAMGATIA.

120 I.C. 44=11 P.L.T. 99=A.I.R. 1930 Pat. 149.

—S. 115—Parties and Privies —Transferee.

———Mahomedan lady executing mortgage attested by her brother to raise money to meet his debts—Mortgagee bringing suit on mortgaged property—Property purchased pending suit—Purchaser suing for cancellation of delivery order—Purchaser held not estopped from setting brother's rights in mortgage property. (*Ananthakrishna Ayyar, J.*). MD. ISMAIL SAHEB *v.* RASOOL BI. **123 I.C. 42= A.I.R. 1930 Mad. 567.**

EVIDENCE ACT (1872), S. 115—Plea under.

———Gift by a widow—Next reversioner's assent—A transferee from such reversioner is not estopped from challenging the gift. (*Gokul Prasad, J.*). RAM DAYAL *v.* MITHOO LAL. **71 I. C. 287= A.I.R. 1923 All. 410.**

—S. 115—Parties and Privies—Two capacities.

———Anything done by a person in his representative character cannot create an estoppel on what is a personal claim by himself by a perfectly different arrangement: A.I.R. 1927 Oudh 341, *Affirmed.* (*Viscount Dunedin*). RAM HARAKH *v.* HANWANT RAM. **A.I.R. 1930 P. C. 249 (P. C.).**

———Partition decree—Some lands, liable to be sold for revenue due on another estate, allotted to one party—Land sold in revenue sale and purchased by other party—Such party is not estopped from enforcing his rights. (*Sir John Wallis*). KRISHNA PROMADA DASI *v.* DHIRENDRA NATH GHOSH.

113 I. C. 465=56 Cal. 813= 56 I. A. 74=33 C. W. N. 289= 49 C. L. J. 112=A. I. R. 1929 P. C. 50 (P. C.).

———Admission of *wakf* by *mutwalli* does not estop him from claiming a share in it as heir, if *wakf* is void. (*B.B. Ghose and Roy, JJ.*). RUKAYA BANU *v.* NAZIRA BANU. **105 I.C. 647= 55 Cal. 448=32 C.W.N. 248=A.I.R. 1928 Cal. 130.**

———*Under-proprietorship by estoppel.*

Act of the Deputy Commissioner, holding a person's estate as manager on behalf of the Court of Wards, in describing persons in possession as under-proprietors or in accepting rents from their mortgagees cannot create a title as under-proprietor by estoppel in favour of them: A.I.R. 1924 P.C. 213, *Foll.* (*Stuart, C.J. and Wazir Hasan, J.*). JHAGOO SINGH *v.* DEPUTY COMMR. PRATABGAR.

101 I.C. 803=A.I.R. 1927 Oudh 538.

———Release of interest as the heir of father is not bar to a claim to inherit a share after the brother's death. *Halsbury's Laws of England*, Vol. X, page 461, *Foll.*; 20 Cal. 373, *Dist.* (*Martineau and Campbell, JJ.*). YUSAF ALI *v.* ALI BHOY.

83 I. C. 776=A. I. R. 1923 Lah. 8.

—S. 115—Pleadings.

———*Change of.*

Where the plaint allegation was that the position of *K* under a certain award was that of a trustee for the plaintiff but in appeal the plaintiff's counsel urged that *K* had only a life-interest in the property but the other allegations were stuck to,

Held, that the plaintiff did not change her case so completely as to be estopped from urging what were the positions of the respective parties under the award. (*Mukerji, J.*). MT. DURGA KUNWAR *v.* MT. CHUNNA KUNWAR. **78 I.C. 633= 5 L.R.A. Civ. 276=A. I. R. 1924 All. 862.**

—S. 115—Plea under.

———Defence of estoppel can always be taken if it is warranted by the facts proved or admitted even if those facts have not been specifically pleaded. (*Heald, Offg. C.J. and Chari, J.*). CO-OPERATIVE TOWN BANK OF PADIGON *v.* SHANMUGAM PILLAY. **125 I.C. 365=8 Rang. 223= A.I.R. 1930 Rang. 265.**

———Where plea of estoppel is not set up in the pleadings or issues it cannot be availed of later, because estoppel is eminently a matter of pleadings. (*Wallace and Madhavan Nair, JJ.*). PAPAMMAL *v.* ALAMELU AMMAL.. **119 I.C. 152= A.I.R. 1929 Mad. 467.**

EVIDENCE ACT (1872), S. 115—Plea under.

———*To whom available.*

Only the person to whom the representation was made or for whom it was designed can avail himself of it. If however, the declaration was intended to be general, then, it seems that one who did not hear it, but to whom it was made known directly afterwards or within the time to be allowed for acting upon it, may act upon it.

A declaration in the sale proclamation by the decree-holder that the property advertised for sale is not subject to any encumbrance does not act as estoppel as against him in favour of a purchaser of the property privately from the judgment-debtor and not in auction sale to which the proclamation related : *Case law discussed.* (*Greaves and Mukerji, JJ.*). JOGESHCHANDRA *v.* ENTAZ ALI.

97 I.C. 625=A.I.R. 1927 Cal. 34.

———The rule of estoppel is a rule of evidence and ought to be pleaded with sufficient clearness. (*Das and Ross, JJ.*). SHAIKH ABDUL RAHIM *v.* MT. BARIRA. **61 I.C. 807=2 P.L T. 556= 6 P.L.J. 273=A.I.R. 1921 Pat. 166.**

———*Nature of.*

Per *Kemp, A.J.C.*—Estoppel being a rule of evidence is not proper to be set out in a plaint which should confine itself to facts. It is a rule of evidence and not a cause of action. (*Fawcett, J. C., Crump and Kemp, A. J. Cs.*). BANUMAL *v.* NEWANDMAL. **83 I.C. 360=16 S.L.R. 207= A.I.R. 1921 Sind 159 (F.B.).**

—S. 115—Pre-emption.

———Successful pre-emptor dying—Vendor succeeding as legal representative of pre-emptor—Vendor is not estopped from taking benefit of decree. (*Sulaiman and Kendall, JJ.*). BINDRABAN *v.* DURAG SINGH. **1930 A.L.J. 369= A.I.R. 1930 All. 220.**

———*Consent to a transfer—Effect.*

By consenting to a transfer a person disqualifies himself from pre-empting and loses his right of pre-emption altogether. He is then estopped not only as against the vendor and the vendee but also against a rival pre-emptor. (*Sulaiman and Pullan, JJ.*). RAM DAWAN SHUKAL *v.* RAM SURAT. **117 I.C. 345=1929 A.L.J. 935= A.I.R. 1929 All. 589.**

———*Co-sharer—Refusal to purchase—Effect.*

A co-sharer intended to sell his share. Other co-sharer refused to purchase the share, on the ground that he had no money to make the purchase, but without showing his intention to reserve his right to pre-empt subsequently, and thereby induced the vendee to purchase the share on the belief that this other co-sharer had waived his right to pre-empt. In a suit for pre-emption by the other co-sharer,

Held, that there was absolute refusal to purchase the share and he would now be estopped from going behind his refusal and claiming a right to pre-empt although no notice was given under S. 14, Agra Pre-emption Act: 6 All. 463; 27 All. 670 and 5 A.L.J. 331, *Not appr.*; 39 All. 127; 15 A.L.J. 315; 40 All. 690, *Dist.*; A.I.R. 1926 All. 467, *Rel. on.* (*Sulaiman and Kennedy, JJ.*). RAMESHAR PRASAD *v.* GHISIAWAN PRASAD. **121 I.C. 241= 1929 A.L.J. 665=51 All. 820= A.I.R. 1929 All. 531.**

———*Appeal.*

Withdrawal by the vendee of the money paid in the lower Court under its decree by the pre-emptor does not debar the vendee from appealing against that decree: 16 P.R. 1907; 83 P.R. 1912 and A.I.R. 1926 All. 661, *Foll.*; 82 P.R. 1868, *Over-*

EVIDENCE ACT (1872), S. 115—Question of law.

ruled by 31 P.R. 1907 and 76 P.L.R. 1906, *Dist.* and *Dist. from.* (*Tek Chand, J.*). MEHDI *v.* MT. NADRAN. **111 I.C. 814=A.I.R. 1929 Lah. 137.**

———Pre-emptor party to suit by village landlords challenging sale to be pre-empted—Sale confirmed by compromise decree—Right of pre-emption cannot be exercised. (*Lord Shaw.*) RIKHI RAM *v.* DHANPAT RAI. **110 I.C. 1=10 Lah. 75= 55 I.A. 266=48 C.L.J. 158=33 C.W.N. 90= 30 P.L.R.1=A.I.R. 1928 P.C. 190 (P. C.).**

———The Mukhtar-am of the vendor, who took part in the proceedings relating to the sale and subsequently purchased part of the property sold to the vendee, on account of his having taken part in the negotiation relating to the sale is not estopped from resisting the plaintiffs' claim, of whom he is co-sharer and with whom he is on equal footing and who as such have no preferential right as against him, and so he is entitled to say that as the property has now come into his hands, he being a co-sharer of the plaintiffs, they have no preference over him. 29 All. 125, *Foll.* (*Sulaiman and Banerji, JJ.*). BOHRA GANGA PRASAD *v.* POORAN. **108 I.C. 157=26 A.L.J. 89.**

———The applicability of the rule of estoppel by acquiescence in cases of pre-emption in the Province of Oudh cannot be questioned. 22 O.C. 323; 10 O.C. 257; 5 O.C. 395 and 1 O.C. 254, *Foll.* (*Ashworth and Gokaran Nath Misra, JJ.*). JAGANNATH PERSHAD *v.* CHANDI PERSHAD. **93 I.C. 640= 29 O.C. 327=13 O.L.J. 212=3 O.W.N. 356= 1 Lnck. 68=A. I. R. 1927 Oudh 86.**

———Where the vendor has offered property to the pre-emptor at a price higher than that ultimately accepted by him from vendee the pre emptor is not estopped from asserting his right by reason of his refusal to buy the property. (*Martineau and Zafar Ali, JJ.*). NATHA SINGH *v.* SUNDAR SINGH. **92 I.C. 258=7 L.L.J. 559=26 P. L. R. 835= A.I.R. 1926 Lah. 10.**

———The person to whom a notice has been given to the effect that a property is going to be sold and who intimates his refusal to purchase cannot be allowed, after the sale has been made after his refusal, to turn round and seek to enforce his right of pre-emption through the Court. The doctrine of estoppel applies to all sorts of cases including pre-emption cases. (*Lindsay and Kanhaiya Lal, JJ.*). OON MAHOMED *v.* BINT ZOHRA. **87 I.C. 414= 6 L.R.A. Civ. 300=A.I.R.1925 All. 645.**

———Party consenting to sale to vendee cannot pre-empt—Taking active part in collecting money and in effecting registration amounts to acquiescence. 7 P.R. 1912, *Dist.* (*Harrison and Zafar Ali, JJ.*). BHAGAT RAM *v.* RAGHBAR DIAL. **79 I.C. 132=A.I.R. 1925 Lah. 57.**

———Accepting money from the vendee in satisfaction of mortgage does not estop mortgagee from pre-empting. (*Broadway and Brasher, JJ.*). KAUSHI RAM *v.* BHOJARAM. **69 I. C. 648= A. I. R. 1924 Lah. 159.**

—S. 115—Public policy.

———*Adoption by a dancing girl.*

An adoption by a dancing girl for purposes of prostitution is invalid. Such an adoption cannot be validated on the ground of estoppel as an estoppel cannot defeat a prohibition based on the ground of public policy. (*Ayling and Coutts-Trotter, JJ.*). KANDAIYA PILLAI *v.* CHOKKAMMAL. **59 I. C. 214=28 M. L. T. 106=12 L. W. 7.**

—S. 115—Question of law.

———Applicability of a case cited is a pure question of law and no question of estoppel arises.

EVIDENCE ACT (1872), S. 115—Question of law.

(*Mullick. Ag. C. J. and Jwala Prasad, J.*). RAMSARUP RAUT *v.* RAM NARAIN TEWARY.

114 I. C. 479=7 Pat. 85=10 P. L. T. 399=A. I. R. 1929 Pat. 32.

———There cannot be any estoppel on a point of law going to the jurisdiction of the Court. (*Dalip Singh, J.*). RAM SINGH *v.* IMPERIAL BANK OF INDIA, LTD., RAWALPINDI.

A. I. R. 1928 Lah. 802.

———*Construction of document.*

Per *Ashworth, A.J.C.*—The question of the proper construction to be placed on a deed is a question of law and there can be no estoppel by a pleading of law inasmuch as the other side must be presumed to know what the law is. (*Kanhaiya Lal, J. C. Daniels and Ashworth, A.J.C.*). SARSUTI PRASAD *v.* EHTISHAM ALI. **77 I. C. 310=25 O.C. 349=A.I.R. 1923 Oudh 123.**

—S. 115—Recitals.

———Recitals in deed—Executant is not necessarily estopped from denying. 1 Lah. 137, *Expl.*; 40 All. 593 (P.C.), *Dist.* (*Jai Lal, J.*). SHIWALA MAHADEO *v.* LACHHMAN. **96 I.C 440=8 L. L. J. 291=27 P. L. R. 581=A.I.R. 1926 Lah. 471.**

—S. 115—Representation—Absence of.

———Person misled by mistaken legal advice and not by representations by another—The other is not estopped. (*Lord Phillimore.*) VERTANNES *v.* ROBINSON. **102 I.C. 639=5 Rang. 427=54 I.A. 276=29 Bom. L.R. 1017=1927 M.W.N. 492=39 M.L.T. 134=25 A.L.J. 713=46 C.L.J. 126=31 C.W.N. 1078=26 M.L.W. 417=A.I.R. 1927 P.C. 151=53 M.L J. 71 (P. C.).**

———Where a Mahomedan widow who had one-eighth share, alienated property on behalf of her minor children but it did not appear either from the recitals or from evidence on record that she intended or contracted to transfer property, or any portion thereof in her own individual right,

Held, the alienation was not valid to the extent of her share. (*Kinkhede, A. J. C.*). GULAM JAFAR *v.* RAMDHAN. **103 I.C. 209=A I.R. 1927 Nag. 290.**

———*No question of estoppel arises.*

P sued *D* for possession on the basis of the expiry of a lease. *D* claimed to be an occupancy tenant and the matter went up to the Privy Council. While the appeal was pending *D* transferred his right to *R*. *P* therefore impleaded *R* as party in the appeal. *D* was ultimately declared as the occupancy tenant. *P* then instituted this suit to eject *R* as a mere trespasser.

Held, there is nothing even remotely of the nature of an estoppel in this case. The plaintiffs neither in the petition nor in the presenting of it made any representation that transferees had acquired any title to the lands in question or were tenants of those lands either with or without a right of occupancy. The position of the plaintiffs then was and still is that transferees were trespassers without any title to the possession of or interest in the lands in question. (*Sir John Edge.*) DAMODAR NARAIN *v.* S. A. MILLER. **69 I.C. 134=16 M. L.W. 692=31 M. L.T. 205=4 P.L.T. 199=27 C.W.N. 461=21 A.L.J. 365=A.I.R. 1922 P.C. 349=44 M.L.J. 723 (P. C.).**

—S. 115—Representation—Action on.

———In the absence of any evidence to prove that the plaintiff acted on the faith of any representation made by the defendant, the question of estoppel does not arise. (*Kumaraswami Sastri, J.*). SHYAMA BHAI *v.* PURUSHOTHAMADOS.

90 I.C. 124=21 M.L.W. 551=A.I.R. 1925 Mad. 645.

EVIDENCE ACT (1872), S. 115—Representation—Lease.

—S. 115—Representation—Adoption.

———Where, in a dispute regarding family property, settlement was effected between *B* and *W* (a female member) and property was partitioned between them and *B* agreed that *W* would be at liberty to adopt any person as her son and in pursuance of the compromise between them *W* adopted a son.

Held, that whatever the legal position as regards the validity of the adoption may be, *B* is estopped from questioning the adoption by *W*: 34 All. 398 (P.C.) and 15 Mad. 486, *Rel. on.* (*Bhide, J.*). MT. ICHHNUN *v.* BANWARI LAL. **114 I.C. 711=A.I.R. 1929 Lah. 16.**

—S. 115—Representation—Application for sanction.

———Where a party led another to apply for sanction to validate a sale he cannot plead that that sanction will not validate the sale. (*Fawcett and Coyajee, JJ.*). KARSANDAS KALIDAS *v.* CHHOTALAL MOTICHAND. **77 I. C. 275=48 Bom. 259=25 Bom. L.R. 1037=A.I.R. 1924 Bom. 119.**

—S. 115—Representation—Award.

———Where one party to the award led another to believe to his prejudice that he is going to abide by the award he is estopped from contesting it. The fact that he signed the award does not however by itself render it more binding on him. 6 C.P.L. R. 95, *Foll.* (*Baker, Offg. J. C.*). CHOWDHARI MANOHAR LAL *v.* MT. AMANO. **77 I.C. 41=A.I.R. 1924 Nag. 14.**

—S. 115—Representation—By mortgagor.

———*Auction-purchaser with knowledge of defect—Protected.*

When a person mortgages a property falsely representing it as his own, and after inheriting it subsequently, claims to recover the same, contending that he had no right to mortgage it, the auction-purchaser gets a good title even if he had knowledge of the facts provided the mortgage was unaware. (*Greaves and Ghose, JJ.*). SARODA PRASAD BANERJEE *v.* GOSTA BEHARI HAZRA. **70 I.C. 385=27 C.W.N. 943=36 C. L.J. 78=A.I.R. 1922 Cal. 542.**

—S. 115—Representation—Carrier.

———Consignor's agent—Representation to Railway and getting reduced rate thereby creates estoppel. (*Daniels and Neave, JJ.*). RAGHUNANDAN RAM *v.* G. I. P. RY. **81 I.C. 1=46 All. 649=22 A.L.J. 645=5 L.R.A. Civ. 396=A.I.R. 1924 All. 692.**

—S. 115—Representation—Finding of.

———Finding as to representation by one inducing another to do an act is one of fact. (*Venkatasubba Rao, J.*). MD. BATCHA SAHIB *v.* ARUNACHALAM CHETTIAR. **90 I.C. 875=1925 M.W.N. 596=A.I.R. 1926 Mad. 39=49 M.L.J. 396.**

—S. 115—Representation—Knowledge unnecessary.

———Section 115 does not require that a person, who by his declarations or conduct induces a belief in the mind of the other, must of a necessity have been aware of his rights: 20 Cal. 296 (P.C.) and A.I.R. 1925 P.C. 146, *Foll.* (*Sulaiman and Iqbal Ahmad, JJ.*). MATA DAYAL LAL *v.* LALJI SAHAI. **106 I.C. 524=25 A. L. J. 878=A.I.R. 1927 All. 838.**

—S. 115—Representation—Lease.

———Lessee requesting permission of lessor to build leasehold—Lessor informing that lease was permanent and that lessee had a right to build—Lessee building accordingly—Lessor cannot evict lessee

EVIDENCE ACT (1872), S. 115—Representation —Lease.

on the ground that lease was not permanent: 1 H.L. 129; 28 Cal. 693 (P.C.); 20 Cal. 296 (P.C.), *Rel. on.* (*Mr. Ameer Ali.*) FORBES *v.* RALLI.

87 I. C. 318=52 I.A. 178=6 L.R.P.C. 119= 1925 M.W.N. 453=23 A.L.J. 548= 27 Bom.L.R. 860=41 C.L.J. 543=2 O.W.N. 514= 6 P.L.T. 404=4 Pat. 707=30 C.W.N. 49= A.I.R. 1925 P.C. 146=49 M.L.J. 48 (P. C.).

———Property taken on lease for public purposes—Public purposes forming part of consideration for lease—Lessee or his successors cannot be allowed to claim absolute interest. (*Suhrawardy and Duval, JJ.*). PEARY LAL MULLIK *v.* SURENDRA NATH. **88 I. C. 505=A.I.R. 1925 Cal. 1233.**

—S. 115—Representation—Nature of.

———In order that representation may operate as an estoppel, it must be representation of an existing fact and not of a mere intention or of future promises. Estoppel does not confer any title but is merely a rule of evidence which prevents one party from denying the existence of a fact which he represented as existing and upon which representation another person has been induced to act to his detriment. (*B.B. Ghose and Panton, JJ.*). HINDUSTHAN CO-OPERATIVE INSURANCE SOCIETY *v.* SECRETARY OF STATE. **121 I. C. 737= 56 Cal. 989=A. I. R. 1930 Cal. 230.**

———A representation that the interests of a deceased had devolved upon the persons making the representation is a "thing" within the meaning of S. 115 as it is not a question of law but is mixed question of law and fact. (*Mukerji and Mallick, JJ.*). BARKAT ALI *v.* TRASANNA KUMAR. **33 C. W. N. 873=A.I.R. 1929 Cal. 819.**

———*Representation, of a mere opinion or of a point of law.*

No estoppel can ensue upon a representation, not of a fact, but of a mere opinion or of a point of law. If, therefore, a person alters his position, to his detriment, by acting on the representation of a mere question of opinion or a matter of law which would be equally accessible to both the parties, no estoppel could arise. But where there has been a representation as to the existence of a fact to a certain person and the latter believes it and acts upon it and his position is altered, so that he cannot be put back to his original position at all, at any rate, without great loss and inconvenience, estoppel will undoubtedly ensue. 30 All. 549; 34 All. 398 (P. C.); *Frederick Bloomenthal* v. *James Ford*, (1897) A. C. 156, *Rel. on*; A. I. R. 1925 P. C. 118 (P. C.) and 19 W. R. 12 (P. C.), *Dist.* (*Sen and Niamatullah, JJ.*). DHARAM PRAKASH *v.* MT. KALAWATI DEVI. **110 I.C. 665= 50 All. 885=26 A.L.J. 1106= A.I.R. 1928 All. 459.**

———*Promises* de futuro.

The doctrine of estoppel by representation is applicable to some state of facts alleged at the time to be in existence and not to promises *de futuro* which if binding at all, must be binding as a contract. *Maddison* v. *Alderson*, (1883) 8 A. C. 473, *Foll.* (*Rupchand Bilaram, A.J.C.*). DEVIBAI *v.* DAYABHOY MOTILAL. **89 I.C. 164= A. I. R. 1926 Sind 42.**

———*Inducing belief in validity of custom.*

The fact that defendant induced the belief that a custom was valid is not such a belief as is referred to in S. 115 of the Act, that is to say, a belief in the truth of a "thing" which means a belief in a fact. Where the act complained of was not done with the intention of inducing the result

EVIDENCE ACT (1872), S. 115—Representation —Payment under.

and where the act complained of was not the case of the belief in ,the truth of a thing, which means a belief in a fact, *held*, estoppel was not created. (*Martineau, J.*). RAMJI DAS *v.* JAI GOPAL. **69 I.C. 431=A.I.R. 1923 Lah. 244.**

—S. 115—Representation—Omission to object.

———*Attachment of decree—Omission to object—Effect.*

Where the Chairman and the Manager of a bank have arranged, between themselves without actual knowledge on the part of other officers of the bank, the assignment of a decree by the Chairman to the Bank, the Bank cannot claim the benefit of that assignment without the accepting liability for knowledge on the part of the Chairman and Manager of a subsequent attachment of the decree which had been assigned. If in such a case the bank by its omission to object to that attachment of the decree leads the attaching decree-holder of the assignor Chairman to believe that the decree was still the property of his judgment-debtor at the time of the attachment, and to act on that belief in giving credit for the amount recovered by execution of the decree which he attached, the bank is estopped from denying that the Chairman was still owner of the decree attached at the time of attachment. (*Heald, Offg. C.J. and Chari, J.*). CO-OPERATIVE TOWN BANK OF PADIGON *v.* SHANMUGAM PILLAY. **125 I. C. 365=8 Rang. 223= A. I. R. 1930 Rang. 265.**

—S. 115—Representation—Pardanashin Lady.

———Where the executant is a *pardanashin* and uneducated lady and she is made to agree to sell her property on the understanding that a forfeiture clause will be operative in her favour and it is not explained to her that such a forfeiture was illegal and unenforceable, then if the defendant wishes to stick to the transaction he cannot be allowed to repudiate the forfeiture clause on the strength of which the executant's consent had been obtained. (*Sulaiman and Kendall, JJ.*). ALTAF BEGAM *v.* BRIJ NARAIN. **116 I.C. 855=51 All. 612= 1929 A.L.J. 367=A.I.R. 1929 All. 281.**

—S. 115—Representation—Partners.

———Where one person bids at an auction sale and after acceptance of his bid another person representing himself to be a partner with the first joins him in making initial deposit, the second person becomes a co-contractor or co-lessee and not a sub-lessee or transferee and is estopped from denying his liability thereunder. (*Kumaraswami Sastri and Walsh, JJ.*). MUNICIPAL COUNCIL, TIRUVARUR *v.* P. R. KANNUSWAMI PILLAI. **1930 M.W.N. 140=53 Mad. 352= 31 M. L. W. 271=A.I.R. 1930 Mad. 600= 58 M.L.J. 377.**

—S. 115—Representation—Patta.

———Per *Ramesam, J.*—A person having induced the Revenue Authorities to issue a patta in the name of another and himself is estopped from contending that the other has no title. (*Spencer and Odgers, JJ.*). LAKSHMINARASIMHAM *v.* VENKATARUTNAYAMMA. **70 I. C. 642= 30 M.L.T. 334=A.I.R. 1921 Mad. 645.**

—S. 115—Representation—Payment under.

———*A* made advances to *B* on the assurance given by *C*, who also was requested by *A* that money due to *B* by *C* should be paid to *A* direct. After a cheque drawn in favour of *A* by *C* was presented for payment, it was dishonoured, *C* having stopped payment to *B* in the meanwhile having discovered misconduct on *B's* part.

EVIDENCE ACT (1872), S. 115—Representation —Pre-emption.

Held, that *A* was entitled to recover and C was estopped from denying that bills due to *B* were in order. (*Sanderson, C. J. and Buckland, J.*). B. N. RY. CO. LTD. *v.* CO-OPERATIVE HINDUSTHAN BANK LTD. **97 I.C. 606=53 Cal. 622= A.I.R. 1926 Cal. 1089.**

—S. 115—Representation—Pre-emption.

———Where, however, a pre emptor has previously expressed his clear intention not to pre-empt the property on any account and has waived his objection in unequivocal language to the property being sold to the vendee, he is estopped personally from pre-empting afterwards, even though the exact share or price at which it was going to be sold was not mentioned to him. 6 All. 463 ; 27 All. 670 ; 5 A.L.J. 331 ; A.I.R. 1926 All. 467, *Ref.* (*Sulaiman and Sen, JJ.*). BASIRA BIBI *v.* SHEIKH ATA ULLAH. **118 I.C. 170=1929 A. L.J. 528= A.I.R. 1929 All. 453.**

—S. 115—Representation—Reversioner.

———*Consent to a family arrangement—Effect.*

Next presumptive reversioners consenting to and joining in a family arrangement thereby agreeing to an acceleration of part or whole of the estate by limited owner are estopped from challenging the same if it has been acted upon provided the agreement is not opposed to the nature of estate vesting in the reversioners. A.I.R. 1922 All. 297 ; A.I.R.1923 All. 387 (F. B.) and A.I.R. 1918 P. C. 70, *Rel. on ; Cases discussed.* (*Mukerji and Bennet, JJ.*). POKHAR SINGH *v.* MT. DULARI KUNWAR. **A.I.R. 1930 All. 687**

———Where a reversioner for good consideration agrees not to lay claim to a property when the succession opens out, he must in equity be held bound by that agreement : A.I.R. 1918 P. C. 70; A.I.R. 1926 All. 715, *Rel on* and A.I.R. 1923 All. 387 (F. B.), *Dist.* (*Sen and Niamatullah, JJ.*). RAGHUBIR *v.* NARAIN. **A.I.R. 1930 All. 498.**

———*Relinquishment by—Effect.*

Where a widow transfers by gift a portion of her husband's property and the reversioners execute a deed of relinquishment whereby they purport to renounce and relinquish whatever rights and whatever interest they might conceivably possess under the Hindu Law in respect of the property covered by the deed of gift and expressly covenant that at no time hereafter will either of them or their heirs successors or representatives, set up any right or claim or whatsoever to the property.

Held, that they cannot sue to have the gift deed set aside even when the succession opens in their favour. 45 C. 590, (P. C.), *Cons.* ; 44 Bom. 488, *Dist.* ; A.I.R. 1922 All. 297, *Affirmed.* (*Mears, C.J. Banerjee, Piggott, Walsh and Ryves, JJ.*). FATEH SINGH *v.* THAKUR RUKMINI RAWANJI MAHARAJ. **72 I.C. 8=45 All. 339=21 A.L.J. 235= 4 L.R.A. Civ. 392=A.I.R. 1923 All. 387.**

———Hindu Law—Alienation—Hindu widow—Gift—Reversioner joining in the alienation and consenting to alienation is estopped from disputing it later A.I.R. 1917 P.C. 95 ; A.I.R. 1918 P. C. 140, *Ref. to* ; 3 All. 362, *Ref. to.* (*Tudball and Sulaiman, JJ.*). MAHADEO PRASAD SINGH *v.* MATA PRASAD. **63 I. C. 721=44 All. 44= 19 A. L. J. 799=A.I.R. 1922 All. 297.**

—S. 115—Representation—Status.

———Plaintiff describing defendant's status as that of *raiyat* in lease—Defendant acting upon it—Plaintiff is estopped from saying to the contrary later on. (*Mookerjee and Rankin, JJ.*). ISWAR CHANDRA NATH *v.* GOUR SUNDAR NATH. **82 I.C. 90=39 C.L.J. 337=A.I.R. 1923 Cal. 608.**

EVIDENCE ACT (1872), S. 115—Scope of.

—S. 115—Representation—Validity of document.

———Person taking under a will which could be repudiated, and paying maintenance to testator's widow as provided in the will—He cannot subsequently repudiate the will so as to defeat widow's right. (*Kumaraswami Sastri and Ramesam, JJ.*). LAKSHMAMMA *v.* SREERAMULU. **104 I. C. 650= A.I.R. 1927 Mad. 1066.**

—S. 115—Representation—Validity of transaction.

———A party to a contract for a sale inducing a belief in a subsequent purchaser of a property that he has no right over the property—The right under the contract cannot subsequently be enforced. (*Wazir Hasan, J.*) JIA LAL *v.* MT. SAERA BIBI. **99 I. C. 2=3 O. W. N. (Sup.). 273= A.I.R. 1927 Oudh 104.**

———When a person mortgages a property falsely representing it as his own, and after inheriting it subsequently, claims to recover the same, contending that he had no right to mortgage it, the auction-purchaser gets a good title even if he had knowledge of the facts provided the mortgagee was unaware. The burden of proving mortgagee's knowledge is upon the mortgagor. (*Greaves and Ghose, JJ.*). SARODA PROSAD BANERJEE *v.* GOSTA BEHARI HAZRA. **70 I.C. 385=27 C. W. N. 943= 36 C. L. J. 78=A. I. R. 1922 Cal. 542.**

———Sikh, desiring son marrying Arain woman with relatives' consent—Son born—Relatives are estopped from questioning legitimacy. (*Leslie Jones and Broadway, JJ.*). LACHMAN SINGH *v.* PARTAP SINGH. **67 I. C. 937=3 L.L.J. 366= A.I.R. 1921 Lah. 251.**

—S. 115—Scope of.

———Rule of estoppel although primarily rule of evidence affects substantive rights. (*Sen and Niamatullah, JJ.*) MT. WAHIDAN *v.* NAZIR KHAN. **A. I. R. 1930 All. 434.**

———A party relying upon S. 115 of the Evidence Act has to establish not only that the opposite party had made a certain declaration but that the said declaration had been believed and had been actod upon and that it was not reasonably possible for the said party to know the true state of affairs by pursuing enquiries reasonably and with diligence. Where truth is accessible to party the plea of estoppel upon representation fails. (*Sen and Niamatullah, JJ.*). MAHOMED SHAFI *v.* MAHOMED SAID. **122 I. C. 871.**

———*Acts or declarations need not be intentional.*

The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself or must have acted with an intention to mislead or deceive. What the law and Indian Statute mainly regard is the position of the person who was induced to act and the principle on which the law and the statute rest is that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it. So long as there is no duty cast upon the person induced not to rely upon the inducer's statement but to make further inquiries the

EVIDENCE ACT (1872), S. 115—Scope of.

word "intentionally" is satisfied. 20 Cal. 296 (P. C.), *Foll.* (*Mukerji and Mullick, JJ.*). BARKAT ALI *v.* PRASANNA KUMAR. **33 C.W.N. 873= A. I. R. 1929 Cal. 819.**

———The existence of estoppel does not depend on the motive, or on the knowledge of the person making the representation and it is not essential that the intention of the parties whose declaration act or omission had induced another to act, or to abstain from acting should have been fraudulent or he should not have been under a mistake or misapprehension: 20 cal. 296 (P. C.), *Foll.* (*Sen and Niamatullah, JJ.*). DHARAM PRAKASH *v.* MT. KALAWATI DEVI. **110 I.C. 665=50 All. 885= 26 A.L.J. 1106=A.I.R. 1928 All 459.**

———The law enacted in S. 115 relating to estoppel does not differ from the English law on the subject. (*Shadi Lal, C.J. Broadway, Harrison, Tek Chand and Dalip Singh, JJ.*). KHAN GUL *v.* LAKHA SINGH. **111 I.C. 175= 9 Lah. 701=10 L.L.J. 413=30 P.L.R. 60= A.I.R. 1928 Lah. 609 (F.B.)**

———Questions of acquiescence and estoppel require very careful treatment. (*Walsh and Pullan, JJ.*). RAFI-ULLAH KHAN *v.* MT. MUMTAZ BEGAM. **102 I.C. 586=A.I.R. 1927 All. 609.**

———*Ashworth, J.*—In English law the general rule appears to be that a person who is a party to a deed is estopped from denying its contents, but to this general rule there is the exception that a receipt in a deed does not amount to an estoppel generally, either at law or in equity.

Section 115 is not exhaustive of the law of estoppel applicable to India.

A recital of a receipt in a deed will not operate as an estoppel, under any application of the principle embodied in S. 115 (as opposed to the terms of that section) because such recitals do not operate by way of estoppel in English law. (*Mukerji and Ashworth, JJ.*). BAZ BAHADUR SINGH *v.* RAGHUBIR PRASAD. **100 I.C. 1037=25 A.L.J. 572= 49 All. 707=A.I.R. 1927 All. 385.**

———*Parties to whom it is available.*

It makes no difference whether the persons against whom the estoppel is urged happen to be the defendants or the plaintiffs.

If the title of a plaintiff in a case in respect of a certain property has been admitted by the defendant or if the defendant's title has been admitted by the plaintiff and either of the parties to the case is estopped from denying the title of the other, it is difficult to perceive any distinction in the two cases.

If a plaintiff can assert his claim to a particular property, there being no estoppel in his way, and if he is entitled to a decree in respect of the property to which he is legally entitled, there is no reason why the plaintiff, whose title has been admitted by the defendant and which title the latter is estopped from denying, should not be given a decree in his favour. (*Gokaran Nath Misra, J.*). TEJ BAHADUR KHAN *v.* NAKKO KHAN. **99 I.C. 472= 3 O.W.N. 993=A.I.R. 1927 Oudh 97.**

———Where a party seeks to give evidence of a subsequent oral agreement modifying the terms of the written grant, he puts forward that agreement as true and relies upon the truth of that agreement. In the case of an estoppel, the party who pleads it does not profess to show that the representation made is true. On the contrary his case very probably is that the representation is false but that the person who made it should not be allowed to show that it is false. Sections 92 and 115 deal

EVIDENCE ACT (1872), S. 115—Silence.

with two entirely different topics and there is no conflict between the two. (*Venkatasubba Rao, J.*). MAHOMED BATCHA SAHEB *v.* ARUNACHELAM CHETTIAR. **90 I.C. 875=1925 M.W.N. 596= A.I.R. 1926 Mad. 39=49 M.L.J. 396.**

———No such principle can be laid down as that a person who states that any portion of a document is true and binding between the parties should not be allowed to state that any other recital in the document is false. (*Srinivasa Aiyangar, J.*) LODD GOVINDOSS KRISHNADASS *v.* MUTHIAH CHETTY. **A. I. R. 1925 Mad. 660=48 M.L.J. 721.**

———Does not override Civil P.C., O. XXI, R. 2. (*Kennedy, J. C. and Raymond, A.J.C.*). MOTOOMAL *v.* TEOOMAL. **79 I.C. 89=18 S.L.R. 51= A.I.R. 1925 Sind 140.**

———Estoppel must be very strictly interpreted and any point in doubt must be decided against the estoppel. (*Shadi Lal, C.J. and Le Rossignol, J.*). NIHAL SINGH *v.* NARAIN SINGH. **80 I.C. 525= 6 L.L.J. 45=A.I.R. 1924 Lah. 469.**

———*Estoppel and* res judicata—*Difference.*

Estoppel is a rule of evidence precluding a person from denying the truth of that thing which he has induced another person to believe to be true whereas *res judicata* is founded on the principle that there should be an end to litigation when once it has been decided between the parties. (*Dawson-Miller, C.J. and Coutts, J.*) KALI DAYAL *v.* UMESH PRASAD. **65 I.C. 266=1922 P.H.C.C. 33= 1 Pat. 174=3 P.L.T. 506=A.I.R. 1922 Pat. 63.**

—S. 115—Silence.

———Silence cannot operate as an estoppel unless it is established that there was duty to speak. (*Das and Fazl Ali, JJ.*). BHAGWANDUTT SINGH *v.* LACHMI NARAYAN SINGH. **119 I. C. 882= A.I.R. 1930 Pat. 150.**

———*Person being party to sale as* pro forma *defendant is not estopped from asserting title subsequently.*

There is no duty cast upon a person who is made *pro forma* defendant in the suit under B. T. Act, S. 148-A, to give notice to intending purchasers that the rent-suit or the execution sale or the proceedings in execution are not such as to confer title on the purchaser as contemplated under the special provision of S. 158-B, of the Bengal Tenancy Act. His silence cannot influence the conduct of the auction-purchaser, in any way and it cannot be said that the person keeping silent will be estopped from asserting his title. (*B. B. Ghose, J.*). SURENDRA NATH BANDOPADHYA *v.* JABED ALI TALUKADAR. **85 I.C. 747=A.I.R. 1926 Cal. 420.**

———Mere silence or omission to act does not create estoppel unless there is a duty to speak. (*Mukerji, J.*). UMARAM GOGOI *v.* PURUK CHAND OSWAL. **85 I.C. 540=A.I.R. 1925 Cal. 993.**

———Non-intervention in mortgage suit by *A* against *B* regarding property which, subsequent to the mortgage, was allotted in partition to *C* does not estop *C* from recovering the property when it has been sold in execution of mortgage decree. (*Daniels and Neave, JJ.*). NARAIN *v.* RAM SARAN. **85 I.C. 490=22 A.L.J. 853=5 L.R.A. Civ. 751= A.I.R. 1924 All. 871.**

———The failure to object to the admissibility of evidence in time so as to enable the opposite party to amend his pleading estops one from raising the plea of inadmissibility subsequently. (*Das and Ross, JJ.*). CHHATERDHARI MAHTO *v.* NASIB SINGH. **78 I.C. 919=5 P.L.T. 551= A.I.R. 1924 Pat. 806.**

EVIDENCE ACT (1872), S. 115—Vendor and Purchaser.

—S. 115—Vendor and Purchaser.

———*Vendee's incapacity to contract—Vendor not estopped.*

(Per *Rutledge, C.J.* and *Maung Ba, J.*).—Where the buyer of immovable property, is under disability to buy there can hardly be any question of his being induced to buy by misrepresentation that he was under no such disability. The vendor, therefore, is not estopped from suing to recover possession of the property on the ground of vendee's incapacity to contract. (*Heald, O. C. J., Chari, Mya Bu, Ormistone and Dass, JJ. on equal divisian between Rutledge, C.J., Maung Ba, Brown, and Carr, JJ.*). U. PYINNA *v.* MAUNG LAW. **121 I. C. 705= 7 Rang. 677=A.I.R. 1929 Rang. 354 (F.B.).**

———*Vendee assuring his readiness to complete sale —Vendor demanding immediate completion—Vendee cannot resile.*

Where the vendee under a contract for the sale of immovable property stated to the vendor that his (the vendee's) money was ready and that the title was being engrossed and where those two matters alone were wanting to complete the sale, and where the vendor gave five days' notice to the vendee to complete the sale,

Held, that the vendee was estopped from denying the truth of his statements. (*Lord Shaw.*) MOTI LAL *v.* HAJI MOOSA. **88 I.C. 440= 27 Bom. L.R. 814=23 M.L.W. 51=41 C.L.J. 334= 1925 M.W.N. 314=6 L.R.P.C. 106= 3 Pat. L.R. 152=26 P.L.R. 209=30 C.W.N. 410= A.I.R. 1925 P. C. 124=48 M.L.J. 484 (P.C.).**

———*Vendor representing whole property to be his own and agreeing to sell the whole cannot resile from the contract.*

If a man, having partial interest in an estate, chooses to enter into a contract, representing it and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety and therefore the purchaser shall not have the benefit of his contract. The person contracting under these circumstances is bound by the assertions in the contract; and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the Court will not hear an objection by the vendor that the purchaser cannot have the whole. (*C. C. Ghose and Panton, JJ.*). KRISHNA CHANDRA DEY *v.* W. GRAHAM. **75 I.C. 421=50 Cal. 700= 27 C.W.N. 693=A. I. R. 1923 Cal. 694.**

———*Conveyance by estoppel—English and Ceylon Laws.*

Though there is a considerable analogy between the doctrine of English Law as to the conveyance by estoppel, and the doctrine of the Roman Dutch Law which prevails in Ceylon that doctrine is not identical with that of the English Law. The mode by reasoning by which it is reached is different, and the conclusions are not necessarily the same. This law admitted what was called the *exceptio rei venditate et traditoe*. Under this exception the purchaser who had got possession from a vendor who at the time had no title could rely upon a title subsequently acquired by the vendor not only against the vendor but against any one claiming under the vendor; and though delivery (traditio) was a part of the defence, if the purchaser had acquired possession without force or fraud he could use the exception though he had never received actual delivery from the vendor. Also if he had once been in possession without force or fraud, and had since lost possession he could recover it by the publician action, using the exception as a replication to any defence set up by the vendor or those claiming title under him. The principle does not rest upon estoppel by recital and is broader in its effect than the English rule.

Under the Roman-Dutch Law, the question is what was the property purported to be conveyed; and on all principles of construction the recitals can only be looked at for the purpose of assisting the Courts to arrive at the determination of the actual effect of the conveyance. The recitals as to how the transferor got the title to the property are not material; if the transferor had no title at the time, under the Roman-Dutch Law, his subsequent acquisition would make the transfer effective, howsoever the title is subsequently got. (*Lord Phillimore.*) FERNANDO *v.* GUNATILLAKA. **A.I.R. 1921 P.C. 138 (P.C.).**

—S. 115—Waiver.

———*Sale proclamation—Waiver of by judgment-debtor.*

Where a judgment-debtor with full knowledge of his rights to insist upon the decree-holders to attach his property again, secures a postponement of the sale for a month, with a promise to pay the debt in that time, and agrees to decree-holder's holding the sale on that adjourned date without a fresh proclamation, in case he does not pay, and consents not to raise the question of want of fresh attachment, he cannot afterwards be permitted to resile from his position having secured an advantage to the prejudice of the decree-holder: 13 C. L. J. 243, *Dist.*; A.I.R. 1922 Mad. 447; (1917) M.W.N. 89; 24 M.L.J. 70; A.I.R. 1926 Mad. 211; 13 C. L. J. 243 and A. I. R. 1925 Mad. 1113, *Ref.* (*Pandalai, J.*). (BADAM) SESHAYYA *v.* (GRANDHI) SATTIRAJU. **120 I.C 863=A.I.R. 1930 Mad. 414.**

———*Arbitration—Objections as to misjoinder of causes of action.*

By agreeing to refer different causes of action against different parties on one and the same reference the parties to it do not only waive objections as to misjoinder of causes of action but agree to a joint trial and cannot afterwards be permitted to challenge the award. (*Rupchand and Barlee, A. J. Cs.*). DATTARAM MUNSHILAL *v.* HARJIMAL & SONS. **121 I.C. 161=24 S.L.R 145= A.I.R. 1930 Sind 170.**

———*Lessee continuing after breach by lessor waives right (if any) to terminate lease.*

It is not open to a lessee to continue to occupy the house after the breach of a covenant by the lessor without giving notice that he was willing to extend the time for performance up to a specified date and then throw up the lease on a date arbitrarily chosen by him. If he did not put an end to the lease on the date of the breach by the lessor it must be taken that he has waived the benefit of the condition (assuming there was one). (*Ramesam, J.*). GOVINDASWAMI CHETTIAR *v.* PALANIAPPA CHETTIAR. **87 I.C. 10= 21 M.L.W. 271=A.I.R. 1925 Mad. 833= 48 M.L.J. 397.**

———*Lessor and lessee.*

Where the lessor did not exercise his right to forfeit the tenancy for two years after his title was repudiated by the tenant and allowed a third party to purchase the leased property at a Court auction he was held as estopped as against the third party from setting up the forfeiture which was considered as waived. (*Broadway, J.*). CHIRAGH DIN *v.* MUHAMMAD USMAN KHAN. **70 I.C. 349= A.I.R. 1924 Lah. 281.**

EVIDENCE ACT (1872), S. 115—Waiver.

———Where in compromising a suit, certain rights are given up, the parties are estopped from claiming those rights afterwards. (*Mears, C.J. and Banerji, J.*). MAHAMMAD IBRAHIM *v.* CHANDAN SINGH. **63 I.C. 727=3 U.P.L.R. All. 187.**

—S. 115—Miscellaneous.

———*Certified copies only of former applications filed—Evidence of identity available but not given—No estoppel created.*

Where certain facts have been admitted by certain persons in certain applications the mere production of their certified copies without evidence of identity, when such evidence is available, only shows that persons purporting to be the persons sought to be estopped by the applications, made the applications and that the officer before whom they were made was satisfied as to their identity. This is not sufficient for creating an estoppel against these persons so as to preclude them from denying the contents of the applications. (*Aston, A.J.C.*). SUFAN *v.* KHEMCHAND.

A.I.R. 1930 Sind 150.

———Property of husband and wife mortgage by wife during absence of husband in jail—Husband recovering possession—There was no estoppel against husband. (*Maung Ba, J.*). MAUNG SHWE HTA *v.* MAUNG AN. **118 I.C. 127= A.I.R. 1929 Rang. 112.**

———A land was added to a village by the river changing its course. Some of the zamindars claimed ownership to it on the basis of a previous suit many years ago in which they had asserted their rights to land which had subsequently ceased to exist and had gone back into the river.

Held, that there can be no question of *res judicata* or estoppel. (*Stuart, C.J. and Raza, J.*). SHIV RAM LAL *v.* GANGA SHANKAR. **111 I.C. 370= A.I.R. 1929 Oudh 15.**

———Railway receipt—Delivery of, to another without endorsement—Printed rule on the Railway receipt that unendorsed person not to be recognised as agent—Railway Company may still plead that the person is agent unless it operates as estoppel. (*Ashworth and Iqbal Ahmad, JJ.*). SECRETARY OF STATE *v.* RISHI RAM JAGDISH PRASAD. **108 I.C. 457=50 All. 227= 25 A.L.J. 1029=A.I.R. 1928 All. 145.**

———Civil P,C., S. 2—Suit against *A* as legal representative of deceased debtor—*C*, alleged real representative, joined as party but his name struck off on his application that he was unnecessarily joined—So far as *C* and persons claiming under him are concerned decree against *A* is valid. (*Shah and Fawcett, JJ.*). CHHAGANLAL *v.* JAYARAM. **100 I.C. 956=51 Bom. 125= 29 Bom. L.R. 107=A.I.R. 1927 Bom. 131.**

———Civil P.C., S. 11—Suit for mortgage debt against father and sons—Mortgagee's pleader-making statement that sons should be discharged—Simple money-decree passed—Statement neither operates as *res judicata* nor as estoppel in subsequent declaratory suit by sons that the property is not liable to execution and sale in the decree against father. (*Raza, J.*). MANOHAR LAL. *v.* IMDAD ALI. **98 I.C. 300=3 O.W.N. 862= A.I.R. 1927 Oudh 15.**

———Where plaintiff failed in prior suit on certain facts alleged by defendant and denied by him, defendant is not estopped in later suit from taking advantage of plaintiff's evidence about the facts in the later suit though it conflicts with defendant's allegation in the prior suit. (*Lord Blanesburgh.*) LALCHAND MARWARI *v.* MAHANT RAMRUPGIR. **93 I.C. 280=5 Pat. 312=53 I.A. 24=24 A.L.J. 105= 1926 M.W.N. 203=7 P.L.T. 163=3 O.W.N. 335= 43 C.L.J. 249=28 Bom. L.R. 855=30 C.W.N. 721= A.I.R. 1926 P.C. 9=50 M.L.J. 289 (P.C.).**

EVIDENCE ACT (1872), S. 116—Adverse possession.

———Talukdari watan lands liable to payment of *jama* recorded as rent-free lands by mistake—No estoppel arises against Government. (*Fawcett and Madgavkar, JJ.*). SURSINGJI DAJIRAJ *v.* SECY. OF STATE. **99 I.C. 293=28 Bom. L. R. 1213= A.I.R. 1926 Bom. 590.**

———Mortgage by Hindu widow as guardian of her adopted son—Subsequent sale of the equity of redemption by her as owner—Purchaser is not estopped from redeeming. (*Spencer, J.*). RANGAYYA NAIDU *v.* BASANA SIMON. **94 I.C. 639= 23 M. L. W. 367=A.I.R. 1926 Mad. 594.**

———There can be no estoppel against a litigant arising out of the wrongful act of the Court permitted or performed by its own officials. (*Walsh, A. C. J. and Ryves, J.*). PANDIT BALGOBIND *v.* SHEO KUMAR. **82 I. C. 184=22 A. L. J. 791= 5 L. R. A. Civ. 545=46 All. 864= A.I.R. 1924 All. 818.**

———*Point of law—Conduct of party affects.*

Where the plaintiffs had put in a petition to add the other co-sharers landlords as parties to the suit but the defendants objected to this addition and the Munsif refused to allow it,

Held, that the respondents were not entitled to raise this point in appeal. (*Ross, J.*). JAGSAH *v.* SRI KANTA PRASAD. **72 I.C. 401=A.I.R. 1924 Pat. 168.**

—S. 116.

Acquiescence.
Adverse possession.
Cessor of title
Dispute with third person.
Effect of attornment.
Ejectment by another.
Interpretation and scope.
Mortgagor and mortgagee.
Tenant already in possession.
Termination of tenancy.
When tenant can deny.
Miscellaneous.

—S. 116—Acquiescence.

———Acquiescence is an instance of estoppel—Mere non interference is not enough—Acquiescing with full notice in act prejudicial to oneself so as to induce reasonable belief of his consent, followed by consequent alteration of others position is necessary. 7 Jur. (N.S.) 149 and 8 Ch. D. 286, *Foll.* (*Mukerji, J.*). BANESHAR BANDOPADHYA *v.* AMULYA CHARAN. **82 I. C. 309= A.I.R. 1925 Cal. 288.**

—S. 116—Adverse possession.

———Where land is in the possession of a tenant not only is the possession consistent with the title of the landlord, but the tenant cannot by himself alter its character. The duty which he owes to the landlord of preserving his title prevents any acts of his from having the effect of acts of adverse possession. By disclaiming the landlord's title he forfeits the term but the landlord is not bound to take advantage of the forfeiture, and might enter upon the natural expiration of the term. When the tenant for years becomes a tenant at sufferance by holding over he is still unable to disseise his landlord and gain an adverse possession, or at any rate such disseisin would not be presumed from mere length of possession. A.I.R. 1929 P.C. 272; A.I.R. 1923 P.C. 118;

EVIDENCE ACT (1872), S. 116—Adverse possession.

A.I.R. 1923 P.C. 205; A.I.R. 1924 P.C. 65, *Foll.*; 19 W.R. 252 (P.C.), *Dist.*; A.I.R. 1924 Cal. 168, *Expl.* (*B. B. Ghose and Cammiade, JJ.*). BEJOYCHAND MAHTAB *v.* SUKUMARI DEVI. **117 I.C. 842= 32 C. W. N. 720.**

———*Party acquiring by adverse possession—Permissive possession after if estopped.*

Where the rights of the vendors of the plaintiff had become extinguished by adverse possession of plot of land by defendant for more than 12 years, the defendant will not be estopped from pleading acquisition of title by adverse possession and denying plaintiff's title to plot even though the defendant, after purchase of the plot by the plaintiff had obtained his permission to occupy the plot. (*Chari, J.*). (MAUNG) BA THAN *v.* (MAUNG) SEIN WIN. **120 I. C. 662=A. I. R. 1929 Rang. 170.**

———An adverse possession by the tenant cannot be predicated from the mere fact of non-payment of rent or discontinuance of payment of rent unless in connection therewith the landlord has been apprised that the tenant claims title in himself. When the tenant thus disclaims the title of the landlord, claims title in himself, and the landlord has notice of that fact it has the effect of an ouster and disseisin, even though this has happened during the continuance of the term. The theory on which adverse possession becomes a perfect title is that the true owner has, by his own fault, failed to assert his right against the hostile holder. Consequently, where possession is originally, taken and held under the true owner, a clear positive, and continued disclaimer and disavowal of title, and an assertion of an adverse right brought home to the true owner are indispensable before any foundation can be laid for the operation of the statute of limitation. Without this, the length of the occupation is immaterial and does not affect the title; possession for the full period of limitation must have elapsed after repudiation before title based thereon can be acquired. If the rule were otherwise, the greatest injustice might be done; without such knowledge of the repudiation, the landlord has the right to rely upon the fiduciary relation under which the possession was originally taken. As has been well said, a possession commencing under the authority of or in subordination to the true title, does not become transformed into a hostile one, by a mere change in mental attitude. It must be shown that the true owner had knowledge of the adverse holding, or it must be so open and notorious as to raise a presumption of notice to him. (*Mookerjee and Walmsley, JJ.*). GIRISH CHANDRA *v.* SRI KRISHNA. **75 I.C. 325= 38 C.L.J. 266=A.I.R. 1924 Cal. 168.**

—S. 116—Cessor of title.

———Where a person holding a paramount title steps in and the title of the landlord is put an end to, a tenant who has attorned to the former is not estopped from denying his landlord's title. A.I.R. 1925 Mad. 143, *Ref.* (*Wallace, J.*). LINGAYYA AYYAVARU *v.* KANDULA GANGIAH. **105 I.C. 892= A.I.R. 1928 Mad. 58.**

———*Landlord and tenant.*

Tenant can prove cessor of landlord's title by ouster by paramount title holder and can attorn to the latter on such ouster. 2 M. 226, *Ref.*; A.I.R. 1922 Cal. 237, *Ref.* (*Wallace, J.*). RAMASWAMI THEVAN *v.* ALAGA PILLAI. **79 I. C. 881= A. I. R. 1925 Mad. 143.**

———It is open to the tenant to prove a subsequent cessor of the landlord's title. The estoppel mentioned in S. 116 of the Evidence Act refers to the title at the beginning of the tenancy. One way in which the tenant can show that the title has determined is by proving an eviction by title paramount or the equivalent of such an eviction. (*Sanderson, C.J and Richardsan, J.*). RAM CHANDRA CHATTERJI *v.* PRAMATHA NATH CHATTERJI. **63 I.C. 754=35 C.L.J. 146=A.I.R. 1922 Cal. 237.**

EVIDENCE ACT (1872), S. 116—Effect of attornment.

—S. 116—Dispute with third persons.

———Tenant can set up his own title against third person though not against landlord. (*Sulaiman and Kendall, JJ.*). TIKA RAM *v.* MOTI LAL. **1930 A.L.J. 564=A.I.R. 1930 All. 299.**

———A subsequent licensee can sue a prior licensee who had abandoned his rights in the land of which the licensor had then granted a subsequent license to the plaintiff. 38 A. 178, *Dist.* (*Kanhaiya Lal, J.*). SYED ZAHUR HASAN *v.* MT. SHAKER BANOO. **78 I.C. 189=A.I.R. 1925 All. 29.**

———Donee is not estopped from pleading against stranger want of title in the donor nor against mortgagee by redeeming mortgage executed by donor. 61 P.R. 185, *Foll.* (*Martineau, J.*). RADHA KISHAN *v.* MOOL CHAND. **76 I.C. 128= A.I.R. 1925 Lah. 27.**

———Person not claiming through tenant is not estopped from claiming plaintiff's title. (*Stuart and Kanhaiya Lal, JJ.*). MAHARAJA OF JAIPUR *v.* SURJAN SINGH. **75 I. C. 495=44 All. 671= 20 A.L.J. 615=A.I.R. 1922 All. 333.**

—S. 116—Effect of attornment.

———After one of the three brothers who were landlords became insolvent they jointly mortgaged their property. A tenant was let into possession by them prior to the insolvency and mortgage, who after the mortgage was executed attorned to the mortgagee and paid him rent. In a suit for ejectment by the mortgagee, the tenant claimed that he was not estopped from denying the title of the mortgagee.

Held, that the rent note was separated from and independent of the mortgage, and so the taint of illegality of the mortgage, if any, as one of the executants was an insolvent, does not extend to the rent note. Hence the tenant would be estopped from denying mortgagee's title. 32 Bom. 449 and A. I. R. 1927 Bom. 129, *Dist.*

Held further: that even though the tenant was originally let into possession by the mortgagors from the time when he passed a fresh rent note in favour of the mortgagee a new tenancy arose and he remained in possession under the mortgagee, and so his former possession did not prevent estoppel from arising. A. I. R. 1928 Bom. 265, *Foll.*; 11 Cal. 519, *Not foll.* (*Madgavkar, J.*). NAGINDAS SANKALCHAND *v.* BAPALAL PURSHOTTAM. **32 Bom. L.R. 692=A.I.R. 1930 Bom. 395.**

———Tenant cannot challenge title of his landlord. 42 I. A. 202, *Foll.* (*Lord Phillimore.*) VERTANNES *v.* ROBINSON. **102 I.C. 639=5 Rang. 427= 54 I.A. 276=29 Bom. L.R. 1017= 1927 M.W.N. 492=39 M.L.T. 134=25 A.L.J. 713= 46 C.L.J. 126=31 C.W.N. 1078=26 M.L.W. 417= A.I.R. 1927 P.C. 151=53 M.L.J. 71 (P.C.).**

———Landlord and tenant—Person attorning to lessors as tenant cannot question title of lessors. (*Rankin, C. J. and C. C. Ghose, J.*). KESORAM PODDAR *v.* BANAMALI DE. **103 I.C. 93= 45 C.L.J. 249=A.I.R. 1927 Cal. 941.**

———Where the lessors accepted and acted upon the *kabuliyat*, the lessors as well as the persons claiming under them, are equally estopped from

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denying the validity of the lease. (*Cuming and B. B. Ghose, JJ.*). HARI MONDAL *v.* DURJODHAN MONDAL. **94 I.C. 661=A.I.R. 1926 Cal. 882.**

———*Tenant cannot set up title inconsistent with that under which he was let into possession.*

A person who has lawfully come into possession of land as tenant from year to year or for a term of years cannot set up during the continuance of such relation any title adverse to the landlord inconsistent with the legal relation between them and however notoriously and to the knowledge of the other party, acquire by the operation of the law of limitation, title as owner or any other title inconsistent with that under which he was let into possession: 24 Mad. 246; 37 Mad. 1; 21 Mad. 153, *Foll.*; 7 Bom. 96; 27 Bom. 515, *Dist.* (*Kennedy, J.C. and Aston, A.J.C.*). SIDIK HAJI YACUB *v.* MAHOMED FARUQ. **90 I.C. 1007=21 S.L.R. 185=A.I.R. 1926 Sind 71.**

———*Tenant can't plead he is benamidar.*

By accepting a deed of conveyance in fee and going into possession, a grantee is estopped to deny the title or seisin of his grantor by alleging that he is merely benamidar for another person. (*C. C. Ghosh and Panton, JJ.*). PRABHAT CHANDRA CHATTERJI *v.* BIJOY CHAND MAHATAP. **75 I.C. 89=50 Cal. 572=A. I. R. 1924 Cal. 84.**

———Lessee cannot deny title of lessor. (*Abdul Raoof, J.*). MELA RAM *v.* RIKHI KESH. **69 I.C. 111=33 P.W.R. 1922=A. I. R. 1923 Lah. 69.**

———A tenant cannot set up an adverse title to the landlord. (*Ryves and Stuart, JJ.*). DEBI PROSAD *v.* MT. GUJAR. **68 I.C. 750=20 A. L. J. 696=A.I.R. 1922 All. 423.**

———Covenant in *kabuliyat*—Rights incorrectly recorded in covenant—Person entering into covenant must recognise rights. (*Woodroffe and Walmsley, JJ.*). MIDNAPORE ZEMINDARI CO., LTD. *v.* NARES NARAIN ROY. **63 I. C. 161=33 C. L. J. 317=A. I. R. 1921 Cal. 368.**

———A lessee from a mortgagor cannot question the validity of the mortgage in a suit for ejectment of the lessee. (*Newbould and Abdul Majid, JJ.*). SHASHI BHUSHAN *v.* DEB NATH. **60 I.C. 705 (Cal.).**

———Tenant executing lease cannot deny lessor's title—It is immaterial from whom he held before. (*Macnair, A. J. C.*). CHANDOO *v.* PARBHOO. **59 I.C. 707=A. I. R. 1921 Nag. 118.**

—S. 116—Ejectment by another.

———Lessee ejected by true owner—Rent suit by lessor—Plaintiff's title cannot be denied. (*Daniels, J.*). MOTI LAL *v.* YAR MUHAMMAD. **86 I.C. 756=47 All. 63=6 L.R.A. Civ. 108=A.I.R. 1925 All. 275.**

———Tenant let in possession by *A* but evicted by true owner—Tenant attorning to true owner can then challenge title of *A*. (*Devadoss and Waller, JJ.*). ALAGA PILLAI *v.* RAMASWAMI THEVAN. **91 I. C. 1074=1925 M.W.N. 878=23 M.L.W. 296=A.I.R. 1926 Mad. 187=49 M.L.J. 742.**

—S. 116—Interpretation and scope.

———"*Continuance of tenancy.*"

The words "continuance of tenancy" in S. 116 applies to the tenancy in question in the same suit in which the estoppel arises, and not to any previous tenancy. (*Madgavkar, J.*). NAGINDAS SANKALCHAND *v.* BAPALAL PURSHOTTAM. **32 Bom.L.R. 692=A.I.R. 1930 Bom. 395.**

———Section 116 does not state that every license is revokable at the whim of the licensor. (*Baguley, J.*). V. AHDEIKSA *v.* MA SAN ME. **121 I.C. 787=7 Rang. 617=A.I.R. 1930 Rang. 29.**

EVIDENCE ACT (1872), S. 116—Mortgagor and mortgagee.

———Estoppel would operate only as regards the denial in so far as it relates to the beginning of the tenancy and not to any other point of time. Though the tenancy may be continuing, it is quite open to the tenant to plead and show that his liability to pay the rent has wholly or partially or for a time ceased. Such a plea does not amount to disputing the landlord's title but is really one of confession and avoidance, and is available to the tenant: 2 Mad. 226; 12 W.R. 109; 14 W.R. 85 and 21 W.R. 5, *Foll.* (*Cuming and Mukerji, JJ.*). JOGENDRA LAL *v.* MAHESH CHANDRA. **112 I.C. 172=55 Cal. 1013=47 C.L.J. 387=32 C.W.N. 559=A.I.R. 1929 Cal. 22.**

———*Tenant is not prevented from showing subsequent devolution of title.*

Section 116 only provides that the tenant cannot deny that the landlord at the beginning of the tenancy, had a title to the property or that he had a right to let the property. He cannot, however, be prevented from showing that the landlord had only a life-interest and that on his death the property devolved on some one else. (*Sulaiman, Ag. C.J. and Weir, J.*). MADAN LAL *v.* MT. GUR DASSI. **110 I. C. 376=26 A. L. J. 1255=A. I. R. 1928 All. 650.**

———'*At the beginning of tenancy.*'

If once the relation of landlord and tenant is established between the parties, the tenant would be estopped from disputing the landlord's title. The words "at the beginning of the tenancy" cannot be construed to mean the time when the tenant was first let into possession. It may be that in some cases the tenant may be in possession before the new tenancy begins and he may attorn to another landlord by executing a lease which constitutes a new tenancy. The question, therefore, to be decided in each case under S. 116 would be whether a new tenancy had arisen and not whether the tenant had been let into possession by the landlord. In support of the contention that there is no relation of landlord and tenant between the parties the tenant may assert that the contract of tenancy is void or voidable on account of misrepresentation or fraud: 40 Mad. 561 (F.B.); 8 B.H.C (A.C.J.) 175 and 34 Bom. 329, *Rel. on*; 37 All. 557 (P.C.), *Ref.* (*Patkar and Baker, JJ.*). SHANKAR RANA *v.* JAGANNATH. **111 I.C. 911=30 Bom. L.R. 741=A.I.R. 1928 Bom. 265.**

———*Words "at the beginning" do not apply where tenant is already in possession.*

The words in S. 116 "At the beginning of the tenancy" only apply to cases in which tenants are put into possession of tenancy by the person to whom they have attorned and not to cases in which the tenants have previously been in possession. Where there was no proof of any rent ever having been paid or that the defendant was inducted as a tenant by the plaintiff and the parties were brothers and admittedly the house was once joint property,

Held, in these circumstances the defendant was not estopped from denying that he was the plaintiff's tenant. (*Campbell, J.*). RIKHI KESH *v.* MELA RAM. **73 I. C. 450=A. I. R. 1923 Lah. 483.**

—S. 116—Mortgagor and mortgagee.

———A mortgagee cannot deny the title of his mortgagor on the date of the mortgage. It is however, open to him to assert that on the death of the mortgagor persons who are his heirs under the

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Hindu Law did not succeed to his occupancy rights in accordance with the special rules laid down in Act 12 of 1881. (*Niamatullah, J.*). MAHADEO CHAUBE *v.* RAM RAJ CHAUBE.

122 I. C. 414= A.I.R. 1930 All. 108.

———Mortgage with possession—Mortgagors to remain in occupation as tenants in pursuance of lease executed by them—Mortgagors are precluded from challenging otherwise. (*Zafar Ali and Bhide, JJ.*). ASA RAM *v.* KISHANCHAND. **120 I. C. 166= A.I.R. 1930 Lah. 386.**

———A mortgagee cannot deny the title of the mortgagor, for the purposes of the mortgage nor can the mortgagor derogate from his grant so as to defeat his mortgagee's title : 36 Bom. 185 ; 42 Cal. 455 and *Tasker* v. *Small*, (1837) 3 My. and Cr. 63, *Foll.* (*Patkar, J.*). SOMBHAI *v.* JAGAJIVAN.

114 I. C. 377=30 Bom. L. R. 987= A. I. R. 1928 Bom. 380.

———Landlord and Tenant—Mortgagor of *muafi* land cannot assert against the mortgagee whom he has ejected his own want of title. (*Stuart, C.J. and Raza, J.*). SHYAM MANOHAR *v.* BENI MADHO.

110 I. C. 320=5 O.W.N. 545= 10 L.R.A. Rev. 29=A. I. R. 1928 Oudh 336.

———Mortgagee is estopped in a redemption suit from setting up an interest of a third party, at the time the mortgage was entered into. (*Sulaiman, J.*). RAJARAM DHAR *v.* JADUNANDAN. **88 I. C. 539= A. I. R. 1925 All. 758.**

———Mortgagee can't dispute mortgagor's title to property. (*Shah, Ag. C. J. and Fawcett, J.*). MADHAVRAO HARBAJI THAKUR *v.* AMABABAI LAXMAN JADHAV. **85 I.C. 193=26 Bom.L.R. 1210= A. I. R. 1925 Bom. 125.**

———Mortgagee is estopped from denying the title of mortgagor in a redemption suit where he had obtained possession from the mortgagor. (*Raymond and Madgavkar, A.J. Cs.*). MAHOMED MOOSA *v.* KAZI FATEHULLAH. **79 I.C. 466= 19 S.L.R. 268=A.I.R. 1925 Sind 167.**

———Defendants in a redemption suit disputing the title of plaintiffs who were not the original mortgagors, is a different matter from a mortgagee setting up a paramount title as against his admitted mortgagor. In the former case the defendants would be quite within their rights.

Quaere :—Is the mortgagor's title itself open to attack in a redemption suit by him ? (*Miller, C.J. and Kulwant Sahay, J.*). BASDEO PRASAD *v.* DWARIKA PANDEY. **83 I.C. 478=2 Pat. 805= A.I.R. 1924 Pat. 234.**

———*Mortgagor though trustee is estopped from setting up trust.*

Even where the mortgagors are trustees acting in a public capacity and not for their own benefit, they are estopped from denying their title and cannnot set up as a defence against the mortgagee that the property so mortgaged is trust property which the mortgagors had no right to mortgage. Where the mortgage-deed clearly and unmistakeably purports to be executed by the mortgagor as the proprietor of the property in his own interest, he is estopped from denying the interest which he represented as his own proprietary right in the deed. (*Dawson Miller, C.J. and Foster, J.*). BRIJ RATAN DAS *v.* RAGHUNANDAN GIR.

71 I.C. 944=1923 P.H.C.C. 49=1 P. L.R. 225= 4 P.L.T. 457=A.I.R. 1923 Pat. 203.

—S. 116—Tenant already in possession.

———Where a tenant being already in possession has made an attornment or acknowledgment of the tenancy, he may show that he did so through ignorance, mistake or the like. (*Raza, J.*). BISHAN NARAIN BARGARA *v.* FIDA HUSAIN.

112 I.C. 382.

———Section 116 applies to cases where a tenant is let into possession by a landlord, and so a person who was in possession before the landlord had purchased the property is not estopped from pleading that he is not a tenant. 11 Cal. 519 and 25 I.C. 721, *Foll.* (*Zafar Ali, J.*). RAMZAN SHEIK *v.* ARUNA MAL. **108 I.C. 182 (Lah.).**

———Where some of the members of the tenant's family under misapprehension of their title excuted *kabuliyat* but the tenant was not put into possession by such *kabuliyat* or by any lease executed by the landlord and remained in possession of his own *sir* plots, the execution of the *kabuliyat* having no effect upon his possession or title.

Held, no question of estoppel would arise under S. 116. A.I.R. 1915 P.C. 96, *Foll.* (*Raza and Pullan, JJ.*). BISHONNATTI *v.* SURAJPAL. **106 I.C. 8= 4 O.W.N. 1037=9 L.R.A. Rev. 342= A.I.R. 1928 Oudh 33.**

———Where a tenant is not let into possession by the landlord, but was already in possession at the time of the *kirayanama* he is not estopped from proving that he made acknowledgment of the tenancy by executing the *kirayanama* through ignorance, mistake or the like. A.I.R. 1915 P.C. 96, *Rel. on* and A.I.R. 1928 Oudh 33, *Foll.* (*Raza, J.*). BISHEN NARAIN BHARGAVA *v.* FIDA HUSAIN.

112 I.C. 382 (Oudh).

———Mere attornment after previous possession as proprietor would not raise estoppel. (*Dawson-Miller, C.J. and Mullick, J.*). KAMAKHYA NARAYAN v. SURENDRA KARAN DEO.

113 I.C. 703=A.I.R. 1928 Pat. 284.

———*Kabuliyat* executed by person already in possession as tenant of third party does not create estoppel. (*Daniels, J.*). FAQIR MOHAMMAD *v.* BHAGGU KHAN. **79 I.C. 371=5 L.R.A.Rev. 111= A.I.R. 1925 All. 244.**

———*Tenant in possession prior to lease also is estopped.*

A tenant who has executed a lease but has not been let into possession by the lessor is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in the lessor's title, or that the execution of the lease was procured by fraud, misrepresentation or coercion. The mere fact that the tenant was in possession prior to the execution of the lease does not prevent the doctrine of estoppel from applying. 40 M. 561; 123 P. R. 1919 (F.B.), *Foll.* (*Broadway, J.*). MELA RAM *v.* MT. BHOLI. **76 I.C. 47= A.I.R. 1925 Lah. 60.**

———*Tenant can deny landlord's title if tenant is in possession already.*

Though under S. 116 no tenant can deny his landlord's title existing at the commencement of the lease, the rule only applies where the tenant has been let into possession by such landlord and not to cases where he has been in possession previously. 25 I. C. 721, *Foll.* Also if through ignorance or mistake a tenant has executed a rent note and has not been put in possession by the lessor he can dispute the lessor's title. 13 B. 323, *Ref.* (*Prideaux, A.J.C.*). MT. LAXMIBAI *v.* DEVI. **72 I.C. 855= A. I. R. 1924 Nag. 62.**

———Whatever might be the nature of user of the land by lessee before the lease is executed if he

EVIDENCE ACT (1872), S. 116—Tenant already in possession.

clearly attorns to the lessor when he executes the lease the lessee is estopped. (*Rafique and Stuart, JJ.*). SITAL PRASAD *v.* BADRI PRASAD
69 I.C. 647=20 A.L.J. 907= A.I.R. 1923 All. 53.

———Estoppel—Payment of rent by tenant—Tenant is not estopped from denying landlord's title if he was not let into possession by him. 11 Cal. 519, *Ref. to.* (*Mittra, A. J. C.*). SETH SAGUNCHAND *v.* LALA CHHABILERAM. **76 I.C. 884= 18 N.L.R. 11=A.I.R. 1922 Nag. 60.**

—S. 116—Termination of tenancy.

———Section 116 does not contain the whole law of estoppel and the tenant's estoppel operates even after the termination of the tenancy. (*B. B. Ghose and Cammiade, JJ.*). M. MUJIBAR RAHAMAN *v.* ISUB SURATI. **32 C.W.N. 867=49 C.L.J. 1= A.I.R. 1928 Cal. 546.**

———*Lessee on expiry of lease can question title of lessor.*

A lease was granted after a mortgage. The lessee purchased rights under the foreclosure decree which was obtained on the mortgage. The lessor then instituted the present suit after the expiry of the lease for possession of the land leased.

Held, when the lease has terminated it is open to the man in possession to dispute the lessor's title to the land on the ground that ownership of it had passed of either by a transfer or operation of law, to another. (*Prideaux, A.J.C.*). DAULAT *v.* SARDAR SINGH. **82 I. C. 616= A. I. R. 1923 Nag. 91.**

———A tenant in possession cannot, even after the expiration of his lease, deny his landlord's title without actually and openly surrendering possession to him. 123 P.R. 1919, *Foll.*

Once the relationship of landlord and tenant has been established, the tenant must surrender possession before he can set up a claim to be the real owner. (*Broadway, J.*). ALLAH BAKHSH *v.* LAL KHAN. **67 I.C. 269=79 P.L.R. 1922= A.I.R. 1921 Lah. 370.**

—S. 116—When tenant can deny.

———Per *Ramesam, J.*—Although where the lands are lands in an estate, a tenant cannot contract out of his occupancy rights, *i.e.*, however, much he may, contract to surrender the land at the end of the period of a *muchilika*, such a clause would be void and in spite of the clause he may continue in possession; still where the question whether the land is in an estate or not is itself in dispute and the dispute has been settled by a Court of law against the contention of the tenant that the land is in an estate, and therefore, *prima facie* the Estates Land Act does not apply, if the tenant submits to the decision and obtains a *muchilika* he will be estopped from raising the question that the lands are in an estate so long as he keeps possession under the *muchilika* and has not surrendered vacant possession: A.I.R. 1922 P.C. 241; A.I.R. 1925 Mad. 1043; 29 Cal. 518; 34 Mad. 211, *Rel. on*; (1895) 2 Ch. 273 and (1899) A.C. 144; *Re: Anderson Peeler* v. *Gillatt*, (1905) 2 Ch. 70. *Re. Coole Coole* v. *Flight*, (1922) 2 Ch. 536, *Dist.*; 22 Bom. 348, *Ref.* (*Ramesam and Venkatasubba Rao, JJ.*). RAMALINGA MUDALI *v.* RAMASAMI AYYAR. **119 I.C. 577=29 M.L.W. 760= 1929 M.W.N. 239=A.I.R. 1929 Mad. 529.**

———A tenant is estopped from denying his landlord's title till he surrenders possession. A.I.R. 1915 P.C. 96, *Expl.* and *Foll.* (*Carr, J.*). DAYALAL & SONS *v.* KO LON. **117 I.C. 60= 6 Rang. 657=A.I.R. 1929 Rang. 15.**

EVIDENCE ACT (1872), S. 116—Miscellaneous.

———Tenant must quit possession before challenging landlord's title. (*Das and Doyle, JJ.*). J. A. VERTANNES *v.* J.G. ROBINSON. **120 I.C. 657= A.I.R. 1928 Rang. 162.**

———*Illegality of transaction.*

If in a suit for ejectment on a rent note it is found that the alleged tenant is in possession under the rent note but the rent note forms only a part of other documents forming one transaction and such trasaction is illegal, it is open to the tenant to plead that the transaction is illegal: 32 Bom. 449; 38 Bom. 709 and 39 Bom. 358, *Rel. on*; 22 Bom.L.R. 149, *Dist.* (*Marten, C.J. and Patkar, J.*). BHAVAN LALU *v.* UMAR MAHOMED. **100 I. C. 1004=51 Bom. 43=29 Bom.L.R. 97= A. I. R. 1927 Bom. 129.**

———Tenant cannot deny landlord's title until he surrenders possession: A.I.R. 1915 P.C. 96, *Foll.* (*Wazir Hasan, J.*). MAHOMED SAYED *v.* ZAHIRUDIN. **101 I.C. 771= A.I.R. 1927 Oudh 544.**

———Unless the lessee surrenders possession to the lessor he is bound by estoppel under S. 116 and cannot repudiate his landlord's title and set up title in another person: 37 All. 557 (P.C.); 38 All. 226 and 41 All.654, *Foll.* (*Kinkhede, A.J.C.*). PUNDIT DIWAKAR *v.* URKUNDA. **97 I.C. 992 (Nag.).**

———Title of landlord cannot be denied until surrender by tenant is proved—This principle applies between lessee and sub-lessee: 37 All. 557 (P.C.) and A.I.R. 1924 Oudh 309; 1 O. W. N. 957, *Foll.* (*Gokaran Nath Misra, A. J. C.*). MOHAMMAD HUSAIN & SONS *v.* UBEROI & CO., LTD. **89 I. C. 590=12 O. L. J. 501=2 O. W. N. 576= A.I.R. 1925 Oudh 694.**

———Defendant let in by plaintiff — Defendant cannot deny plaintiff's title unless he has openly surrendered possession. (*Dalal, J. C.*). DHANI RAM *v.* MAIKOO LAL. **87 I.C. 286= A.I.R. 1925 Oudh 687.**

———A tenant who has been let into possession cannot deny his landlord's title, however, defective it may be, so long as he has not openly restored possession by surrender to his landlord: 37 A. 557 (P. C.), *Foll.* (*Wazir Hasan, A. J. C.*). SHAMSUDDIN KHAN *v.* AGHA SAYID FATEH SHAH. **75 I.C. 936=84 I. C. 532=A.I.R. 1924 Oudh 309.**

———A tenant cannot dispute his landlord's title unless he first gives up possession of the property to the landlord and it makes no difference in this respect whether the lease is determined by the expiration of the specific term fixed in the lease, or by a notice given in pursuance of a power in the lease to determine it. (*Marten, J.*). LAKSHMAN GOWROJI *v.* RAMJI ANTONE. **23 Bom. L. R. 939= A.I.R. 1921 Bom. 93.**

—S. 116—Miscellaneous.

———Suit for ejectment by transferee of land conveyed by widow (as executrix) against widow's son to whom land was leased and widow and other three children residing with him—Suit decreed as against widow's and son's share and three children declared entitled to partition of their share—Son held estopped under S. 116, Evidence Act, but his liability under S. 115 left open and application to make it clear dismissed—On vacating land son claimed title to his share as one of next-of-kin of his father—Suit held to be barred under S. 11. (*Lord Russell of Killowen.*) JOHN AGABEG VERTANNES *v.* JAMES GOLDEN ROBINSON. **34 C. W. N. 720=A.I.R. 1930 P. C. 224 (P.C.).**

EVIDENCE ACT (1872), S. 116—Miscellaneous.

———A sub-lessee cannot deny the title of his lessor, *i.e.*, the main lessee. (*Das and Kulwant Sahay, JJ.*). DAMODAR PRASAD *v.* MASOODAN SINGH. **105 I.C. 172=8 P.L.T. 829= A.I.R. 1928 Pat. 89.**

———Tenant ejected by landlord's decree—He cannot subsequently sue for declaration of his title. (*Das and Doyle, JJ.*). J. A. VERTANNES *v.* J. G. ROBINSON. **120 I.C. 657= A.I.R. 1928 Rang. 162.**

———No customary right to use land for a certain purpose can be claimed by a tenant against his landlord. (*Ashworth, J.*). MT. BILASI *v.* BIJAJ NARAIN. **102 I.C. 186=A.I.R. 1927 All. 566.**

———Tenant taking land from one person but paying rent to another—Tenant is not estopped from disputing title of that other—English and Indian Law. (*Mukerji, J.*). ABDUL RAJJAK SIKDUR *v.* PROMADA SUNDARI DEVI. **80 I.C. 22= A.I.R. 1925 Cal. 482.**

———Where a document does not create a tenancy at a fixed rent, an expression in the *kabuliyat* that it did create, does not estop the landlord from proving that tenancy at fixed rent was not created. (*Suhrawardy and Duval, JJ.*). ESHAQUE SHEIKH *v.* MOTILAL MALO. **81 I.C.1043= A.I.R. 1925 Cal. 294.**

—S. 117—Dishonoured bill.

———In a suit on a dishonoured bill of exchange after the defendant has accepted the Bill and by so doing has got possession of the goods he cannot be allowed to plead that he was merely an agent acting for the drawer. He cannot be allowed to defend himself on the lines: A.I.R. 1918 P.C. 146, *Ref.* (*Barlee, A.J.C.*). PHOENIX TRADING CO., LTD. *v.* F. R. B. DIWANCHAND SIBAL. **117 I.C. 160= 23 S.L.R. 479=A.I.R. 1929 Sind 172.**

—S. 118—Child.

———*Criminal trial.*

Where the Court is of opinion that the child upon whom an offence under S. 376, I.P.C., is committed is unable to give relevant information in the matter by reason of tender years and consequent immaturity of judgment, it should not examine the child at all: 38 All. 49, *Foll.*; 41 Cal. 406, *Not foll.* (*Agha Haidar, J.*). GHULAM HUSSAIN *v.* EMPEROR. **A.I.R. 1930 Lah. 337.**

———*Evidence by child should be accepted with caution.*

There is no more dangerous witness than young children. Any mistakes or discrepancies in their statements are ascribed to innocence of failure to understand, and undue weight is often given to what is merely a well taught lesson. Children have good memories and no conscience. They are easily taught stories and live in a world of make-believe so that they often become convinced that they have really seen the imaginary incident which they have been taught to relate. The evidence of a child should therefore be accepted with great caution. (*Raza and Pullan, JJ.*). MANNI *v.* EMPEROR, **A.I.R. 1930 Oudh 406.**

———*Sufficient understanding.*

A child of tender years is a competent witness when such child is intellectually sufficiently developed to understand what it has seen and afterwards to inform the Court about it; this sufficiency may be tested even in examination-in-chief: understanding is thus the sole test of competency under S. 118: 38 All. 49, *Foll.*; 41 Cal. 406, *Rel. on*, 10 All. 207, *Expl.* (*Kalumal, A.J.C.*). S. RASUL *v.* EMPEROR. **120 I. C. 514=31 Cr.L.J. 114= A. I. R. 1930 Sind 129.**

EVIDENCE ACT (1872), S. 118—Rejection of evidence.

———*Procedure before admitting child as a witness.*

Before examining a child of tender years as a witness, a Court should satisfy itself that the child is sufficiently intellectually developed to comprehend what he has seen and to give an intelligent account of it to the Court, by testing his intellectual capacity, by putting a few and simple and ordinary questions to him and the Court should record a brief proceeding so that the appellate Court may feel satisfied as to the capacity of the child to give evidence. If the Court is of opinion that by reason of tender years and defective or immature understanding the child could not have perceived the particular incident to prove which he is produced as a witness, the Court should not only refrain from administering the oath to him but should also decline to examine him as a witness: 38 All. 49 and 11 C.W.N. 51, *Ref.* (*Agha Haidar, J.*). TULSI *v.* EMPEROR. **110 I.C. 799= 10 A. I. Cr. R. 527=29 Cr.L.J. 767= A.I.R. 1928 Lah. 903.**

———*Capacity—Record of opinion as to, is not obligatory.*

When the evidence of a child of tender years is adduced the Judicial Officer should for the sake of precaution ascertain as a preliminary measure by means of a few simple questions whether the intelligence of the child is such that (whether sworn or not) it is capable of giving testimony and it is certainly desirable that something should at the commencement of the record of the evidence of a witness of this character be entered to show that such a test has been in fact made. But the mere fact that the Judge omits to make the record will not render the evidence inadmissible, if the Judge is, as a matter of fact satisfied about the capacity to give the evidence. (*Bucknill, J.*). PANCHU CHAUDHURY *v.* EMPEROR. **66 I.C. 73=3 P.L.T. 649= 23 Cr. L.J. 233=A.I.R. 1923 Pat. 91.**

—S. 118—Competency.

———*Test.*

The only test of competency is that the witness should not be prevented from understanding the questions put to him or from giving rational answers to those questions by tender years or other cause. (*Ross and Wort, JJ.*). RAM JOLAHA *v.* EMPEROR. **102 I. C. 349=8 A. I. Cr. R. 189= 8 P.L.T. 594=28 Cr.L.J. 541= A. I. R. 1927 Pat. 406.**

—S. 118—Counsel.

———*Rule as to exclusion from Court—Inapplicable.*

The rule as to the exclusion of the witnesses from Court until they have been examined is not without exceptions. It does not extend to the parties themselves in civil cases so long as they conduct themselves properly, or to their solicitors whose assistance is necessary for the proper conduct of the case. The same rule applies in Criminal Cases. There are even stronger reasons for not applying the rule to the Counsel for the parties who have to conduct the case. (*Wallis, C. J. and Krishnan, J.*). VEMUREDDI BABUREDDI, *In re.* **62 I. C. 828=44 Mad. 916=13 M.L.W. 702= 1921 M.W.N. 440=22 Cr. L.J. 588= A. I. R. 1921 Mad. 424=41 M.L.J. 158.**

—S. 118—Rejection of evidence.

———Rejection of evidence on the ground of a relation of the witness belonging to the same village as the wife of a near relation of the accused was held to be bad. (*Scott-Smith and Fforde, JJ.*). BAGH SINGH *v.* EMPEROR. **81 I. C. 113= 25 Cr. L. J. 625=A.I.R. 1925 Lah. 49.**

EVIDENCE ACT (1872), S. 118—Scope.

—S. 118—Scope.

———Section 118 makes no distinction between prosecution and defence witnesses. (*Baguley, J.*). A. V. JOSEPH *v.* EMPEROR. **85 I. C. 236=26 Cr. L. J. 492=3 Bur. L. J. 265=3 Rang. 11=A. I. R. 1925 Rang. 122.**

—S. 120—Party to suit.

———*Evidence of a plaintiff or defendant is not to be disbelieved on the ground that he is a party.*

There is no inflexible rule that if a party, plaintiff or defendant, gives his testimony, he must be disbelieved, because he is a party to the suit. Such a rule, if adopted, would nullify the provisions of S. 120 which provides that in all civil proceedings, the parties to the suit shall be competent witnesses. When a plaintiff has deposed in support of his case, his testimony must be scrutinised in the same manner as that of any other witness; and the Court is free to attach to the evidence that amount of credence which it appears to deserve, from his demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, powers of memory, and other tests, by which the value of a statement of a witness can be ascertained, though not with absolute certainty, yet with such a reasonable amount of conviction as ought to justify a man of ordinary prudence in acting upon those statements. (*Mookerjee and Buckland, JJ.*). JOGENDRAKRISHNA ROY *v.* KURPAL HARSHI & CO.

68 I.C. 993=35 C.L.J. 175=49 Cal. 345=A.I.R. 1923 Cal. 63.

—S. 122—Admissibility.

———*Receipt of bribe.*

The communication made by an arbitrator to his wife shortly before his death admitting that he had accepted bribe from a party can be permitted to be disclosed in evidence only if the requirements of S. 122, have been fulfilled. (*Tek Chand and Dalip Singh, JJ.*). KAIKOCAD *v.* KHAMHATTA.

120 I.C. 494=A.I.R. 1930 Lah. 280.

—S. 122—Confession to husband.

———No statement of an incriminating nature made by the appellant as to her guilt under S. 302 to her husband could be received in evidence. 10 P. R. 1914, *Foll.* (*Broadway and Martineau, JJ.*). MT. IHSANAN *v.* THE CROWN.

81 I.C. 271=25 Cr. L.J. 783=A. I. R. 1923 Lah. 40.

—S. 123—Jail report.

———*Privileged document.*

A report submitted to the Inspector-General of Prisons under S. 900 of the Jail Manual is clearly an unpublished official record relating to affairs of State within the meaning of S. 123, and there is no distinction between the actual text of the report and the statements which it incorporates: 48 C.304 *Foll.* (*Daniels, J. C.*). KING EMPEROR *v.* NANDA SINGH. **89 I.C. 387=12 O.L.J. 450=2 O.W.N. 422=26 Cr. L.J. 1347=A.I.R. 1925 Oudh 540.**

—S. 123—Power to decide.

———The public officer concerned and not the Judge is to decide whether the evidence referred to shall be given or withheld. If the objection is taken by the proper person the Court will not go behind it. A.I.R. 1921 Cal. 282, *Rel. on.* (*Jackson, J.*). SECY. OF STATE *v.* SAMINATHA NADAR.

119 I.C. 718=A.I.R. 1930 Mad. 342.

———Moreover it is the public officer concerned, and not Judge, who is to decide whether the evidence referred to shall be given or withheld. In such cases the head of the department has absolute discretion to give or withhold permission and the Court is not entitled to question the claim of privilege raised by him. 5 O. L. J. 294, *Foll.* (*Daniels, J.C.*.) KING EMPEROR *v.* NANDA SINGH.

89 I.C. 387=12 O.L.J. 450=2 O.W.N. 422=26 Cr. L.J. 1347=A.I.R. 1925 Oudh 540.

EVIDENCE ACT (1872), S. 124—Power to decide.

———The public officer concerned, and not the Judge, is to decide whether the evidence referred to shall be given or withheld. This holds good even when there is reason to suspect that the witness concerned may have had access to the official records withheld and may have refreshed his memory therefrom before he came to give evidence. (*Mookerjee, A J.C. and Chaudhuri, J.*). W. S. IRVIN *v.* D. J. REID. **63 I.C. 467=48 Cal. 304=25 C.W.N. 150=A.I.R. 1921 Cal. 282.**

—S. 124—Document of state.

———*Court can on its own motion disallow a document of state if public policy so requires.*

No sound distinction can be drawn between the duty of the Judge when objection is taken by the responsible officer of the Crown, or by the party, or when no objection being taken by anyone, it becomes apparent to him that a rule of public policy prevents the disclosure of the documents or information sought and therefore a Court is justified in declining to allow a document of State to be produced on its own motion. *Hennessy* v. *Wright*, 21 Q.B.D. 509, *Foll.* (*Findlay, O.J.C.*). WAMANRAO *v.* EMPEROR. **94 I.C. 899=22 N.L.R. 34=27 Cr. L.J. 707=A.I.R. 1926 Nag. 304.**

—S. 124—Government resolutions

———A Government Resolution reciting various opinions of Government officers, including their legal adviser, is a privileged document under S. 124. (*Fawcett and Madgavkar, JJ.*). SURSENJI DAJIRAJ *v.* SECY. OF STATE. **99 I.C. 293=28 Bom. L.R. 1213=A.I.R. 1926 Bom. 590.**

—S. 124—Official confidence.

———*Statement of person desiring Court of Wards to take charge of his properties made to Collector, is privileged.*

In a suit, the Collector, as Manager Court of Wards was ordered to produce certain documents relating to a certain estate under his control. He claimed privilege under S. 124 on the ground that the document contained statements that were made to him in his official capacity and that their disclosure would be prejudicial to the public interest. The Lower Court held that statements made under process of Law cannot be said to be made in "Official Confidence,"

Held, that under the Court of Wards Manual (3 of 1899) there is no question of process of law in this case and therefore the particular document was a communication made to the Collector in his "Official Confidence" and he could not be compelled to disclose it. (*Rafique and Lindsay, JJ.*). COLLECTOR OF JAUNPUR *v.* JAMNA PRASAD.

66 I.C. 171=44 All. 360=20 A.L.J. 140=A.I.R. 1922 All. 37.

—S. 124—Power to decide.

———The Trial Court has jurisdiction to decide whether an official communication is confidential. (*Devadoss, J.*). SECY. OF STATE *v.* MUTHU ALAGAPPA. **113 I.C. 872=A.I.R. 1928 Mad. 1093.**

———Under S. 124, it is for the Court to decide whether a document is a communication made to a public officer in official confidence. If the Court decides that it was so made then it is solely for the officer to say if its disclosure would or would

EVIDENCE ACT (1872), S. 124—Railway communications.

not be in the public interests. (*Rafique and Lindsay, JJ.*). COLLECTOR OF JAUNPUR *v.* JAMNA PRASAD. **66 I.C. 171=44 All. 360=20 A. L. J. 140=A.I.R. 1922 All. 37.**

—S. 124—Railway communications.

———*Communications by railway employees to Station Master as regards theft are not protected.*

B was charged of having committed theft of certain pieces of cloth in charge of the railway company from a goods truck at a railway station. The Station Master started an enquiry and recorded statements of four persons all of whom were railway employees; these statements were forwarded to the Divisional Superintendent who objected under S. 124 to their production before the trying Magistrate when the accused called for them in order that he might cross-examine the witnesses,

Held, that these communications were not protected. (*Stuart, C. J.*). EMPEROR *v.* BHAGWATI PRASAD. **6 O.W.N. 937=1929 Cr. C 677=A.I.R. 1929 Oudh 543.**

—S. 124—Waiver.

———*Waiver at one stage—Privilege cannot be claimed subsequently.*

Where copies of documents had been filed in the lower Court apparently without any objection that they were privileged documents which should not be admitted in evidence, it cannot be claimed any more that they are communications made in official confidence. 32 M. 62; 39 M. 304, *Dist.* (*Krishnan and Ramesam, JJ.*). RATHNAMASARI *v.* SECY. OF STATE. **72 I.C. 214=17 M.L.W. 415=32 M.L.T. 279=A. I. R. 1923 Mad. 332=44 M.L.J. 132.**

—S. 126—Absence of litigation.

———*No excuse for disclosure.*

The obligation to keep undisclosed matters which ought not to be disclosed has nothing to do with the question whether at the time when the communications were made there was pending litigation or any prospect of it. L. R. 8 Ch. 361, *Foll.* (*Shah, Ag. C.J., Kajiji and Kincaid, JJ.*). AN ATTORNEY, *In re.* **84 I.C. 353=26 Bom. L.R. 887=A. I. R. 1925 Bom. 1 (F. B.).**

—S. 126—Advice by third party.

———Section 126 prohibits disclosure not only of any advise given by the professional adviser in the course and for the purpose of his employment but also the disclosure by an attorney of advice given by another person such as a barrister, attorney, etc. (*Shah, Ag. C. J., Kajiji and Kincaid, JJ.*). AN ATTORNEY, *In re.* **84 I.C. 353=26 Bom. L.R. 887=A.I.R. 1925 Bom. 1 (F.B.).**

—S. 126—Counsel for two parties.

———Where legal practitioner is engaged by two parties he cannot make any disclosures in proceedings between a third party and one of his clients without consent of both of his clients though as between them there can be no secrecy. 3 Bom. 91; 2 A. and E. 171, *Foll.* (*Shah, Ag. C. J., Kajiji and Kincaid, JJ.*). AN ATTORNEY, *In re.* **84 I.C. 353=26 Bom.L.R. 887=A.I.R. 1925 Bom. 1 (F.B.).**

—S. 126—Friend of party.

———Presence of the client's friend when professional communications are made to an attorney does not affect attorney's obligation to keep the communications secret. (*Shah, Ag. C. J., Kajiji and Kincaid, JJ.*). AN ATTORNEY. *In re.* **84 I.C. 353=26 Bom. L.R. 887=A.I.R. 1925 Bom. 1 (F.B.).**

EVIDENCE ACT (1872), S. 132—Compulsion.—S. 126—Period.

———The obligation continues after the employment has ceased. (*Shah, Ag. C. J., Kajiji and Kincaid, JJ.*). AN ATTORNEY, *In re.* **84 I.C. 353=26 Bom. L.R. 887=A.I.R. 1925 Bom. 1 (F.B).**

—S. 126—Privileged communication.

———Pleaders engaged for obtaining succession certificate examined as to contents of testator's will—He was privileged from disclosing its terms. 5 Bom. L. R. 122, *Dist.*; A.I.R. 1925 Bom. 1 (F.B.), *Ref.* (*Marten, C. J. and Murphy, J.*). BAIKANTA *v.* BHAILAL GHELABHAI AMIN. **31 Bom. L.R. 1046=A.I.R. 1929 Bom. 414.**

—S. 126—Scope.

———Giving out matter which is already a disclosed fact is not forbidden. (*Shah, Ag.C.J., Kajiji and Kincaid, JJ.*). AN ATTORNEY, *In re.* **84 I.C. 353=26 Bom.L.R. 887=A.I.R. 1925 Bom. 1 (F.B.).**

—S. 129—Applicability.

———*Statements made by servants of a party are not privileged.*

The documents for which privilege can be claimed would be those only which are in the nature of communications between the lay clients and their professional legal advisers. No privilege can attach in law to the statement, made by a party's servants with reference to the subject-matter of the suit to the master. 2 Bom. 453; 15 Bom. 7 and 11 Cal. 655, *Rel. on.* (*Mirza, J.*). CENTRAL INDIA SPINNING WEAVING AND MANUFACTURING CO. *v.* G.I.P. RY. CO. **102 I C. 425=29 Bom.L.R. 414=A.I.R. 1927 Bom. 367.**

—S. 132—Co-accused.

———The section affords sufficient protection to a co-accused to give evidence against his co-accused if compelled to do so and there is no ground why his evidence should be refused. (*Zafar Ali, J.*). RAJA RAM *v.* EMPEROR. **73 I. C. 521=5 L. L. J. 429=24 Cr. L. J. 633=A.I.R. 1924 Lah. 247.**

—S. 132—Compulsion.

———*What is.*

The protection offered by S. 132, Proviso, does not cover any and every answer given by a witness during the course of his trial. The compulsion contemplated in that section is something more than being put into the witness-box and being sworn to give evidence. The compulsion in the proviso refers to compulsion by Court and not compulsion under law. The witness, of course, need not ask in so many words the protection of the Court. The compulsion may be implied or explicit, and in every case it is a question of fact whether there was or was not compulsion. But a witness who answers a question or questions put to him without seeking the protection of S. 132 by objecting to the question put, and requesting to be excused, is not entitled to that protection. 3 Mad. 271 (F.B.); A I.R. 1926 Bom. 141 (F.B.); A.I.R. 1926 Mad. 906, (F.B.); A.I.R. 1924 All. 381; 16 All.88; 40 All. 271, *Foll.*; 42 All. 257 and A.I R. 1921 All. 362, *Not foll.*; A.I.R. 1927 Mad. 379; A.I.R. 1925 Rang. 345, *Dist.* (*Devadoss and Waller, JJ.*). PEDDABHA REDDI *v.* VARADA REDDI. **116 I.C. 337=52 Mad. 432=29 M.L.W. 210=2 M.Cr.C. 8=1929 M W N. 84=30 Cr L.J. 613=13 A.I. Cr. R. 21=A.I.R. 1929 Mad. 236=56 M.L.J. 570.**

———Compulsion under that section is a question of fact. It by no means follows that the witness is

EVIDENCE ACT (1872), S. 132—Compulsion.

compelled to answer every question put by Counsel. (*Watts and Ryves, JJ.*). EMPEROR *v.* BANARSE.
77 I.C. 829=46 All. 254=22 A.L.J. 144=5 L.R.A. Cr. 73=25 Cr.L.J. 477=A. I. R. 1924 All. 381.

———Unless a person objects to any question the answer, to which is likly to criminate him, he cannot be said to have been compelled to give such answer. (*Heaton, A.C.J., Shah and Hayward, JJ.*). EMPEROR *v.* CUNNA. **59 I.C. 324=22 Cr.L.J. 68=22 Bom. L.R. 1247.**

—S. 132—Compulsory and voluntary.

———*Test—Mere record of deposition is not by itself sufficient.*

Where the Judges are permitted to simply make notes of the deposition of a witness it is difficult to know whether a witness voluntarily made a statement or was "compelled" to make it in answer to a relevant question. So the mere record of a deposition is not by itself sufficient evidence of compulsory or voluntary nature of the statement of a witness. (*Kinkhede, A.J.C.*). SURAJMAL *v.* RAMNATH. **105 I. C. 820=28 Cr.L.J. 996=9 A.I. Cr.R. 204=A.I.R. 1928 Nag. 58.**

—S. 132—Defamation, what is.

———To give out that a woman had miscarriage without any knowledge whether she was married or not would amount to defamation because the person who makes the statement would have reasonable belief that such imputation would harm the reputation of the woman in case she was not married and if such statement is made in a witness-box and epecially so in examination-in-chief when the character of the woman is not a fact in issue, the witness is not protected by S. 132, unless the Judge himself asked the question. 32 Cal. 756; 18 A.L.J. and 112, *Ref.* (*Dalal, J.*). KASHI RAM *v.* EMPEROR. **A.I.R. 1930 All. 493.**

—S. 132—Liquidation proceedings.

———In proceedings under S. 196 (5), Companies Act there is no contest between two parties and therefore the proviso to S. 132 does not confer any special privilege on the person so examined. (*Jai Lal, J.*). RAMCHAND GURWALA *v.* KING EMPEROR. **98 I.C. 599=27 Cr. L.J. 1383=A.I.R. 1926 Lah. 385.**

—S. 132—Omission to protest.

———Relevant statements made by a witness on oath or solemn affirmation in a judicial proceeding are not protected in cases where the witness has not objected to answering the question put to him. (*Macleod, C. J., Crump and Coyajee, JJ.*). BAI SHANTA *v.* UMROO AMIR. **93 I.C. 151=50 Bom. 162=28 Bom. L.R. 1=27 Cr. L.J. 423=A.I.R. 1926 Bom. 141(F.B.).**

———*Answer to question on a relevant point—Protected.*

A voluntary statement by a witness may stand on a totally different footing to an answer given by him as a witness on oath to a question put to him either by the Court or Counsel on either side, especially when the question is on a point which is relevant to the case. In the latter case the witness is within the protection afforded by S. 132 although he may not have objected to the question being put to him. 3 Mad. 271; 16 All. 88; 40 All. 271 and 42 All. 257, *Diss. from.* (*Tudball, J.*). CHATUR SINGH *v.* EMPEROR. **43 All. 92=A. I. R. 1921 All. 362.**

—S. 132—Privilege.

———*Motive—Important elements.*

Not only the status of the witness claiming privilege and his capacity to realize the risk and take

EVIDENCE ACT (1872), S. 133—Accomplice, who is.

objection to the question at the time of giving the answers but also the motive with which he gives his evidence, go a great way to determine his criminal responsibility or otherwise for the statement. (*Kinkhede, A.J.C.*). SURAJMAL *v.* RAMNATH. **105 I.C. 820=28 Cr.L.J. 996=9 A.I.Cr.R. 204=A.I.R. 1928 Nag. 58.**

———Ordinarily, it is for the witness to claim protection at the time of giving his self-criminating answer, and to prove it as a defence to a prosecution for defamation. (*Kinkhede, A.J.C.*). SURAJMAL *v.* RAMNATH. **105 I.C. 820=28 Cr.L.J. 996=9 A.I.Cr. R.204=A.I.R. 1928 Nag. 58.**

—S. 132—Scope of protection.

———*Privilege applies only to particular questions objected to—Objection to answer is necessary.*

The proviso applies only to answers given to particular questions. It does not confer a general immunity on a person who is examined even after his protest. In order to substantiate the privilege he must object to the particular questions which are put to him if he desires that answers to those questions be not used against him in any subsequent criminal proceedings. A general objection is not sufficient. (*Jai Lal, J.*). RAMCHAND GURVALA *v.* KING EMPEROR. **98 I.C. 599=27 Cr.L.J. 1383=A.I.R. 1926 Lah. 385.**

—S. 132—Voluntary statement.

———Witness actuated by malicious motives making voluntary and irrelevant statement not elicited by questions put to him, is guilty under S. 500. He cannot claim privilege under I.P.C. 21 Cal. 392; 32 Cal. 756; 40 Cal. 433, *Rel. on.* (*Kinkhede, A.J.C.*). SURAJMAL *v.* RAMNATH. **105 I.C. 820=28 Cr.L.J. 996=9 A.I.Cr.R. 204=A.I.R. 1928 Nag. 58.**

—S. 133—*See also* EVIDENCE ACT, S. 114, ILL. (*b*).

Accomplice, who is.
Conviction on uncorroborated testimony.
Corroboration, extent and nature.
Corroboration, what is.
Retracted confession.
Value of accomplice's evidence.
Value of approver's evidence.
Miscellaneous.

—S. 133—Accomplice, who is.

———*Persons assisting concealment of evidence of crime are "accomplices."*

Witnesses who admittedly had witnessed the crime, who have assisted in concealing the evidence of that crime or at least connived at such being done and who have not attempted to give any information either to the police or to any other person to enable the offender to be brought to justice are in a very little better position than that of accomplices. (*Fforde and Hilton, JJ.*). MAYATU *v.* EMPEROR. **120 I.C. 190=31 Cr. L. J. 50=1929 Cr.C. 87=A.I.R. 1929 Lah. 540.**

———*Penal Code, S.* 161.

A person who offers a bribe to a public officer is an accomplice. Persons who actually pay the bribes or co-operate in such payments or are instrumental in the negotiations for the purpose are also accomplices of the person bribed, and a person who with knowledge that the bribe has to be paid advances money is clearly an abettor and as such an accomplice. 14 Bom. 331; 26 Bom. 193 and 27 Cal. 144, *Rel. on.* (*Kinkhede, A. J. C.*). MUHAMMAD USAF KHAIN *v.* EMPEROR. **114 I.C. 457=30 Cr. L.J. 311=1929 Cr.C. 110=A.I.R. 1929 Nag. 215.**

EVIDENCE ACT (1872), S. 133—Accomplice, who is.

———*Accomplice and informer—Distinction.*

In criminal cases the distinction between an informer and an accomplice assumes at times considerable importance, and in order to determine whether a witness who first associated with wrongdoers and subsequently gave information to the police belongs to the first category or is an accomplice whose evidence cannot be accepted without corroboration, it has to be seen whether the witness had entered into the conspiracy for the sole purpose of detecting and betraying it or whether he is a person who concurred fully in the criminal designs of his co-conspirators for a time and joined in the execution of those till either out of fear or for some other reasons he turned on his former associates and gave information to the police. If at the time when he joined the conspiracy he had no intention of bringing his associates to book, but his sole object was to partake in the commission of the crime, he cannot be called an informer but is an accomplice; and his position is not modified simply because later on he turns round and carries information to the police: A. I. R. 1928 Lah. 193, *Rel. on.* (*Tek Chand, J.*). MANGAT RAI *v.* EMPEROR.

110 I.C. 676=10 L.L.J. 262=
29 P.L.R. 703=10 A.I. Cr. R. 519=
29 Cr. L. J. 740=A.I.R. 1928 Lah. 647.

———*Distinction between accomplice and informer explained.*

If at the time when a person joined the conspiracy he had no intention of bringing his associates to book but his sole object was to partake in the commission of the crime, he cannot be called an informer but is an accomplice and his position is not modified simply because later on he turns round and carries information to the police.

A person was present when the plans for committing a dacoity were hatched and had agreed to go to the meeting place in the evening armed with a revolver. He returned soon after and remained there for more than six hours but during this period he took no steps whatever either to inform the police or his master that a dacoity was contemplated. He then actually proceeded to a spot near the house where the dacoity was to be committed and took part in the preparations for committing the offence. It was only after it had been decided to postpone the dacoity till the moon had gone down and he had been sent to the town to bring food for two of the offenders that he for the first time disclosed the whole affair.

Held, that in view of these facts the person cannot but be regarded as an accomplice and his evidence needs corroboration in material particulars against each convict. (*Tek Chand, J.*). KARIM BAKHSH *v.* EMPEROR. **109 I.C. 593=9 Lah. 550=**
29 Cr. L.J. 577=10 A.I.Cr.R. 293=
A.I.R. 1928 Lah. 193.

———A person who has knowledge of the commission of an offence but keeps quiet for some days is no better than an accomplice. 21 Cal. 328 and 24 W.R. 55 (Cr.). *Foll.* (*Suhrawardy and Duval, JJ.*). UMED SHEIKH *v.* EMPEROR. **96 I.C. 867=**
30 C. W. N. 816=27 Cr. L. J. 1011=
45 C. L. J. 581.

———*Person privy to crime.*

Where a witness is found. from his own testimony, to be privy to the crime alleged to be committed by accused, his evidence is no better than that of an accomplice. (*Martineau and Campbell, JJ.*). NUR MUHAMMAD *v.* EMPEROR.

6 L.L.J. 529=A.I.R. 1925 Lah. 253.

EVIDENCE ACT (1872), S. 133—Conviction on uncorroborated testimony.

———Murder—One who helps accused to dispose of body is not an accomplice. (*Le Rossignol and Zafar Ali, JJ.*). JEHANA *v.* THE CROWN.

73 I. C. 506=24 Cr. L. J. 618=
A.I.R. 1923 Lah. 345

—S. 133—Conviction on uncorroborated testimony.

———In law the uncorroborated testimony of an accomplice is sufficient to uphold a conviction provided there is any reason to suppose that it is true. Thus if an accomplice makes a clean breast of the crime and convinces the Court that he is speaking the truth the Court can accept his evidence against his fellow offender. But if so far from making a clean breast of it, he consorts a story of his perfect innocence saying that the fellow offender committed the crime the Court cannot in the same breath refuse to accept the story and convict the fellow offender. (*Jackson, J.*). KUPPUSWAMY IYER, *In re.* **1930 M.W.N. 169.**

———*It is not safe to convict on the sole testimony of accomplice unless corroborated in material particulars by direct or circumstantial evidence.*

The evidence of accomplices is always admissible and is always relevant, but under a very old practice of the Courts in England some evidence is accepted only with great caution and after the closest scrutiny and is not usually accepted against any individual person unless it is corroborated. Although it is not illegal to convict on the uncorroborated evidence of an accomplice, there is a consensus of opinion that a conviction on the uncorroborated evidence of an accomplice is rarely justified. The practice in India is the same as the practice in England. The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some material particulars not only the evidence that the crime has been committed, but also that the prisoner committed it. The corroboration need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connexion with the crime: A. I. R. 1927 Oudh 369, *Ref.* (*Raza and Nanavutty, JJ.*). BACHCHU *v.* EMPEROR.

A.I.R. 1930 Oudh 455.

———It is nowhere laid down as an inflexible proposition of law that a conviction cannot be based upon the uncorroborated testimony of an accomplice; but it is the usual practice of the Courts to require corroboration of the story of the approver before declaring an accused person to be guilty of a crime. The amount or kind of corroboration required in a particular case must, however, depend upon the peculiar circumstances of that case. (*Shadi Lal, C. J. and Bhide, J.*). NARAIN *v.* EMPEROR. **107 I.C. 97=9 A.I. Cr. R. 497=**
29 Cr. L.J. 209.

———*Co-accused and accomplice—Difference explained.*

A confession of an accused person implicating a co-accused under S. 30 cannot be considered as the same thing as 'the testimony of an accomplice, which is referred to in S. 133. Section 133 contemplates that the accomplice shall be examined as a witness. This being so, the provision that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, has no application to the case of an uncorroborated confession taken into consideration as against a

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co-accused jointly tried with the confessing accused under S. 30. Therefore an accused person cannot be convicted solely on such a confession made by a co-accused: 9 C. P. L. R. 35 Cr. and 37 Cr.; 24 W. R. (Cr.) 42; 38 Cal. 559, *Rel. on.* (*Kinkhede, A. J. C.*). NECHA *v.* EMPEROR.
139 I.C. 801=11 N.L.J. 104=29 Cr. L. J. 609=10 A.I. Cr. R. 340=A.I.R.1928 Nag. 213.

———*If jury be not warned of danger in accepting uncorroborated evidence, conviction based upon it must be set aside.*

A jury must be warned expressly of the danger in accepting the uncorroborated evidence of an accomplice and if the warning is omitted a conviction based upon such uncorroborated evidence must be set aside. (*Courtney Terrell, C. J. and Macpherson, JJ.*). RATTAN DHANULL *v.* EMPEROR.
113 I.C. 329=9 P.L.T. 672=8 Pat. 235=30 Cr. L. J. 137=12 A. I. Cr. R. 41=A.I.R. 1928 Pat. 630.

———*Conviction is rarely justifiable though not illegal—English Law.*

The evidence of accomplices is always admissible and is always relevant but under a very old practice of the Courts in England such evidence is accepted only with great caution and after the closest scrutiny, and is not usually accepted against any individual person unless it is corroborated. Although it is not illegal to convict on the uncorroborated evidence of an accomplice, there is a consensus of opinion that a conviction on the uncorroborated evidence of an accomplice is rarely justifiable. The practice in India is the same as the practice in England. *Rex* v. *Baskerville*, (1916) 2 K. B. 658, *Cons.* and *Rel. on.* (*Stuart, C. J. and Raza, J. C.*). RAM PRASAD *v.* EMPEROR.
106 I. C. 721=2 Luck. 631=1 L. C. 339=8 A. I. Cr. R. 449=A.I.R. 1927 Oudh 369.

———When there is no corroborative evidence of the approver's testimony, it is unsafe to base a conviction on that evidence. (*Broadway and Zafar Ali, JJ.*). JANG SINGH *v.* EMPEROR.
96 I. C. 262=27 Cr. L. J. 918 (Lah.)

———A conviction can be based on the uncorroborated testimony of an accomplice: A.I.R. 1922 Lah. 1, *Ref.* (*Daniels and Neave, JJ.*). ABDUL WAHAB *v.* EMPEROR.
95 I. C. 756=47 All. 39=27 Cr. L. J. 836=5 L.R.A. Cr. 193=A.I.R. 1925 All. 223.

———Conviction entirely based on the evidence of an approver with no corroboration in material particulars is bad. (*Scott-Smith and Campbell, JJ.*). FEROZ KHAN *v.* EMPEROR.
86 I. C. 401=6 L. L. J. 608=26 Cr. L. J. 769=A.I.R. 1925 Lah. 268.

———If the Court is satisfied as to the veracity of the testimony of an accomplice, conviction may be based on the uncorroborated evidence of the accomplice. (*Baguley, J.*). A. V. JOSEPH *v.* EMPEROR.
85 I.C. 236=26 Cr.L.J. 492=3 Bur. L.J. 265=3 Rang. 11=A.I.R. 1925 Rang. 122.

———*Judge should direct the jury that they can legally convict.*

There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. But it has long been a rule of practice for the Judge to warn the Jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices and in the discretion of the Judge to advise them not to convict upon such evidence but the Judge should point out to the Jury

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that it is within their legal province to convict upon such unconfirmed evidence. (*Richardson and Suhrawardy, JJ.*). EMPEROR *v.* JAMALDI FAKIR.
81 I.C. 712=51 Cal. 160=28 C.W.N. 536=25 Cr.L.J. 1000=A.I.R. 1924 Cal. 701.

———*Conviction on uncorroborated evidence, when approver is a scoundrel is not warranted.*

The decision in each case must depend on its own particular circumstances and no general rule can be laid down as to when an accomplice's uncorroborated evidence alone should be accepted and acted on against an accused. A conviction on the uncorroborated evidence of an accomplice is to be regarded as exceptional. The two illustrations given under S. 114 of the Act clearly indicate that the application of S. 133 must be exceedingly rare. There is no positive legal bar to taking an approver's evidence as a basis for a conviction but unless some reliable corroboration on a material point were superadded to it, it would, in almost all cases, be unsafe to accept it as conclusive. Where in several respects the approver's evidence did not appear to the Trial Court to be quite satisfactory and the likelihood of his "playing a double game" strongly suggested itself at one time, and the approver was a thorough paced scoundrel.

Held, that the uncorroborated testimony of the approver did not afford a sufficient foundation for conviction. (*May Oung, J.*). MAUNG LAY *v.* EMPEROR.
77 I.C. 429=25 Cr. L.J. 381=A.I.R. 1924 Rang 173.

———The evidence of an accomplice by itself is enough for a conviction, but it is a rule of practice founded on experience that in every case where an accomplice has given evidence, the Court must raise a presumption that he is unworthy of credit unless corroborated in material particulars. Failure to raise this presumption is an error of law, but in each case the weight to be attached must depend on the particular circumstances. (*Mullick and Thornhill, JJ.*). MADAN GURU *v.* EMPEROR.
73 I. C. 963=4 P.L.T. 381.

———Conviction on the uncorroborated evidence of an accomplice is not illegal. Such evidence must be treated with great suspicion and caution but must be acted upon if believed in: 8 All. 306t. *Diss. from.* (*Hallifax and Macnair, A. J. Cs.*). GOVINDA *v.* EMPEROR.
69 I.C. 257=17 N.L.R. 113=A.I.R. 1921 Nag. 39.

—S. 133—Corroboration, extent and nature.

———*Several accused—Corroboration as regards particular accused—Necessity of.*

Per *Staples, A. J. C.* (*Contra*)—It is true that an approver's story shouldbe corroborated not only as regards the facts of the case but also as regards the identity of the accused, but where there are several accused and the story of the approver has been confirmed on many points, and as regards the identity of several of the accused, it should not be considered necessary that his story should be corroborated as regards the identity of the remaining accused unless there are reasons for believing that the approver has named those other accused on account of personal spite or for some other reason. The real test of the evidence of the approver is whether it has been believed or not and when it has been corroborated on many points and has not been shown to be false in any particular it should be accepted; and when once it has been accepted as a whole corroboration as regards the identity of each of several accused

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should not be demanded : A. I. R. 1921 Nag. 39 ; 9 All. 528, *Expl.* ; *Rex* v. *Baskerville*, (1916) 2 K. B. 658, *Dist.*

(Per *Jackson* and *Subhedar*, *A. J. Cs.*)—Even where there are several accused persons, an approver's story to be corroborated as regards a particular accused must be corroborated on some points which implicates that accused. It is not necessary that it should be corroborated on all points relating to him, but there must be some guarantee that his evidence is true as regards that particular accused: A.I.R. 1921 Nag. 39, *Rel. on* ; 14 Bom. 331; A.I.R. 1922 Nag. 172 ; A.I.R. 1925. Nag. 78, *Appl.* (*Jackson*, *A. J. C. on difference between Staples and Subhedar*, *A. J. Cs.*). DOULAT *v.* EMPEROR.

120 I. C. 721= 31 Cr. L.J. 153= A.I.R. 1930 Nag. 97.

———Corroboration may be circumstantial.

(Per *Staples*, *A. J. C.*)—A.I.R. 1922 Nag. 172, *Rel. on.* (*Jackson*, *A. J. C. on difference between Staples and Subhedar*, *A. J. Cs.*). DOULAT *v.* EMPEROR. **120 I.C. 721=31 Cr. L.J. 153= A.I.R. 1930 Nag. 97.**

———*Need not be direct.*

The evidence in corroboration of the approver's evidence need not be direct evidence showing that the accused have committed the crime. It is sufficient if it is merely circumstantial evidence of their connexion with the crime : 1 L. C. 339, *Cons.* (*Raza*, *J.*). LALE *v.* EMPEROR. **118 I.C. 423= 6 O.W.N. 441=30 Cr.L.J. 922= 1929 Cr. C. 143=A.I.R. 1929 Oudh 321.**

———*Approver's evidence must be corroborated also as to the identity of accused.*

The evidence of an approver must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner : A.I.R 1922 Lah. 1 ; *Rex.* v. *Baskerville*, (1916) 2 K. B. 658 and *R.* v. *Francis Stubbs*, (1855) 25 L. J. M. C. 16, *Foll.* (*Addison and Skemp*, *JJ.*). WAZIR CHAND *v.* EMPEROR. **102 I.C. 500=8 A.I.Cr. R.230= 28 Cr.L.J. 564=A.I.R. 1928 Lah. 30.**

———It is very difficult to vary the standard of corroborative proof required in the case of various approvers. Tender age is no ground for applying lenient standard. (*Addison and Skemp*, *JJ.*). WAZIR CHAND *v.* EMPEROR. **102 I. C. 500= 8 A.I. Cr. R. 230=28 Cr. L J. 564= A.I.R. 1928 Lah. 30.**

———*Corroboration is required with respect to each individual accused.*

Where there are several accused, corroboration is required with respect to the guilt of each individual accused, that is to say, the fact that the evidence of the accomplice is corroborated as to certain of the accused does not amount to corroboration of the evidence as regards the guilt of the other accused. (*Courtney-Terrell*, *C. J. and Macpherson*, *J.*). RATTAN DHAMUK *v.* EMPEROR. **113 I.C. 329= 9 P. L. T. 672=8 P. L. T. 235=30 Cr. L. J. 137= 12 A. I. Cr. R. 41=A.I.R. 1928 Pat. 630.**

———There is no definite rule of law that a person cannot be convicted upon the uncorroborated evidence of an accomplice. But Ill. (*b*) to S. 114 of the Evidence Act is the rule such cases and Courts must act up to it. If the suspicion which attaches to the evidence of an accomplice be not removed that evidence should not be acted upon unless corroborated in material particulars. Rule as to corroboration elaborately discussed. (*Scooke and Chatterji*, *JJ.*). EMPEROR *v.* KAILASH MISSIR. **11 P. L. T. 545.**

EVIDENCE ACT (1872), S. 133—Corroboration, extent and nature.

———*Principles explained.*

Although under S. 133, Evidence Act, an accomplice is a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of such accomplice, the rule of caution that such testimony should be supported by extrinsic evidence connecting the accused with the crime is now regarded as a rule of law, and although it is not illegal to convict a person on the uncorroborated testimony of an approver, the Courts in points of facts always insist upon the rule being followed.

What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.

The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged and it would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice, that the accused committed the crime, is true not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime ; it is sufficient if it is merely circumstantial evidence of his connexion with the crime.

Corroborative evidence need not be sufficient in itself to base a conviction on. Confirmation of the story of an accomplice does not mean that there should be independent evidence of the accomplice's account of the crime itself. What the law clearly requires is that some relevant and material part of the approver's story incriminating the accused should have support from an independent source. This supplies a test of the truth of the accomplice's narrative as a whole by checking it in some relevant portion: *Rex.* v. *Baskerville*, (1916) 2 K. B. 658, *Foll.* (*Fforde*, *J. on difference between Agha Haidar and Broadway*, *JJ.*). BARKALI *v.* EMPEROR. **103 I. C. 43=28 Cr. L. J. 625=8 A. I. Cr. R. 273= A.I.R. 1927 Lah. 581.**

———*Must connect the prisoner with the offence.*

It is not sufficient that the approver's testimony is confirmed as to the circumstances of the felony but it must be proved that the testimony is corroborated in some material circumstances, such circumstance connecting and identifying the prisoner with the offence. (*Shadi Lal*, *C.J. and Jai Lal*, *J.*). KATTU *v.* EMPEROR. **98 I. C. 190= 27 P. L. R. 615=8 L. L. J. 616= 27 Cr. L. J. 1294=A.I.R. 1927 Lah. 10.**

———*Corroboration as to the part played by the accomplice.*

It is not sufficient that the approver should be corroborated with regard to the actual commission of the crime itself; for such corroboration merely shows that he himself took part in the offence. Experience requires that the approver should also be corroborated in material points as to the part played by his accomplices. The amount of corroboration in this respect as indeed in respect of all corroboration of an approver's evidence, must depend upon the view which the Court takes of the approver's character and of his general demeanour in the witness-box. (*Mullick*, *Ag.C.J. and Jwala Prasad*, *J.*). JAGWA DHANUK *v.* EMPEROR. **93 I.C. 884=5 Pat. 63=7 P.L-T. 396= 27 Cr.L.J. 484=A.I. R. 1926 Pat. 232.**

EVIDENCE ACT (1872), S. 133—Corroboration, extent and nature.

———A statement of an approver in order to be a basis for conviction must be a trustworthy statement and must be amply corroborated in material particulars which must be Independent of the accomplice or of the co-confessing accused. (*Kotval and Kinkhede, A.J. Cs.*). SHEROO *v.* EMPEROR.
81 I.C. 891=25 Cr. L. J. 1067=A. I. R. 1925 Nag. 78.

———It is not necessary that the approver should be corroborated as regards every single statement that he makes and therefore a direction to jury that if the approver was corroborated on some points, they might believe him on other points in respect of which he was not corroborated, is not misdirection. (*Newbould and B.B. Ghose, JJ.*). LEDU MOLLA *v.* EMPEROR. **87 I. C. 925=52 Cal. 595=26 Cr.L.J. 1037=42 C.L.J. 501=A.I.R. 1925 Cal. 872.**

———*Defence being false is not corroboration of approver.*

Section 133 contains the rule of law regarding the testimony of accomplices and S. 114, Ill. (b) is merely a guide to assist the Courts, though, as stated by *Johnstone, C.J.* in 17 P.R. 1915, in a vast majority of cases prudence requires that there shall be corroboration. No hard and fast rules can however, be laid down to regulate the extent and nature of such corroboration, this being dependant entirely on the cirmstances of each case. The fabrication of a false defence cannot be regarded as sufficient to corroborate an approver. (*Scott-Smith and Broadway, JJ.*). MAHANT NARAIN DAS *v.* EMPEROR. **68 I. C. 113= 3 Lah. 144=4 L. L. J. 91=9 P. W. R. 1922 (Cr.)=23 Cr.L.J. 513=A.I.R. 1922 Lah. 1.**

———*Nature and extent of corroboration required discussed—English and Indian Law on the point do not differ.*

Confirmation (corroboration) does not mean that there should be independent evidence of that which the accomplice relates, otherwise his testimony would be unnecessary. But one accomplice's evidence is not corroboration of the testimony of another accomplice. (1848) 3 Cox C. C. 526 and 531.

Evidence in corroboration must be evidence which implicates the accused, *i.e.*, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.

The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. Where the law otherwise, many crimes which are usually committed between accomplices in secret, such as incest, offences with females, etc., could never be brought to justice. *Rex* v. *Baskerville*, (1916) 2 K. B. 658.

The law in this country regarding corroboration of an accomplice's evidence does not differ from English law. (*Kotval, A.J.C.*). KISAN *v.* EMPEROR. **67 I.C. 343=6 N.L.J. 52=23 Cr. L.J. 391=A.I.R. 1922 Nag. 172.**

———*Several accused.*

When there are several accused, each person accused is entitled to claim that as against him the statement of the approver shall be corroborated by some reliable evidence. (*Chevis, J.*). LALA *v.* EMPEROR. **65 I.C. 622=34 P.L.R. 1922=3 P.W.R. 1922 (Cr.)=23 Cr. L.J. 158=A.I.R. 1921 Lah. 215.**

EVIDENCE ACT (1872), S. 133—Corroboration, what is.

—S. 133—Corroboration, what is.

———*Theft and murder—Corroboration of theft—If connects accused with murder.*

The evidence of an approver must be corroborated in material particulars, and those material particulars should connect the accused persons with the crime.

In a charge for theft and murder the approver in no way sought to exculpate himself so far as the conspiracy to commit theft and the theft itself was concerned, nor so far as regards conspiring to commit murder, though he exculpated himself so far as the actual murder was concerned. The story of the approver so far as a conspiracy to commit theft and the actual theft was corroborated, and the circumstances showed that the persons who committed theft were the same who committed the murder,

Held, that the corroboration connected the accused with the crime of murder. (*Adami, J.*). SHEO BARHI *v.* EMPEROR. **A.I.R. 1930 Pat. 164.**

———*Involuntary accomplices—Slighter degree of corroboration enough.*

Where police officers act in conspiracy with one another to demand and receive illegal gratification and are ready to make use of their official position to enforce such demand, the testimony of accomplices who are really victimised by them into offering them illegal gratification and have not willingly done so requires a much slighter degree of corroboration than would be the case if the accomplices were entirely voluntary accomplices. 33 Cal. 649, *Ref.* (*Mirza and Murphy, JJ.*). EMPEROR *v.* C. E. RING. **120 I.C. 340=31 Bom. L. R. 545=53 Bom. 479=31 Cr. L. J. 65=1929 Cr. C. 114=A.I.R. 1929 Bom. 296.**

———A man who has been guilty of a crime himself will always be able to relate the facts of the case and if the confirmation be only on the truth of that history, without identifying the persons, that is no corroboration at all : *R.* v. *Farler*, 8 C. and P. 106 and *R.* v. *Ealhai Bux*, B.L.R. Sup. Vol. 459 (F.B.), *Foll.* (*Cuming and Lort Williams, JJ.*). REHATI MOHAN *v.* EMPEROR. **115 I. C. 258=32 C.W.N. 945=56 Cal. 150=30 Cr.L.J. 435=12 A.I. Cr. R. 265=A. I. R. 1929 Cal. 57.**

———*Dacoity— Approver — Corroborating witness omitting to mention dacoits in F. I. R.—No corroboration.*

Where a dacoity was committed and the evidence against the accused persons was that of an approver and the corroborative evidence consisted of a witness who said he identified certain accused persons when they committed the dacoity but omitted to mention the dacoits by their names in the first information report, such omission is a disqualifying circumstance for accepting his evidence on the point of identification and there is absolutely no corroborative evidence which connects or tends to connect the accused persons with the crime : 6 Bom. L.R. 443 ; 8 All. 306 ; A.I.R. 1921 Nag. 39 ; A.I.R. 1922 Nag. 172 ; A.I.R. 1925 Nag. 78, *Rel. on* ; *Rex.* v. *Baskerville*, (1916) 2 K. B. 658, *Ref.* (*Kinkhede, A.J.C.*). LODYA MAHAR *v.* EMPEROR. **114 I.C. 623=30 Cr. L. J. 331=1929 Cr. C. 108=A. I. R. 1929 Nag. 222.**

———Confirmation does not mean that there should be independent evidence of that which the accomplice relates, otherwise his testimony would be unnecessary. The evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the

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prisoner. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. (*Stuart, C.J. and Raza, J.*). RAM PRASAD *v.* EMPEROR.
106 I.C. 721=2 Luck. 631=1 L.C. 339=8 A.I. Cr. R. 449=A.I.R. 1927 Oudh 369.

———*Co-accused and approver.*

There is no statutory prohibition against accepting the evidence of an approver who is thoroughly unreliable and base a conviction upon his uncorroborated testimony, but to do so is extremely dangerous especially where such evidence when examined is obviously open to criticism from the point of view of possible mistake, or intentional concealment or misrepresentation. The confession of a criminal who has confessed his guilt, in so far as it implicates other persons besides himself, must be treated as very little if at all superior in value to that of an accomplice who has received a pardon and therefore where the Court has a witness belonging to each of these classes the question necessarily arises as a matter of logic whether unless both these witnesses survive every test which can reasonably and ought properly to be applied to witnesses so that in the result one can say with confidence that neither of them has swerved in substance from the truth the problem remains the same or whether tainted evidence is made better in quality by being doubled in quantity. (*Walsh and Pullan, JJ.*). PARTAB SINGH *v.* EMPEROR. **96 I.C. 127=27 Cr. L.J. 879=A.I.R. 1926 All. 705.**

———It cannot be said that as a point of law the evidence of the witnesses who support the statement of the approver is not corroborative evidence because such evidence was known to the police before the approver was examined by them. (*Newbould and B. B. Ghose, JJ.*). IBRAHIM, *In re.*
88 I.C. 458=42 C.L.J. 496=26 Cr. L. J. 1146=A. I. R. 1926 Cal. 374.

———Verification of the approver's confession may be of value as corroboration of his evidence in Court. (*Newbould and B.B. Ghose, JJ.*). LEDU MOLLA *v.* EMPEROR. **87 I.C. 925=26 Cr.L.J. 1037=52 Cal. 595=42 C.L J. 501=A.I.R. 1925 Cal. 872.**

———Murder—Blood stains on accused's shirt is not sufficient corroboration—Evidence as to motive does not dispense with need for corroborative evidence. (*Le Rossignol and Fforde, JJ.*). JIT SINGH *v.* EMPEROR. **86 I.C. 811=26 Cr.L.J. 875=26 P.L.R. 124=A. I. R. 1925 Lah. 526.**

———Mere fact that the accused were seen with the approver a few days before the dacoity is not a material corroboration of the evidence of the approver to the effect that they joined him in the dacoity. If the accused person produces certain property which is identified at the trial as having been stolen in the course of the dacoity, it is sufficient corroboration. (*Scott-Smith, A.C.J.*). HAZARA SINGH *v.* THE CROWN. **82 I.C. 707=6 L.L.J. 370=25 Cr.L.J. 1347=A.I.R. 1924 Lah. 727.**

———*Approver's detention in Police lock-up is immaterial.*

That the evidence of an approver, if believed is sufficient foundation whereon to repose a conviction is quite clear, but in practice the Courts *ex majori cautela* insist upon corroboration of the approver's statement in material particulars. Where the statement of the approvers that there was a murderous conspiracy to which the accused was a party was supported by the evidence proving that

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he did aid the parties to that conspiracy to obtain murderous weapons.

Held, that there was sufficient corroboration. The facts that the approvers did not make statements as soon as they were arrested and that they were kept in the Police lock-up during the enquiry were immaterial. (*Le Rossignol, J.*). TOTA SINGH *v.* EMPEROR. **69 I.C. 462=A.I.R. 1924 Lah. 357.**

———Identification by three persons and the recovery of stolen property with the accused constitute a very satisfactory corroboration. (*Dalal, J.C.*). EMPEROR *v.* RAM CHARAN. **27 O.C. 29=11 O.L.J. 210=25 Cr.L.J. 785=A.I.R. 1924 Oudh 314.**

———*Production of stolen property by accused is a corroboration.*

Where the only evidence against an accused person is that he has produced stolen property out of a place which is not in his own possession, that evidence is not sufficient to support a conviction for theft or for receiving stolen property. But the production of the property is clear evidence against the person producing it and is material corroboration of the evidence of an accomplice who has deposed that that person joined him in committing a dacoity or a burglary or a theft. The discovery of stolen property out of a house jointly occupied by himself and his uncle, is corroboration of the approver's story against the accused. Such production might not be sufficient evidence of itself to support a conviction for being dishonestly in possession of a stolen property, but it certainly is evidence against the persons producing it. The value of the evidence is another matter. (*Scott-Smith, J.*). KHUSHAL SINGH *v.* THE CROWN. **76 I.C. 698=25 Cr. L.J. 234=A.I.R. 1923 Lah. 335.**

———An approver may be telling the truth and it is quite probable that he himself was concerned in the murder but his statement as to who his accomplices were, must be corroborated by reliable evidence before it can form the basis of a conviction. The corroboration offered by the statement of two men who apparently knew something about the matter from the very beginning but refused to make any statement until the third day of the police investigation, must be regarded with doubt and these witnesses may possibly be hiding themselves at the cost of innocent men. (*Chevis, C. J. and Le Rossignol, J.*). FATTA *v.* EMPEROR.
67 I.C. 828=2 L.L.J. 296=23 Cr.L.J. 476=18 P.W.R. (Cr). 1922.

———Several persons making confessions—That particular person is named by more than one, is not sufficient corroboration. (*Chevis, J.*). LALA *v.* EMPEROR. **65 I.C. 622=34 P.L.R. 1922=23 Cr.L.J. 158=3 P.W.R. 1922 (Cr.)=A.I.R. 1921 Lah. 215.**

———*Motive not sufficient corroboration.*

The mere fact of there having existed an animosity in the mind of a person accused of murder against the deceased which might have provided some motive for a crime of this nature is not in itself a corroborative factor of the evidence of accomplices or to put it in other words, if there had merely been this evidence of motive, such in itself would of course not have been sufficient to justify even a thought of conviction. (*Das and Bucknill, JJ.*). DHANNU BELDAR *v.* EMPEROR.
2 P.L. T. 757=A.I.R. 1921 Pat. 406.

EVIDENCE ACT (1872), S. 133—Retracted confession.

—S. 133—Retracted confession.

———*Must be much more corroborated than evidence of accomplice taken on oath.*

A retracted confession is not the testimony of an accomplice within the meaning of S. 133. A retracted confession should carry practically no weight as against the person other than the maker, because it is not made on oath, it is not tested by cross-examination and its truth is denied by the maker himself who has lied on one or other of the occasions and the very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath: 28 Cal. 689; 38 Cal. 559, *Ref.* (*Newbould and Mookerjee, JJ.*). MOYEZ SARDAR *v.* EMPEROR.

84 I. C. 712=40 C.L.J. 551=26 Cr. L.J. 360=A.I.R. 1925 Cal. 406.

———A retracted statement of an approver, is admissible as evidence against an accused person. (*Odgers, J.*). VEERABHADRA *v.* EMPEROR.

61 I.C. 528=22 Cr.L.J. 400=12 M. L.W. 385

———*Rule as to.*

Though, as a matter of law, a conviction may be based upon a retracted confession if the Court can come to the unhesitating conclusion that the confession is voluntary, yet as a matter of prudence no conviction should be based upon such a retracted confession: 2 C.L.R. 132; 21 W.R. Cr. 49; 27 C. 295; 18 A. 78, *Ref.*: (*Jwala Prasad and Sultan Ahmed, JJ.*). MAKSUD ALI *v.* EMPEROR.

60 I. C. 56=2 P.L.T. 773=22 Cr. L.J. 200=A.I.R. 1921 Pat. 337.

—S. 133—Value of accomplice's evidence.

———Although it is not illegal to convict on the uncorroborated evidence of an accomplice there is consensus of opinion that a conviction on the uncorroborated testimony of an accomplice is rarely justified. Nature of corroboration that is required indicated. (*Raza and Nanavutty, JJ.*). BACHCHU *v.* EMPEROR. **7 O.W.N. 862=1930 Cr.C. 1079=A.I.R. 1930 Oudh 455.**

———*Rule of practice.*

Although a conviction is not "illegal" merely because it proceeds on the uncorroborated testimony of an accomplice, the rule of practice is now firmly established that corroboration of such testimony in material particulars connecting each of the individual accused with the crime is necessary to justify his conviction. A.I.R. 1927 Lah. 581, *Ref.* (*Bhide and Johnstone, JJ.*). HAKAM SINGH *v.* EMPEROR. **1929 Cr. C. 626=A.I.R. 1929 Lah. 850.**

———*One accomplice cannot corroborate another accomplice—'Taint' must be removed.*

The testimony of one accomplice is of little value as a piece of corroborative evidence in support of the testimony of another accomplice. The testimony of an approver can be used for the purpose of corroboration if the taint attached to it is removed. But this "taint" must be removed to such an extent that the Court is prepared to believe the testimony of the approver in the same way and to the same extent as the testimony of an ordinary witness whom it considers to be worthy of credit. A.I R. 1923 Lah. 76 and 20 P.R. 1919, *Ref.* (*Bhide and Johnstone, JJ.*). HAKAM SINGH *v.* EMPEROR. **1929 Cr. C. 626=A.I.R. 1929 Lah. 850.**

———*Controlled by S.* 114, *Illus.* (*b*).

Absolute rule of law regarding the evidence of accomplices that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice is subject to a rule of guidance in illustration (b) to S. 114 and which says that an accomplice is unworthy of credit, unless he is corroborated in material particulars. (*Kinkhede and Mohiuddin, A.J.Cs.*). MUSA *v.* EMPEROR. **114 I.C. 609=30 Cr.L.J. 333=1929 Cr. C. 257=A.I.R. 1929 Nag. 233.**

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———*Principles explained.*

It is generally unsafe to convict a person on the evidence of accomplices unless corroborated in material particulars. In considering whether this maxim applies to a particular case it must be remembered that all persons coming technically within the category of accomplices cannot be treated on precisely the same footing.

Accomplice evidence is untrustworthy for three reasons:—(i) He is likely to swear falsely to shift the guilt from him; (ii) He being a participator in crime is likely to disregard the sanction of an oath; and (iii) He gives evidence under promise of or in expectation of a pardon. Therefore if the principal evidence is of accomplices, it is tainted evidence and hence there is need for corroboration. 26 Bom. 193; 14 Bom. 115, *Foll.* (*Kinkhede, A.J.C.*). MUHAMMAD USUF KHAN *v.* EMPEROR. **114 I. C. 457=30 Cr.L.J. 311=1929 Cr. C. 110=A.I.R. 1929 Nag. 215.**

———*Withdrawal of prosecution does not make him independent witness—Corroboration of one accomplice by another is not independent.*

The withdrawal of prosecution against an accomplice relegates him from the position of a co-accused to his original position of an accomplice who had for all practical purposes earned complete immunity for his participation in the crime. His evidence under such circumstances could not be a piece of independent evidence. To regard the testimony of one accomplice as corroborated by the testimony of another accomplice is to hold that there is corroboration where under law or fact there is none at all. (*Kinkhede, A.J.C.*). MAHOMED YUSAF KHAN *v.* EMPEROR. **114 I.C. 457=30 Cr.L.J. 311=1929 Cr. C. 110=A. I. R. 1929 Nag. 215.**

———If evidence of accomplice is truthful demand of corroboration is not obligatory on tribunal—It should apply intrinsic and extrinsic tests to ascertain truthfulness. (*Courtney-Terrell, C.J. and Macpherson, J.*). RATTAN DHANUK *v.* EMPEROR. **113 I.C. 329=9 P.L.T. 672=8 Pat. 235=30 Cr.L.J. 137=12 A.I. Cr. R. 41=A.I.R. 1928 Pat. 630.**

———It is impossible to hold that the evidence of an accomplice uncorroborated cannot be said to be evidence against an accused: A.L.J.R. 110, *Ref.* (*Banerji, J.*). BULCHAND *v.* EMPEROR. **97 I.C. 489=49 All. 181=24 A.L.J. 1050=7 L.R.A.Cr. 197=27 Cr.L.J. 1369=A.I.R. 1927 All. 90.**

———*Co-accused—Discharged instead of being tendered a pardon—Competent witness.*

Where in a trial for offence under S. 401 the case against an accomplice had been withdrawn on the ground that he had aided materially in bringing to light the operations of the gang and he was discharged under S. 494 (1) instead of tendering a pardon under S. 337 and then he was examined as a witness against his co-accused,

Held, that there was nothing illegal in the procedure adopted and that the accomplice was a competent witness in the case: Cr. App. No. 22 of 1918

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(Nagpur J.C.'s Court) and 25 Bom. 422, *Rel. on.* (*Findlay, Offg.J.C.*). MAHADEO *v.* EMPEROR.
95 I. C. 471=27 Cr. L. J. 807= A.I.R. 1926 Nag. 426.

———*Corroboration in all material particulars is not necessary.*

In dealing with the evidence of an accomplice the Judge is not bound to rely on such statements only as are corroborated by other reliable evidence. Once a foundation is established for a belief that a witness is speaking the truth because he is corroborated by true evidence on material points, the Judge is at liberty to come to a conclusion as to the truth or falsehood of other statements not corroborated. (*Macleod, C.J. and Crump, J.*). BHIMRAO NARASIMHA HUBLIKAR *v.* EMPEROR.
86 I.C. 72=27 Bom. L.R. 120=26 Cr. L.J. 696= A.I.R. 1925 Bom. 261.

———Provided that an accomplice is not a co-accused under trial in the same case, in a trial before a Magistrate an accomplice is a competent witness and may be examined on oath. (*Baguley, J.*). A. V. JOSEPH *v.* EMPEROR. **85 I.C. 236= 26 Cr. L.J. 492=3 Bur. L.J. 265= 3 Rang. 11=A.I.R. 1925 Rang. 122.**

———*Accomplice against whom case is withdrawn—One to whom pardon is tendered—Position of.*

An accomplice witness against whom the case has been withdrawn under S. 494 is less reliable than one to whom a pardon has been tendered under S. 337. The latter is pardoned conditionally and has before him, as an inducement to stick to the truth, the constant apprehension that his statement may be used against him in a trial hereafter if he is proved to have given false evidence on any point. On the other hand the accomplice witness who has not received a conditional pardon is a freer man in the witness-box since he is not pinned down to a previous statement which may be based on tutored material by the fear of prosecution for perjury if his deposition in Court does not correspond exactly with that previous statement. (*Campbell, J.*). CHHAPROLIA *v.* EMPEROR.
73 I. C. 808=24 Cr.L.J. 696= A.I.R. 1924 Lah. 235.

———*Accomplice is competent witness.*

There is no provision of Indian Statute Law, nor is there any principle of natural justice, which makes an accomplice as such an incompetent witness at the trial of another person in respect of the offence in the commission of which he was an accomplice. The fact that the Local Government issued a Notification that persons though accomplices will not be prosecuted by the Government if they gave evidence in the case, will not make them incompetent witnesses.(*Mears,C.J. and Piggott, J.*). EMPEROR *v.* HAR PRASAD BHARGAVA.
77 I.C. 961= 21 A.L.J. 42=45 All. 226=4 L.R. A. Cr. 19= 25 Cr. L J. 497=A. I. R. 1923 All. 91.

———The evidence of an accomplice by itself is enough for a conviction, but it is a rule of practice founded on experience that in every case where an accomplice has given evidence, the Court must raise a presumption that he is unworthy of credit unless corroborated in material particulars. Failure to raise this presumption is an error of law, but in each case the weight to be attached must depend on the particular circumstances. (*Mullick and Thornhill, JJ.*). MADAN GURU *v.* EMPEROR.
73 I.C. 963=24 Cr. L.J. 723= 4 P. L. T. 381.

EVIDENCE ACT (1872), S. 133—Value of approver's evidence.

———*Long delay in giving statements—Taint of suspicion.*

An approver may be telling the truth and it is quite probable that he himself had a hand in the murder but his statements as to who his accomplices were must be corroborated by reliable evidence before it can form the basis of a conviction. The corroboration offered in this case was the statement of two men who apparently knew something about the matter from the very beginning but refused to make any statement until the third day of the police investigation. The delay may be due to their reluctance to implicate the accused after they had promised not to give information but it was obvious that statements obtained after such a long delay must be regarded with suspicion: and these witnesses may possibly be scheming themselves at the expense of innocent men. Even if these witnesses bear no enmity to the appellants and are related to them, the long delay in making their statements makes their evidence liable to grave suspicion. (*Chevis, C. J. and Le Rossignol, J.*). FATTA *v.* EMPEROR. **67 I. C. 828 = 23 Cr. L. J. 476=2 L. L. J. 296 =18 P.W.R. 1922 (Cr.).**

———Conviction of accused cannot be based on the evidence of accomplices unless such evidence is corroborated in some material and satisfactory manner. (*Das and Bucknill, JJ.*). DHANNU BELDAR *v.* EMPEROR. **2 P.L.T. 757= A.I.R. 1921 Pat. 406.**

—S. 133—Value of approver's evidence.

———*Dacoits, drawn from different places and committing offence for over a long period—Consistent correct identification of every accused not necessary.*

In the case of a gang the members of which had been collected from an area with a diameter of over fifty miles, and had been concerned in dacoities in the course of which more than a hundred different individuals had taken part in the offences and where the offences had continued over a period of four years, it would almost be a miracle if any man had been able consistently to identify correctly every man who had taken part in these offences, or who had belonged to the gang. No doubt, in such a case the failure of an approver to identify a particular man on one occasion, although he identified him on others, weakens his evidence considerably in respect to that particular man. But this circumstance does not show such a man to be innocent and cannot outweigh other evidence which establishes his guilt. Even where the approver's evidence is weak against a particular individual, that particular individual should be convicted when there is strong evidence apart from the evidence of the approver to establish that he was a member of the gang. (*Stuart, C. J. and Raza, J.*). KHILAWAN *v.* EMPEROR. **112 I. C. 337= 5 O. W. N. 760=29 Cr. L. J. 1009= 11 A. I. Cr. R. 273=A.I.R. 1928 Oudh 430.**

———*Principle explained.*

The evidence of an approver does not differ from the evidence of any other witness save in one particular respect, namely, that the evidence of an accomplice is regarded *ab initio* as open to grave suspicion. Accordingly, if the suspicion which attaches to the evidence of an accomplice be not removed, that evidence should not be acted upon unless corroborated in some material particular, and if the suspicion attaching to the accomplice's evidence is removed then that evidence may be acted upon, even though uncorroborated and the guilt

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of the accused may be established upon that evidence alone. The law on the point, as laid down in Ss. 114, 133 and 134, Evidence Act, gives no countenance to the contention that the uncorroborated testimony of an accomplice is necessarily insufficient to establish a charge against an accused. (*Courtney-Terrell, C. J. and Macpherson, J.*). RATTAN DHANUK *v.* EMPEROR. **113 I. C. 329= 9 P. L. T. 672=8 Pat. 235=30 Cr. L. J. 137= 12 A. I. Cr. R. 41= A.I.R. 1928 Pat. 630.**

———Where the approver's testimony was not sufficiently corroborated by the evidence as to the recovery of articles which were incapable of identification,

Held, the accused should not be convicted. (*Abdul Raoof, J.*). SHAH ALAM *v.* CROWN. **84 I.C. 1052=6 L.L.J. 280=26 Cr. L.J. 412= A.I.R. 1925 Lah. 44.**

———*Charge of murder.*

It is not safe to convict the accused for murder on the strength of an approver's statement and the retracted confession of one of the accused, especially when there is a conflict between the two statements and there is very little independent corroboration. (*Neave and Kendal, A. J. Cs.*). PARMESHWAR *v.* EMPEROR. **82 I.C. 135= 11 O.L.J. 325=25 Cr.L.J. 1207= A.I.R. 1924 Oudh 369.**

———*Approver's complicity in the crime must be proved.*

A statement should not be accepted as that of an approver without any test as to his complicity in the crime. Such a statement does not amount to evidence against the accused. (*Dalal, A. J. C.*). SANT RAM *v.* EMPEROR **74 I.C. 543= 24 Cr. L.J. 799=A.I.R. 1924 Oudh 188.**

———*Statement by one as corroborating that of another.*

There is nothing in S. 133 to suggest that the statement of one approver cannot be regarded as corroborating that made by another approver. No doubt if it could be shown that the approvers had ample opportunity of consultation, this corroborative value would be greatly diminished. (*Lumsden, J.*). EMPEROR *v.* DARYA SINGH. **77 I.C. 984=25 Cr. L.J. 520= A.I.R. 1923 Lah. 666.**

———*Approver's evidence corroborated by circumstances may establish guilt.*

The approver referred to a story by one *A* who invited him along with appellants to join in the dacoity; the incident of the story told by the approver turned out to be true on police inquiry. Appellants were seen with the approver at Sukho and arrested in his company at Mandra. The possession of the three tickets all from Chakala to Mandra and bearing consecutive numbers was strong corroboration of the approver's story as to the appellants having accompanied him to the scene of the occurrence,

Held, the guilt of the appellants has been established beyond reasonable doubt by the evidence of the approver which had been amply corroborated as against them. (*Broadway and Martineau, JJ.*). HAKIM *v.* KING EMPEROR. **84 I.C. 647= 26 Cr. L.J. 343= A.I.R. 1923 Lah. 153.**

———An approver's evidence is in itself tainted evidence though in some cases it may be worthy of belief for various reasons, but the uncorroborated statement of an approver taken at the end of the trial is and must be of no value whatever.

EVIDENCE ACT (1872), S. 134—Criminal trial.

(*Shadi Lal, C.J. and Wilberforce, J.*). SUNDERLAL SINGH *v.* EMPEROR. **4 L.L.J. 284= A.I.R. 1921 Lah. 267.**

—S. 133—Miscellaneous.

———*If one section is controlled by the other.*

Per *Subhedar, A. J. C.*—The rule in S. 114, Illus. (b), that an accomplice is unworthy of credit unless he is corroborated in material particulars has become a rule of practice of so universal application that it has now almost acquired the force of law.

Per *Jackson, A. J. C.*—S. 133 cannot be entirely nullified by judicial decisions and there may be cases in which the rule in S. 114, Illus. (b), should not be applied. The question arising in every case where the uncorroborated evidence of the accomplice has to be considered is whether it can be believed or not. Further when the evidence is strengthened by corroboration of other facts of the story by evidence of several accomplices or by confessions of co-accused, the question whether the maxim should still apply must receive careful consideration: A.I.R. 1921 Nag. 39, *Rel. on.* (*Jackson, A.J.C. on difference between Staples and Subhedar, A.J.Cs.*). DOULAT *v.* EMPEROR. **120 I. C. 721= 31 Cr. L. J. 153=A. I. R. 1930 Nag. 97.**

———If the evidence of an approver is discarded, it must be discarded as a whole and the defence cannot base arguments on it any more than the prosecution. (*Adami, J.*). SHEO BARHI *v.* EMPEROR. **A.I.R. 1930 Pat. 164.**

———*Duty of prosecution to show that evidence is of accomplices and is corroborated.*

It is mainly the duty of the prosecution to bring the accomplice character of the evidence to the notice of the Court and then invite it to believe it by reference to the corroborative evidence on record. An accused is under no legal obligation to do so. He can keep quiet and take advantage of the flaw in the evidence brought by the prosecution against him, or in short, of the weakness of the prosecution case. (*Kinkhede, A.J.C.*). MUHAMMAD USAF KHAN *v.* EMPEROR. **114 I. C. 457=30 Cr. L. J. 311= 1929 Cr. C. 110=A.I.R. 1929 Nag. 215.**

———The evidence of a spy requires corroboration to practically the same extent as that of an accomplice. (*Wazir Hasan and Pullan, A.J.Cs.*). SURAT BAHADUR *v.* KING EMPEROR. **81 I.C. 986= 25 Cr. L. J. 1162=11 O. L. J. 640= A.I.R. 1925 Oudh 158.**

———*Impossibility of corroborative evidence does not dispense with necessity thereof.*

It would be a perversion of the lesson gained by accumulated experience of the conduct of an accomplice to adopt any such rule of practice as that where corroboration is not possible his testimony may be accepted as true without corroboration. An accomplice is too immoral a person to be worthy of credit without corroboration in material particulars and if corroboration is not forthcoming because it is not possible in the nature of things that it should be forthcoming it does not make the accomplice less immoral. The guiding rule in this behalf is furnished by Illus. (b) of S. 114. (*Wazir Hasan, A.J.C.*). MANNA LAL *v.* KING EMPEROR. **75 I.C. 753=27 O.C. 40= 25 Cr.L.J. 49=A.I.R. 1925 Oudh 1.**

—S. 134—Criminal trial.

———In a criminal trial it is not incumbent upon the prosecution to produce all the persons who happened to have gathered at the spot where the offence occurred and that the production of two or

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three of the respectable and leading members of the village would suffice. (*Broadway and Jai Lal, JJ.*). BAHADUR *v.* EMPEROR. **112 I.C. 215= 10 L.L.J. 229=29 Cr. L.J. 999.**

———*One witness.*

It is not illegal to convict a man on the evidence of only one witness. It must entirely depend on the circumstances of each case. (*Coutts Trotter, C. J. and Devadoss and Beasley, JJ.*). VEERAPPA GOUNDAN *v.* EMPEROR. **114 I.C. 353=51 Mad. 956= 1 M. Cr. C. 56=28 M.L.W. 575= 1929 M.W.N. 185=30 Cr. L. J. 317= A.I.R. 1928 Mad. 1186=55 M.L.J. 591 (F.B.).**

—S. 134—Will.

———It is not necessary though it may be desirable to produce all the witnesses to a will, especially where its genuineness is challenged. (*Kendal and Pullan, A.J.Cs.*). KALKA SINGH *v.* JAGWANT KUNWAR. **89 I.C. 722=A.I.R. 1926 Oudh 69.**

—S. 136—Onus in appeal.

———*Witness disbelieved on inadmissible evidence—Effect.*

In ordinary cases the question of the *onus* is not of great importance in appeal where both parties have produced the whole of their evidence upon an issue. But where the witnesses have been disbelieved by admission and perusal of inadmissible evidence, *e.g.*, where certified copies of judgments in previous cases wherein the evidence of these witnesses was disbelieved, were put in without examining the witness under S. 136, the decision is vitiated. (*Campbell, J.*). SOHAN SINGH *v.* SANTA SINGH. **83 I.C. 768=A.I.R. 1923 Lah. 491.**

—S. 138—Criminal trial.

———*Prosecution is not entitled to examine-in-chief on the substantive case after cross-examination by accused.*

After the cross-examination of the witness on behalf of the accused the re-examination would ordinarily be directed to the explanation of the matter referred to in the cross-examination. No doubt, a new matter may, by the permission of the Court, be introduced with leave to the other side to cross-examine the witness upon that matter. But this cannot possibly entitle the prosecution to examine-in chief on the substantive case of the prosecution after the defence has disclosed its case in the cross-examination of the witness. (*Jwala Prasad, J.*). SHIVADHIN SINGH *v.* KING EMPEROR. **60 I.C. 662=3 P. L.T. 32. A.I.R. 1923 Pat. 116.**

—S. 138—Documents filed after examination.

———When a document is produced by opponent after his witness's cross-examination is over the witness can be recalled for further cross-examination on the document. (*Das and Macpherson, JJ.*). SHASHI BHUSAN BANERJI *v.* RAMJAS AGARWALA. **83 I.C. 205=3 Pat. 85=A.I.R. 1924 Pat. 402.**

———*Documents tendered after evidence.*

A witness cannot be disbelieved without his attention being drawn to the documents inconsistent with his deposition even though the documents were produced after his examination. In such a case he should be recalled for further cross-examination. (*Viscount Haldane.*) NABA KUMAR DAS *v.* RUDRA NARAYAN JANA. **77 I.C. 141= 1923 M.W.N. 622=28 C.W.N. 589= 33 M.L.T. 309=5 L.R.P.C. 25= A.I.R. 1923 P.C. 95=45 M.L.J. 438 (P.C.).**

—S. 138—Mode of examination.

———*Court itself examining witnesses—Impropriety of.*

EVIDENCE ACT (1872), S. 145—Admission.

Generally it is not the province of the Court to examine witnesses and as a rule of the Court the Court should leave the witnesses to the pleaders to be dealt with as is provided for in S. 138 of the Indian Evidence Act; where therefore the Court took the witnesses into its own hands and proceeded with their examination and they were not permitted to be examined by the complainant or his pleader,

Held, that a ground for transfer of the case was made out. (*Wazir Hasan, J.C.*). JANKI *v.* SHEONARAIN SINGH. **82 I.C. 154=11 O.L.J. 333= 25 Cr.L.J. 1226=27 O.C. 246= A.I.R. 1924 Oudh 371.**

—S. 138—Omission of cross-examination.

———*Probative value of evidence will deteriorate.*

Where a witness dies after examination-in-chief and before cross-examination, the evidence is admissible but the weight to be attached to such evidence should depend upon the circumstances of each case and though in some cases the Court may act upon it if there is other evidence on record, its probative value may be very small and may even be disregarded. (*Spencer, Ag.C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1= A.I.R. 1925 Mad. 497.**

———*Evidence is not admissible.*

Section 138 implies that the party had an opportunity to cross examine and does not mean that merely a right to cross-examine a witness without an opportunity being offered for cross-examination is sufficient compliance with the requirements of the law. (*Jwala Prasad and Coutts, JJ.*). MOTI SINGH *v.* DHANUKDHARI SINGH. **73 I. C. 339= 24 Cr. L.J. 595=A.I.R. 1923 Pat. 53.**

—S. 138—Scope.

———Section 138 deals not with the rights of the party but only provides the order in which the proceedings are to be conducted. (*Cuming and Lort-Williams, JJ.*). EMPEROR *v.* C.A. MATHEWS. **1929 Cr. C. 669=A. I. R. 1929 Cal. 822.**

—S. 141—Prosecution witness.

———*Leading question without declaring witness hostile.*

It is not open to the prosecution to put a question of the nature of cross-examination to their own witness without declaring him hostile and then cross-examining him. It is improper for the Court to allow the question; the question and the answer are both inadmissible and cannot be taken into consideration. (*Coutts and Das, JJ.*). JAGDEO SINGH *v.* EMPEROR. **71 I. C. 117= 1 Pat. 758=4 P.L.T. 232=24 Cr. L.J. 69= A.I.R. 1923 Pat. 62.**

—S. 145—Admissibility.

———Before a previous admission can be used against a party it must be put to him and an opportunity afforded to him to explain it if it is capable of explanation. (*Tek Chand and Agha Haidar, JJ.*). MARYAM *v.* NAGINA. **12 L. L.J. 161.**

———It is not necessary, in order to make the previous statements admissible for the purpose of impugning the credit of a witness, that the accused should have had an opportunity to cross-examine. (*Madgavkar, J.*) EMPEROR *v.* RAGHOO GANPAT. **97 I.C. 37=28 Bom.L.R. 775= 27 Cr. L.J. 1061=A.I.R. 1926 Bom. 404.**

—S. 145—Admission.

———Where an admission is not put to the party making it and the party making it is not examined on it under S. 145, the admission is not legal evidence and cannot be used against the party making it: A. I. R. 1915 P. C. 7; 21 C. W. N. 280,

EVIDENCE ACT (1872), S. 145—Depositions in commitment proceedings.

Ref.; 31 P. R. 1903, *Diss. from.* (*Tek Chand and Agha Haidar, JJ.*). MUHARRAM ALI *v.* BARKAT ALI. **A.I.R. 1930 Lah. 695.**

—S. 145—Depositions in commitment proceedings.

———*Former statement cannot be put in under S.* 288, *Cr P. Code without putting to witness.*

No doubt when depositions before the committing Magistrate are admitted in the Sessions Court under S. 288 they are on the same footing with any other evidence in the case. But S. 145, Evidence Act: governs the position in so far as these statements are used for contradicting the witness either mainly or incidentally. Depositions, therefore, taken in the Committing Magistrate's Court which contradict the evidence given in the Sessions Court cannot, however, be put in without putting them to the witness: A. I. R. 1922 Pat. 40; 7 All. 862. *Appr.*; 28 All. 683, *Expl.* and *Not appl*; 4 C.W.N. 49, *Diss. from. Other case-law referred.* (*Scroope and Dhavle, JJ.*). NANHU MAHTON *v.* EMPEROR. **A.I.R. 1930 Pat. 338.**

—S. 145—Document tendered after examination.

———*Documents tendered after evidence.*

A witness cannot be disbelieved without his attention being drawn to the documents inconsistent with his deposition even though the documents were produced after his examination. In such a case he should be recalled for further cross-examination. (*Viscount Haldane*). NABA KUMAR *v.* RUDRA NARAYAN. **77 I.C. 141= 1923 M.W.N. 622=28 C.W N. 589= 33 M.L.T. 309=5 L.R.P.C. 25= A.I.R. 1923 P.C. 95=45 M.L.J. 438 (P.C.).**

—S. 145—Evidentiary value.

———*Cr. P. Code, S.* 164.

Previous statements used for discrediting the evidence of a witness cannot be used as substantive evidence: 34 Cal. 129 (P.C.), *Ref.*; 26 Mad. 191 and 17 O. C. 363, *Foll.* (*Walsh and Kendall, JJ.*). BISHEN DATT *v.* EMPEROR. **105 I.C. 677= 8 L.R.A. Cr. 130=8 A.I. Cr. R. 287= 25 A.L.J. 994=28 Cr. L.J. 965= A.I.R. 1927 All. 705.**

—S. 145—First information.

———A first information report can only be used to corroborate or contradict under the provisions of Ss. 157 and 145, the person who makes it. It cannot be used as substantive evidence to contradict other persons: A.I. R. 1928 Lah. 17, *Foll.* (*Addison and Dalip Singh, JJ.*). GAMAN *v.* EMPEROR. **116 I.C. 187=11 L.L.J. 1= 12 A. I. Cr. R. 453=30 Cr. L.J. 571= A.I.R. 1928 Lah. 913.**

———The statement of a person recorded by the police as a first information report can be proved to corroborate that person's evidence in Court under the provisions of S. 157, to impeach his credit by cross examination under S. 145 of the Act provided that the procedure there prescribed is observed, but it cannot be used as substantive evidence against him: 4 P.R. 1918 Cr., *Foll.* (*Tek Chand and Coldstream, JJ.*). THAKAR SINGH *v.* EMPEROR.

107 I.C. 761=29 Cr. L.J. 277=9 A. I. Cr. R. 516.

—S. 145—Mode of contradicting.

———*Procedure.*

If the defendant wishes to cross-examine a witness on a previous deposition with a view to discrediting him the attention of the witness must be drawn to those discrepancies so that he may have the chance of explaining them. In such a case it is not proper for a judge to stop the examination and have the whole deposition filed with a view to discrepancies being pointed out at the time of argument. (*Waller and Cornish, JJ.*). SUBBIAH THEVAN *v.* EMPEROR. **1929 M. W. N. 789.**

EVIDENCE ACT (1872), S. 145—Police diary.

———In order to contradict a witness by a writing or a former statement made by him, it is essential that writing or statement should be put to him. (*Broadway and Agha Haidar, JJ.*). MAKHAN SINGH *v.* EMPEROR. **119 I. C. 333= 30 Cr. L. J. 1052.**

—S. 145—Mode of proof.

———*S.* 145 *controls S.* 155.

Section 155 only lays down that the credit of a witness may be impeached *inter alia* by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted; but it does not lay down the manner in which the former statement is to be proved. The mode of proof of such a statement in writing when it is sought to be tendered in evidence for contradicting a witness is provided in S. 145. In other words S. 155 is controlled by S. 145 and is not independent of it. (*Jai Lal and Bhide, JJ.*). GOPI CHAND *v.* EMPEROR. **A. I. R. 1930 Lah. 491.**

—S. 145—Newspaper.

———Extract from newspaper by itself is not admissible though can be used to contradict or corroborate writer. (*Stuart, C. J. and Raza, J.*). NISAR ALI KHAN *v.* MUHAMMAD ALI KHAN. **119 I. C. 337=6 O. W. N. 549= A. I. R. 1929 Oudh 494.**

—S. 145—Object.

———The object of the provision in S. 145 is to give the witness the chance of explaining or reconciling his statements before the contradiction can be used as evidence. (*Chotzner and Duval, JJ.*). MADARI SIKDAR *v.* EMPEROR. **102 I.C. 550= 54 Cal. 307=28 Cr. L J. 582= 8 A.I. Cr. R. 112=A.I.R. 1927 Cal. 514.**

—S. 145—Omission to draw attention.

———*Previous statement cannot be used to contradict him.*

Where the witness seemed to have improved in his evidence in the Court, upon the statement made by him in the first information report,

Held, that inasmuch as his attention was not directed to the statement made by him in the first information report in accordance with the procedure laid down in S. 145 that statement cannot be used for the purpose of contradicting the evidence given by him in Court. (*Scott-Smith and Martineau, JJ.*). MOHNA *v.* THE CROWN. **86 I.C. 406= 7 L.L.J. 59=26 Cr. L.J 774= A.I.R. 1925 Lah. 328.**

—S. 145—Police diary.

———*Principle explained.*

It is only what is written in the police diaries that can be used under S. 145, to contradict the witness, and what the Police officer stated that a witness said or did not say, is inadmissible. The way to prove those portions of the written statement of a witness which have been specifically put to him in order to contradict him is for the accused to mark the passage or passages in the copy from the police diaries given to him and then to ask the writer of the statement to say that it is a true copy: (A. I. R. 1926 Lah. 347 and A. I. R. 1925 Lah. 337, *Ref. to.* (*Addison and Coldstream, JJ.*). DHARAM SINGH *v.* EMPEROR. **108 I.C. 162= 9 A.I. Cr. R. 567=29 Cr. L.J. 343= A.I.R. 1928 Lah. 507.**

EVIDENCE ACT (1872), S. 145—Previous deposition.

—S. 145—Previous deposition.

———Before a previous admission can be used against a party, it must be put to him and an opportunity afforded to him to explain it if it is capable of explanation. *(Tek Chand and Agha Haidar, JJ.).* GHULAM MURTAZA *v.* NAGINA.
A. I. R. 1930 Lah. 991.

———Deposition before Magistrate who first started to try the case cannot be used for the purpose of discrediting the evidence given before another Magistrate unless it is produced in evidence. *(Fforde, J.).* SAWAN SINGH *v.* CROWN.
90 I.C. 657=7 L.L.J. 339=26 P.L.R. 811=26 Cr. L.J. 1585=A. I. R. 1925 Lah. 499.

—S. 145—Proof of statement.

———The statement by which it is sought to contradict the prosecution witness under S. 162, Cr. P. C. must be either proved by the investigating officer, or must be admitted by the witness in his cross-examination, or must be proved in some other way before it is put to the witness under S. 145. *(Patkar and Baker, JJ.).* SHAIKH USMAN *v.* EMPEROR.
107 I.C. 57=52 Bom. 195=9 A.I. Cr. R. 476=29 Cr. L.J. 221=29 Bom. L.R. 1581=A.I.R. 1928 Bom. 23.

—S. 145—Proper contradiction.

Where the purpose of the production of the document at the time of cross-examination of a witness seemed to have been well understood by him and from the record of his deposition it was manifest that after being shown the document, he was directly asked whether it was not a fact that he was not at a particular place on the alleged date as was clear from the document and where on re-examination no attempt was made to elicit any explanation,

Held, the witness was properly contradicted. *(Sir Lawrence Jenkins.)* BAIKUNTHA NATH CHATTERJI *v.* PRASANNAMOYI DEBYA.
72 I.C. 286=27 C.W.N. 797=A.I.R. 1922 P.C. 409=44 M.L.J. 699. (P. C.).

—S. 145—Report of police.

———A report made by a police officer in connexion with an enquiry made by him in the exercise of his lawful jurisdiction is admissible in evidence in a judicial proceeding only for the purpose of refreshing his memory in case the police officer is examined as a witness. *(Piggott, J.).* BALDEO RAM *v.* KUNKUN RAM.
88 I.C. 586=6 L.R.A. Civ. 393=A.I.R. 1925 All. 808.

—S. 145—Scope.

———Under S. 145 a witness may be cross-examined as to previous statement made by him in writing without such writing being shown to him or being proved. Only if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. *(Spencer and Venkatasubba Rao, JJ.).* RAMAKKA *v.* V. NAGESAM.
92 I.C. 792=47 Mad. 800=A. I. R. 1925 Mad. 145=48 M.L.J. 89.

—S. 145—Statements to police.

———*Compliance with section necessary.*

Under S. 162, Cr. P. Code., a statement made before the investigating officer can be used for the purpose of contradicting such witness when produced at the trial but after strict compliance with the provisions of S. 145, Evidence Act.

If the witness admits to have made the statement the previous statement in writing need not be proved. If he denies to have made any such statement and it is intended to contradict him the relevant portions of the record contrary to his statement in Court must be read to him and the witness should be given the opportunity to reconcile the same. It is only after this is done that the record of the previous statement becomes admissible in evidence for the purpose of contradicting the witness and can then be proved in any manner provided by law. *(Jai Lal and Bhide, JJ.).* GOPI CHAND *v.* EMPEROR.
A.I.R. 1930 Lah. 491.

———*If the entire statement is no part of the judicial record.*

Only those portions of statements made by witnesses before the police as have been actually used under S. 162, Cr. P. Code, to contradict the witnesses in the manner provided in S. 145, in the course of their cross-examination or re-examination are parts of the judicial record and can be treated as evidence in a case. The other parts of the statements cannot be relied upon by the prosecution or the defence in determining the guilt or innocence of the accused and should not be referred to by the Judge. *(Tek Chand and Agha Haidar, JJ.).* MT. SABHAI *v.* EMPEROR.
121 I.C. 66=31 Cr.L.J. 199=A.I.R. 1930 Lah. 449.

———*Cr. P. Code, S. 162—Stage when it can be used.*

So far as proceedings before charge are concerned copies of witnesses, statements made to the police should not be granted until the stage of cross-examination is reached. If that stage is allowed to go by without application being made, an accused must wait until the witness is again about to be subjected to cross-examination before he can claim grant of a copy. Under S. 145, until the occasion arises for putting the statement to the witness it cannot legally be used for any purpose whatsoever. It should not therefore be placed in the accused's hands until that stage in the trial has been reached when he may so use it. *(Curgenven, J.).* PUBLIC PROSECUTOR, MADRAS *v.* VEDI.
122 I.C. 463=2 M. Cr. C. 243=1929 M.W.N. 885=31 M.L.W. 241=1930 Cr.C. 185=31 Cr.L.J. 414=A.I.R. 1930 Mad. 185.

———*Procedure indicated.*

A copy of the statement made before the police cannot be used against the witness till he has been confronted with it. The right procedure, when a prosecution witness is contradicting himself, is to ask the Judge to look into the diary and decide whether the accused person should not have a copy of the statement. If such copy be granted, the witness's attention must be called to the same: A.I.R. 1915 P.C. 7, *Ref.* *(Mears, C.J. and Mukerjee, J.).* KASHI RAM *v.* EMPEROR.
109 I.C. 120=26 A.L.J. 139=9 A.I. Cr. R. 249=9 L.R.A. Cr. 30=29 Cr. L.J. 472=A.I.R. 1928 All. 280.

———*How they can be used.*

The only way a witness can be contradicted by statements made to the police under the provisions of S. 162, Cr. P. Code, is to prove his written statement and put it to the witness under S. 145, Indian Evidence Act, to permit him to explain the contradictions, if any. Statements made to the police cannot be used at a trial in any other way. *(Addison and Kemp, JJ.).* EMPEROR *v.* IBRAHIM.
105 I.C. 807=8 Lah. 605=28 P.L.R. 649=28 Cr.L.J. 983=9 A.I. Cr. R. 132=A.I.R. 1928 Lah. 17.

EVIDENCE ACT (1872), S. 145—Statements to police.

———*First information report—Statement by third parties to police during investigation and counter-information against complainant or his party—Principles explained.*

The first information report against the accused is clearly not a statement within the contemplation of S. 162 because it is not made in the course of an investigation. Such report has to be tended under one or other of the provisions of the Evidence Act. The usual course is for the prosecution to call the informant and for the first information to be tendered as corroboration under S. 157; but it could also be tendered in a proper case under S. 32 (1) as a declaration as to the cause of the informant's death, or as part of the informant's conduct (of the *res gestae*) under S. 8. Theoretically, the defence could prove the information to impeach the informant's credit under S. 155 or to contradict him under S. 145.

Statements made by third parties to the police in the course of their investigation can be used as corroboration under S. 157, or in contradiction under S. 145 or to impeach credit under S. 155 provided the person who made the statement is called as a witness. This would apply to the prosecution and to the defence indifferently under the Evidence Act. But S. 162 of the Cr. P. Code enacts first that if such a statement is not recorded in writing it cannot be used in evidence in any circumstance or for either side or for any purpose: A.I.R. 1920 Rang. 116 (F.B.): A.I.R. 1925 Lah. 399 and A.I.R. 1924 Bom. 510, *Foll.*

If such a statement has been recorded in writing then it cannot be used for any purpose but one and that by the defence. Provided that the person who made it is called as a witness for the prosecution the defence may apply for a copy of the statement and if it be proved may use it under S. 145 of the Evidence Act to contradict that witness.

It sometimes happens that after the first information has been laid against the accused, a counter-information is laid against the complainant or his party by a member of the accused's party who is not himself an accused. As this comes under S. 154 and must be reduced to writing and signed, it cannot come within S. 162. Whether it is admissible at the trial of the accused will depend upon the circumstances and must be decided under Evidence Act. The police cannot of course treat statements as informations unless they are really received as such and come truly and properly within S. 154. (*Rankin and Duval, JJ.*). AZIMADDY *v.* EMPEROR. **99 I.C. 227=44 C.L.J. 253=28 Cr. L.J. 99=54 Cal. 237=A.I.R. 1927 Cal. 17.**

———*Compliance with section necessary.*

The provisions of S. 162 as amended absolutely bar the use of statements, both oral and written, and make those statements inadmissible for any purpose under the Evidence Act in any enquiry or trial except for one purpose, and that is by the accused to contradict a prosecution witness in the manner provided by S. 145: A.I.R. 1925 Mad. 579, *Diss. from.* (*Rutledge, C.J., Heald, Duckworth, Chari and Maung Ba, JJ.*). EMPEROR *v.* NGA THA DIN. **96 I.C. 145=5 Bur.L. J. 30=4 Rang. 72=27 Cr. L.J. 881=A.I.R. 1926 Rang. 116. (F. B.).**

—S. 145—Third party's statement.

———To hold that a witness may be contradicted by previous inconsistent statements, not of himself but of a third party, would be against principle and opposed to this section. (*Phillips and Venkatasubba Rao, JJ.*). B. BHAVAMMA *v.* B. RAMAMMA. **78 I.C. 176=19 M.L.W. 206=1924 M. W.N. 270=34 M. L. T. 365=A.I.R. 1924 Mad. 537.**

—S. 145—Uninterpreted depositions.

———Depositions of the witnesses in a previous case in which there has been no compliance with the provisions of S. 360 may not possibly be used as evidence in the case in which they were made, but nevertheless they can be used on a subsequent occasion to contradict the witnesses under S. 145. (*Adami and Scroope, JJ.*). FAZLUR RAHMAN *v.* KING EMPEROR. **104 I.C. 100=6 Pat. 478=8 P. L. T. 773=8 A.I. Cr. R. 555=28 Cr. L.J. 772=A. I. R. 1927 Pat. 315.**

—S. 149—Leading questions.

———*If may be asked without declaring witness hostile.*

Section 154 read with S. 143 provides that the Court may allow the party to put leading questions to his own witnesses. This does not necessarily mean that he must declare the witness hostile and cross-examine him. It is only when he declares the witness hostile and cross-examines him that he cannot rely upon his evidence. Where the Public Prosecutor asks a witness some questions with the permission of the Court desiring to get from him not a contradiction of what he said but something in addition, he cannot be said to have cross-examined the witness. The questions are merely leading questions.

Per *Lort-Williams, J.*, contra.—Sections 143 and 154 read together do not give power to prosecution to put leading questions to their own witnesses even with the assent of the Judge. The meaning of S. 154 is that with permission of the Court they may treat a witness hostile and cross-examine him. (*Cuming and Lort-Williams, JJ.*). BIKRAM ALI PRAMANIK *v.* EMPEROR. **50 C.L.J. 467=1930 Cr. C. 139=31 Cr. L.J. 610=A.I.R. 1930 Cal. 139.**

—S. 150—Criminal prosecution.

———There is no absolute privilege in the case of an advocate but a question asked in cross-examination making an imputation as regards a witness affords no ground ordinarily for a criminal prosecution: A. I. R. 1927 Cal. 823, *Foll.* (*C. C. Ghosh and Gregory, JJ.*). NAZIR AHMAD *v.* JOGESH CHANDRA BANERJI. **111 I.C. 569=29 Cr. L. J. 889=11 A.I. Cr. R. 156.**

—S. 151—When allowed.

———*Inheritance—Questions as to unchastity.*

During the examination of one of the defendant by plaintiff a question was put whether she was made pregnant by a certain person. The question was objected to but the plaintiff contended that it was relevant, his case being that the witness did not inherit the property by reason of her unchastity during the life-time of her husband. If the plaintiff's case was that she did not inherit the property of her husband by reason of her unchastity during his life-time, then the question would be relevant. If, however, it was asked for impeaching her credit as a witness, the Court will have to consider the provisions of Ss. 146 and 148 to 152 of the Evidence Act. (*Chatterjee and Pearson, JJ.*). SUBALA DASI *v.* INDRA KUMAR HAZZRA. **65 I. C. 692=A. I. R. 1923 Cal. 315.**

—S. 153—Scope.

———Sections 153 and 155, Evidence Act, must be strictly construed and narrowly interpreted if the Courts governed by the Act are to be spared the task in many suits of prosecuting on most perfect

EVIDENCE ACT (1872), S. 153—Scope.

EVIDENCE ACT (1872). S. 154—Cross-examination without examination-in-chief.

material issues, which have no bearing upon that really in contest between the parties: *A. G.* v. *Hitchcock*, 1 Ex. 91, *Ref.* (*Lord Blanesburgh.*) BHOGILAL BHIKACHAND *v.* ROYAL INSURANCE CO., LTD. **108 I.C. 1=6 Rang. 142=26 A. L. J. 377=32 C.W.N. 593=47 C.L.J. 550=30 Bom. L.R. 818=28 M.L.W. 276=A. I. R. 1928 P.C. 54=54 M. L. J. 545 (P.C.)**

—S. 154—Cross-examination without examination-in-chief.

———A prosecution witness not called by the prosecution but "tendered as gained over" cannot be cross-examined by the prosecution. (*Ross and Wort, JJ.*). RAMJAG AHIR *v.* EMPEROR. **109 I. C. 114=7 Pat. 55=9 P. L. T. 567=29 Cr. L.J. 466=A.I.R. 1928 Pat. 203.**

—S. 154—Cross-examination without permission.

———*Procedure explained.*

The party desiring to cross-examine its own witness has to take the permission of the Court, implying thereby that there is a discretion in the Court whether it would permit the witness to be cross-examined or not. That discretion has always to be exercised with caution by the Court before which the matter comes up for consideration. Putting questions by way of cross-examination to one's own witness without the permission of the Court is a procedure not to be allowed. (*Cuming and Mukerji, JJ.*). KHIJIRUDDIN *v.* EMPEROR. **92 I. C. 442=53 Cal. 372=42 C.L.J. 504=27 Cr. L.J. 266=A.I.R. 1926 Cal. 139.**

—S. 154—Difference in statements.

———*Cross-examination must be directed for discrediting altogether.*

The fact that the statement of the witness differed from the statement recorded by the Sub-Inspector shortly after the occurrence, is not a sufficient reason, to cross-examine him as a hostile witness and it must be understood that he should be cross-examined to be discredited altogether, and not merely to get rid of part of his testimony. (*Walmsley and Pearson, JJ.*). EMPEROR *v.* SATYENDRA KUMAR DUTT. **71 I.C. 657=37 C. L. J. 173=24 Cr. L. J. 193=A. I. R. 1923 Cal. 463.**

—S. 154—Hostile witness.

———*Definition.*

A hostile witness may be defined as one who from the manner in which he gives his evidence (within which is included the fact that he is willing to go back upon previous statements made by him) shows that he is not desirous of telling the truth to the Court. (*C. C. Ghose and Pearson, JJ.*). PANCHANAN GOGAI *v.* EMPEROR. **51 C.L.J. 203=34 C.W.N. 526=A.I.R. 1930 Cal. 276.**

———*Ground for discrediting a witness as hostile.*

The grounds that witnesses do not support the prosecution story, but they are neighbours of the accused and they have been won over by them, that one of them is a tout and the other is a man of straw and quite unreliable, are no reasons for declaring the witnesses hostile; and unless there is something in their depositions which is conflicting with earlier statements made by them, which would afford ground for thinking that they have been gained over by the defence, the prosecution is not entitled to declare them hostile. The fact that the witnesses are neighbours of the accused is not sufficient ground for treating them as hostile in order to discredit the statements that they made favourable to the defence. (*Ross and Kulwant Sahay, JJ.*). PARMESHWAR DAYAL *v.* EMPEROR. **94 I.C. 705=7 P.L.T. 567=1926 P H.C.C. 139=27 Cr. L.J. 657=A.I.R. 1926 Pat. 316.**

EVIDENCE ACT (1872), S. 154—Purpose of cross-examination.

———*Definition of—Treating witness as hostile is matter for Court's discretion.*

A witness who is unfavourable is not necessarily hostile; a hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth. Where a witness stands in the situation which naturally makes him adverse to a party desiring his testimony, the party calling the witness is not entitled as of right to cross-examine him. The matter is entirely in the discretion of the Court whether to permit the person calling the witness to put any questions to him which might be put in cross-examination by the adverse party. 12 M. I. A. 380 (P. C.), *Dist.* and 42 Ch. D. 373, *Ref. to.* (*Mookerjee and Buckland, JJ.*). LACHIRAM MOTIRAM BOID *v.* RADHA CHARAN PADDAR. **66 I.C. 15=49 Cal. 93=34 C.L.J. 107=A.I.R. 1922 Cal. 267.**

———*Necessary—Witness cannot be treated as hostile witness as of right—Principles to determine who is a hostile witness discussed.*

There is with regard to S. 154 no distinction on principle between an attesting witness whom a party is obliged to call and any other witness whom he may cite of his own choice; but the Court may, in the exercise of its discretion, be more easily persuaded in the former case than in the latter. In view of the provision of the Indian Evidence Act, there is no room for application, in this country, of the view taken in some English cases, that a necessary witness, that is, one whom a party is compelled to call and who may therefore be considered rather the witness of the Court than of the party, as an attesting witness to a Will, can be discredited as of right by his own side.

Two important points must be borne in mind; first that a witness is considered adverse when, in the opinion of the Judge, he bears a hostile *animus* to the party calling him and not merely when his testimony contradicts his proof; in other words, a hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth; and, secondly, when a witness is treated as hostile and cross-examined by the party calling him, this must be done to discredit the witness altogether and not merely to get rid of part of his testimony. *Case-law referred.* (*Mookerjee and Fletcher, JJ.*). SARENDRA KRISHNA *v.* RANEE DASSEE. **59 I.C. 814=33 C.L.J. 34=A.I.R. 1921 Cal. 677.**

—S. 154—Power under.

———*Commissioner.*

A Commissioner for taking evidence cannot exercise the discretion vested in the Court under S. 154. (*Mookerjee and Fletcher, JJ.*). SURENDRA KRISHNA *v.* RANEE DASSEE. **59 I.C. 814=33 C.L.J. 34=A.I.R. 1921 Cal. 677.**

—S. 154—Purpose of cross-examination.

———*To obtain admission on which party cross-examining may rely.*

A party is allowed to cross-examine its own witness because that witness displays hostility and not necessarily because he displays untruthfulness. The main purpose of such cross-examination is to obtain admissions and it would be ridiculous to assert that a party cross-examining a witness is thereby prevented from relying on admissions and to hold that the fact that the witness

EVIDENCE ACT (1872), S. 154—Result of cross-examination.

is being cross-examined implies an admission by the cross examiner that all the witnesses' statements are falsehoods: A.I.R. 1927 Bom. 501, *Rel. on*; *Bradley* v. *Ricardo*, (1831) 8 Bing. 57, *Ref. on*; *Faulkner* v. *Brines*, (1858) 1 F. & F. 254; A.I.R. 1926 Cal. 139; A.I.R. 1928 Cal. 690, *Diss. from.* (*Courtney Terrell, C. J. and Dhavle, J.*). SOHRAI SAO *v.* EMPEROR. **124 I.C. 836=11 P.L.T. 148=9 Pat. 474=A.I.R. 1930 Pat. 247.**

—S. 154—Result of cross-examination.

———*Position of hostile witness—Rule as to.*

The evidence of a hostile witness cannot in part be relied upon and the rest of it discarded or rejected. When a witness is declared hostile so that leave to cross-examine is granted to the party calling him, it is necessary that the Judge should explain what the position is that then arises, namely that by asking for leave to cross-examine the witness, the party calling him admits that he is not a witness of truth and one whose evidence is not entitled to credit, who is prepared to make one statement on oath at one time and another at another time and that the evidence of such witness should be rejected and left out of account in the minds of the jury. It is a rule which leans in favour of the accused and as such ought not to be departed from lightly. The Judge should tell the jury to reject the evidence of such witness altogether and his omission to do so amounts to misdirection: A.I.R. 1923 Cal. 463; *Alexander* v. *Gibson*, 2 Camp. 556, *Ref.* (*C. C. Ghose and Pearson, JJ.*). PANCHANAN GOGAI *v.* EMPEROR. **51 C.L.J. 203=34 C.W.N. 526=A.I.R. 1930 Cal. 276.**

———*No reliance in part.*

A party cannot be allowed to say that his witness is a truthful witness so far as a part of his evidence is concerned but an untruthful witness so far as some other portion is concerned. Once a party cross-examines his own witness he must be held to no longer rely on him: A.I.R. 1926 Cal. 139 and A.I.R. 1923 Cal. 463, *Rel. on.* (*Cuming and Lort-Williams, JJ.*). MOKBUL KHAN *v.* EMPEROR. **114 I.C. 793=56 Cal. 145=30 Cr. L.J. 350=32 C.W.N 872=A.I.R. 1928 Cal. 690.**

———*Discrediting certain statements does not amount to discrediting whole of the evidence.*

Seeking to discredit the statements of witnesses considered hostile only on certain points does not amount to discrediting the evidence *in toto*, of these witnesses, and it must be a matter for the Court, on the particular facts in each case to credit or to discredit the different portions of the evidence of each witness as in other cases: A.I.R. 1926 Cal. 139, *Diss.* (*Crump and Madgavkar, JJ.*). EMPEROR *v.* JEHANGIR ARDESHIR. **106 I.C. 100=8 A. I. Cr. R. 324=29 Bom.L.R. 996=28 Cr.L.J. 1012=A.I.R. 1927 Bom. 501.**

———When a witness who has been called by the prosecution is permitted to be cross-examined on behalf of the prosecution under the provisions of S. 154, the result of that course being permitted is to discredit that witness altogether and not merely to get rid of a part of his testimony. (*Cuming and Mukerji, JJ.*). KHIJIRUDDIN *v.* EMPEROR. **92 I.C. 442=53 Cal. 372=42 C.L.J. 504=27 Cr. L.J. 266=A.I.R. 1926 Cal. 139.**

—S. 155—Depositions in commitment proceedings.

———Where in the Sessions Court witnesses retracted the statements made before the committing Magistrate,

EVIDENCE ACT (1872), S. 155—Rape case.

Held, the statements made to the police and to the committing Magistrate are relevant to contradict their evidence before the Sessions Court given in place of their retracted statements. (*Pratt and Fawcett, JJ.*). MARUTI JYOTI SHINDE *v.* EMPEROR. **63 I.C. 332=46 Bom. 97=23 Bom. L.R. 820=22 Cr L.J. 636=A. I. R. 1922 Bom. 108.**

—S. 155—First information report.

———*Conviction based on first information report alone, illegal.*

First information report is not substantive evidence of the facts recorded in them and a conviction cannot be based on such reports. They can be used to corroborate the witnesses who made them and are of value showing that they told the same story at the first possible occasion. If they tell a different story in Court, the report can be used to contradict them or discredit their testimony. But it is not legitimate for a Court, when witnesses tell a different story in the witness box and contradict the report made by them, to discard the evidence given on oath and to rely on the report. (*Ryves, J.*). JAMALUDDIN *v.* KING EMPEROR. **74 I.C. 716=24 Cr. L.J. 812=A.I.R. 1924 All. 164.**

—S. 155—'Former statement.'

———A statement in a criminal case, made after the hearing of a civil suit in trial Court but its hearing in appeal is not a "former statement". Such a statement may possibly be used by re-examining the witness in the appellate stage. (*Rutledge, C. J. and Brown, J.*). U. PO SAING *v.* G. KYI MAUNG. **104 I.C. 377=6 Bur. L.J. 86=A.I.R. 1927 Rang. 247.**

—S. 155—Investigating officer.

———*Should not be asked what a witness told him when the evidence is taken down in writing.*

Where the counsel for accused asked in the course of cross-examination the investigating officers if a certain witness made or not a particular statement to them,

Held, that though the language of S. 153 (3) is *prima facie* wide enough to permit of such questions, yet where the evidence has been reduced to writing, it is undesirable to permit the putting of such questions as, if the witness is replying from his memory alone, there is little value in what he may say. If he is refreshing his memory by looking at the diary, the procedure is outside the scope and intent of S. 159, Evidence Act. (*Mears, C. J. and Mukerjee, J.*). KASHI RAM *v.* EMPEROR. **109 I. C. 120=26 A.L.J. 139=9 A.I. Cr. R. 249=9 L.R. A Cr. 30=29 Cr. L. J. 472=A.I.R. 1928 All. 280.**

—S. 155—Prior deposition.

———*Rule explained.*

Where an attesting witness is dead his depositions in a prior judicial proceeding would be relevant and admissible, if the prior judicial proceeding was between the same parties and the adverse party in that proceeding had the right and opportunity to cross-examine him and the question in issue is substantially the same. But if the witness being alive is examined in the present proceeding, his prior depositions are not available as substantive evidence but can only be used to contradict or corroborate his present statements. (*Ananthakrishna Ayyar, J.*). PONNUSWAMI GOUNDAN *v.* KALYANASUNDARA AYYAR. **A.I.R. 1930 Mad. 770.**

—S. 155—Rape case.

———In rape cases the general immoral character of the woman is relevant evidence. (*Newbould and*

EVIDENCE ACT (1872), S. 155—Report of offence.

B. B. Ghose, JJ.). KERAMAT MONDAL *v.* EMPEROR. **92 I. C. 439=42 C. L. J. 524=27 Cr. L. J. 263=A.I.R. 1926 Cal. 320.**

—S. 155—Report of offence.

———*Report after 24 hours.*

A report of an offence, not made at or about the time of the occurrence, to an officer, who has no powers to investigate the matter, though it can be used under S. 155 to impeach the credit of the person making the same, cannot be used to corroborate the witness under S. 157. (*Cuming and Gregory, JJ.*). EMPEROR *v.* RAM CHANDRA. **111 I. C. 327=55 Cal. 879=10 A. I. Cr. R. 456=29 Cr. L. J. 823=A.I.R. 1928 Cal. 732.**

—S. 155—Scope.

———*Sections must be strictly construed.*

Sections 153 and 155, Evidence Act, must be strictly construed and narrowly interpreted if the Courts governed by the Act are to be spared the task in many suits of prosecuting on most perfect material issues, which have no bearing upon that really in contest between the parties: *A. G.* v. *Hitchcock*, 1 Ex. 91, *Ref.* (*Lord Blanesburgh.*) BHOGI LAL BHIKACHAND *v.* ROYAL INSURANCE CO., LTD. **108 I. C. 1=6 Rang. 142=26 A. L. J. 377=32 C. W. N. 593=47 C. L. J. 550=30 Bom. L. R. 818=28 M. L. W. 276=A.I.R. 1928 P. C. 54=54 M. L. J. 545 (P.C.).**

———Section 27 of the Evidence Act remains unaffected by the latest amendment of S. 162 of the Cr. P. C., but Ss. 155 and 157 are affected except in the only instance mentioned in the proviso to S. 162, Cr. P. C. (*Rutledge, C. J., Heald, Duckworth, Chari and Maung Ba, JJ.*). EMPEROR *v.* NGA THA DIN. **96 I. C. 143=4 Rang. 72=5 Bur. L. J. 30=27 Cr. L. J. 881=A.I.R. 1926 Rang. 116 (F.B.).**

—S. 155—Statement before Monegar.

———*Use of.*

A statement by witness signed before the Monegar cannot be used as substantive evidence of the witness against the accused as it is not a statement recorded on oath in the presence of the accused by a Magistrate empowered to take down evidence. The only use of such a statement would be to corroborate or contradict statements made on oath at the trial. (*Spencer and Kumaraswami Sastri, JJ.*). MALAYA GOUNDAN *v.* THE CROWN. **66 I.C. 326=23 Cr. L. J. 262=14 M. L. W. 612=1921 M. W. N. 872=A.I.R. 1922 Mad. 303=42 M. L. J. 278.**

—S. 155—Statement to police.

———Statements made by witnessesto the police officer during the course of investigation under Chapter 14 cannot be used by the Court for contradicting those witnesses. (*N. R. Chatterjee and B.B. Ghose, JJ.*). KERAMAT MANDAL *v.* EMPEROR. **92 I. C. 453=42 C. L. J. 528=27 Cr. L. J. 277=A.I.R. 1926 Cal. 147.**

———*Admissible if S. 145 is complied with.*

Statements made before a police officer and taken down by him in writing are admissible under S. 155 (3) provided only that the provisions of S. 145 had been complied with, in the matter of putting the specific parts of it, which were to be relied upon, to the witnesses in their cross-examination. (*Sanderson, C.J. and Pearson, J.*). THOMAS JAMES HENRY ARNUP *v.* KEDAR NATH GHOSH. **91 I. C. 801=27 Cr.L. J. 129=30 C.W.N. 835=A.I.R. 1925 Cal. 1017.**

EVIDENCE ACT (1872), S. 157—Prior deposition.

—S. 157—First information report.

———Statements in first information report can be used for the purpose of corroborating or contradicting a witness but are inadmissible for the purpose of proving that the facts alleged therein are correct: 17 C.W.N. 1213; A.I.R. 1925 All. 303 and A.I.R. 1927 Cal. 17, *Foll.* (*Beasley, C. J. and Pandalai, J.*). SANKARALINGA TEVAN *v.* EMPEROR. **124 I. C. 506=1930 M.W.N. 496=3 M. Cr. C. 100=1930 Cr.C. 632=31 M.L.W. 451=A.I.R. 1930 Mad. 632=58 M.L.J. 397.**

———*Cannot be used to contradict other persons.*

A first information report can only be used to corroborate or contradict under the provisions of Ss. 157 and 145, the person who makes it. It cannot be used as substantive evidence to contradict other persons: A.I.R. 1928 Lah. 17, *Foll.* (*Addison and Dalip Singh, JJ.*). GAMAN *v.* EMPEROR. **116 I.C. 187=11 L. L. J. 1=12 A.I.Cr. R. 453=30 Cr.L J.-571=A.I.R. 1928 Lah. 913.**

———First information report is not substantive evidence by itself, but it can only be used under S. 157 as a previous statement to corroborate or contradict a statement made subsequently in Court. (*Shadi Lal, C. J. and Zafar Ali, J.*). CHOGHATTA *v.* EMPEROR. **91 I.C. 697=27 Cr.L.J. 121=A.I.R. 1926 Lah. 179.**

—S. 157—Hearsay evidence.

———*Duty of prosecution.*

Section 157 provides an exception to the general rule excluding hearsay evidence and in order to bring a statement within the exception the duty is cast on the prosecution to establish by clear and unequivocal evidence the proximity of time between the taking place of the fact and the making of the statement. (*Tek Chand, J.*). MANGAL RAI *v.* EMPEROR. **110 I. C. 676=10 L.L.J. 262=29 P.L.R. 703=10 A.I. Cr. R. 519=29 Cr. L.J. 740=A.I.R. 1928 Lah. 647.**

—S. 157—Letters of police.

———A letter written by a police officer to his superior expressing that a certain person would make a certain statement for a certain sum of money is not under S. 157 properly receivable in evidence for any purpose. (*Lord Blanesburgh.*) BHOGILAL BHIKACHAND *v.* ROYAL INSURANCE CO., LTD. **108 I.C. 1=6 Rang. 142=26 A.L.J. 377=32 C.W.N. 593=47 C.L.J. 550=30 Bom. L.R. 818=28 M.L.W. 276=A. I. R. 1928 P.C. 54=54 M.L.J. 545 (P.C).**

—S. 157—Prior deposition.

———*Prior whole statement cannot be admitted—Even admissible parts cannot be admitted before witness is examined.*

The trial Judge in a civil suit permitted an officer in charge of the Record-of-Right proceedings to be called as the very first witness and to produce the statements of witnesses recorded in those proceedings, which were exhibited notwithstanding the objection raised on that behalf.

Held, that only parts of such statements, as were necessary to corroborate or contradict the witnesses when they were examined in the case, could be put in through them under the provisions of S. 157. (*Rupchand Bilaram and Lobo, A. J. Cs.*). MT. HAKIMA *v.* MT. JIANDI. **103 I. C. 870=A.I.R. 1927 Sind 209.**

———Where there is nothing in the deposition of a witness in the trial which may be corroborated by his earlier statements, there is no justification for the whole of the depositions being brought as

EVIDENCE ACT (1872), S. 157—Prior deposition.

evidence in the record, but only particular passages which are relevant may be used. (*Cuming and Mukerji, JJ.*). KHIJIRUDDIN *v.* EMPEROR.
92 I.C. 442=
53 Cal. 372=42 C.L.J. 504=
27 Cr L.J. 266=A.I.R. 1926 Cal. 139.

———Where the deposition of a witness before the Committing Magistrate is treated as evidence in the Sessions Courts, a previous statement by the witness under S. 164, can be used to corroborate such deposition in the Sessions Court. 34 B. 599, *Diss. from* ; 2 Weir 821, *Foll.* (*Ayling and Odgers, JJ.*). VERLAIAH KONE *v.* KING EMPEROR.
72 I.C. 529=16 M.L.W. 239=
1922 M.W.N. 506=31 M.L.T. 175=
45 Mad. 766=24 Cr. L.J. 417=
A.I.R. 1923 Mad. 20=43 M.L.J. 222.

—S. 157—Proceedings against pleader.

———*The petition of party and the contents thereof—Admissible.*

Sanderson, C.J. —Where a party files a petition on the date of hearing asking for adjournment on the ground that his pleader cannot attend Court that day on account of *Hartal*, the fact of filing the petition as well as its contents can be proved and are admissible, though not perhaps sufficient, to charge the pleader with professional misconduct.

Woodroffe, J. —The petition is admissible and corroborative to the evidence. (*Sanderson, C.J. Woodroffe and Mookerjee, JJ*). EMPEROR *v.* RAJANI KANTA BOSE. 71 I.C. 81=
49 Cal. 732=26 C.W.N. 589=35 C.L.J. 356=
24 Cr. L.J. 33=A.I.R. 1922 Cal. 515 (S.B.)

—S. 157—Rape case.

———If the evidence of raped girl is excluded from the case, the evidence of her relatives to the effect that she accused a certain person of having raped her cannot be used as corroborative evidence under S. 157. (*Foster, J.*). EMPEROR *v.* PHAGUNIA BHUIAN. 89 I. C. 1043=26 Cr.L.J. 1475=
A.I.R. 1926 Pat. 58.

———Where a tender girl was alleged to have been raped, a statement made by her stating that she was raped, and uttered immediately after the rape, crying and weeping, is admissible as explaining her act of crying, under S. 8 and by way of corroboration under S. 157. (*Kinkhede, A.J.C.*). SOOSALAL, BANIA *v.* EMPEROR. 82 I.C. 142=
25 Cr.L.J. 1214=A.I.R. 1925 Nag. 74.

—S. 157—Records and documents.

———*Dispute regarding boundaries—Documents relating to neighbouring lands are admissible.*

In a suit for possession of land if the opposite party disputes the boundaries of the land in suit, it is open to the plaintiff to produce documents relating to neighbouring lands in which there is recital as to particular boundaries of the land in suit, and such documents will be admissible to prove the plaintiffs' title if the persons in whose favour the documents are executed are examined and admit the correctness of the boundaries : A.I.R. 1927 Cal. 230, *Ref.* (*Suhrawardy and Garlick, JJ.*). MOHIM CHANDRA *v.* KANAILAL SAHA. 33 C.W.N. 1085=
A.I.R. 1930 Cal. 311.

———*Entry in vaccination register.*

Where an entry in the vaccination register, which includes a statement by a woman that a person, bearing the name of the alleged father of her illegitimate child, was the father of the illegitimate child, is made three years after its birth, the entry does not satisfy the terms of S. 157, and is not admissible in evidence.

EVIDENCE ACT (1872), S. 157—Scope.

Quaere.—It is doubtful whether such a statement is rendered admissible by S. 35. (*Curgenven, J.*). M. KANNIAPPAN *v.* KULLAMMAL.
1930 Cr.C. 88=1929 M. W. N. 696=
2 M. Cr. C. 275=A.I.R. 1930 Mad. 194.

———*Sale-deed—Recital therein as to refusal of partition—Admissibility.*

A sale deed dated 1910 by one *N* in favour of *B* recited all the circumstances leading to the sale. It also contained a recital as follows : "About a year ago I came to Poona and asked my uncles and my step-brothers to effect a partition and to allot to me my one-ninth share of our ancestral property, but they refused to give my share." It was contended that the recitals in the deed were not admissible as evidence against the uncles or cousins of *N* on the issue whether *N* demanded a share of the property in 1909 as it did not come within S. 157.

Held, that though the particular statement did not come within S. 157 on the ground that it was not made at or about the time of the *N's* alleged interview with his uncle in 1909 but the deed was admissible in evidence as corroboration of the evidence given by *N* and his witnesses upon other material matters. (*Sir Lancelot Sanderson.*) RADHOBA BALOBA VAGH *v.* ABURAO BHAGWANTRAO.
118 I. C. 1=33 C. W. N. 1006=
31 Bom. L. R. 1030=50 C.L.J. 135=
1929 A.L.J. 1031=30 M.L.W. 514=6 O.W.N. 786=
56 I.A. 316=53 Bom. 699=1929 M.W.N. 852=
A.I.R. 1929 P.C. 231=57 M.L.J. 287 (P.C.).

———*Age—Guardian's former application.*

The verified application formerly made by a guardian, containing his ward's date of birth, is admissible under S. 157 and the guardian is entitled to refresh his memory from that document : 18 All. 478, *Ref.* (*Banerji and King, JJ.*). HURCHAND *v.* DEWAN SINGH. 117 I. C. 832=
1929 A.L.J. 615=A. I. R. 1929 All. 550.

———*Executant of document producing it in support of his evidence.*

Where the executant of a document containing recitals of boundaries of land in dispute is called as a witness and he gives his evidence and in support of that he produces a document executed by him. The document would be admissible under S. 157 as corroborative of the evidence given by the witness in the witness-box. (*B. B. Ghose and Panton, JJ.*). KETABUDIN *v.* NOFORCHANDRA.
93 I.C. 907=44 C.L.J. 582=A.I.R. 1927 Cal. 230.

—S. 157—Report of offence.

———A report of an offence, not made at or about the time of the occurrence, to an officer, who has no powers to investigate the matter, though it can be used under S. 155 to impeach the credit of the person making the same, cannot be used to corroborate the witness under S. 157. (*Cuming and Gregory, JJ.*). EMPEROR *v.* RAM CHANDRA ROY.
111 I. C. 327=55 Cal. 879=10 A. I. Cr. R. 456=
29 Cr.L.J. 823=A.I.R. 1928 Cal. 732.

—S. 157—Scpe.

———Section 157 affected by S. 162 of the Cr. P. C., so far as statements to the police, taken under S. 161, whether oral or recorded are concerned, but S. 27 which deals with information received from persons accused of an offence and in police custody is not affected by the aforesaid section of the Cr. P. C. (*Rutledge, C. J., Heald, Duckworth, Chari and Maung Ba, JJ.*). EMPEROR *v.* NGA THA DIN. 96 I.C. 145=4 Rang. 72=
5 Bur. L. J. 30=27 Cr. L. J. 881=
A.I.R. 1926 Rang. 116 (F. B.).

EVIDENCE ACT (1872), S. 157 — Statements before Magistrate.

—S. 157—Statements before Magistrate.

———Any Magistrate is competent to hold a test identification and if he is not empowered to deal with the matter under enquiry he can prove the statement made before him under the provisions of S. 157. (*Chotzner and Gregory, JJ.*). SAMI-UD-DIN *v.* EMPEROR. **109 I.C. 225=32 C.W.N. 616=10 A.I. Cr. R. 223=29 Cr. L.J. 497=A.I.R. 1928 Cal. 500.**

—S. 157—Statements by third person.

———Section 157 cannot be invoked to let in statements made by third persons as evidence for the purpose of corroboration of witness examined in a case. (*Cuming and Mukerji, JJ.*). AMBICACHARAN *v.* KUMUD MOHUN. **110 I.C. 521=A.I.R. 1928 Cal. 893.**

—S. 157—Statements in commitment proceedings.

———Statements made before a Committing Magistrate, when admissible under the Evidence Act, can be admitted for all purposes and not only for the purpose of corroboration or contradiction: A. I. R. 1925 Pat. 51, *Appr.* (*Sulaiman and Banerji, JJ.*). BEHARI *v.* EMPEROR. **98 I.C. 485=49 All. 251=25 A.L.J. 126=7 L.R.A. Cr. 205=27 Cr. L.J. 1365=7 A.I. Cr. R. 10=A.I.R. 1927 All. 479.**

———The object and effect of S. 288 of the Criminal Procedure Code is to place the deposition in the committal enquiry on exactly the same footing as the deposition in the Sessions Court. Such a deposition is "testimony" within the meaning of S. 157 of the Evidence Act, which, a prior statement by the witness during the police investigation is admissible in evidence to corroborate. A.I.R. 1923 Mad. 20 and 27 Cal. 295, *Foll.* (*Scott-Smith and Fforde, JJ.*). MAM CHAND *v.* THE CROWN. **82 I.C. 129=5 Lah. 324=25 Cr.L.J. 1201=A.I.R. 1924 Lah. 609.**

—S. 157—Statement to police.

———For corroborating a witness, his statement before competent police officer at the identification parade held by the police in the course of the investigation may be proved by oral evidence though the written record of the statement is not admissible. (*K. Kemp, J.*). EMPEROR *v.* WAHIDUDDIN HAMIDUDDIN. **32 Bom.L.R. 327=A.I.R. 1930 Bom. 158.**

———*Statements to police and Committing Magistrate —Not substantive evidence.*

The statements made by a witness to the Police are relevant only for the purpose of contradicting his testimony at the trial, and in the absence of any order under Cr. P.C., S. 288, the statements made to the Committing Magistrate can be used only for the purpose of contradicting or corroborating that testimony. These statements cannot be treated as though they were substantive evidence like the statement made by the witness at the trial. (*Martineau and Zafar Ali, JJ.*). RAM KARAN *v.* EMPEROR. **92 I.C. 577=7 L.L.J. 371=26 P.L.R. 659=27 Cr.L.J. 289=A.I.R. 1925 Lah. 483.**

———Statements made by the witnesses to the police during the investigation are not admissible for purpose of corroborating their depositions before the Committing Magistrate. (*Shadi Lal, C.J. and Zafar Ali, J.*). RAKHA *v.* CROWN. **93 I.C. 230=27 Cr.L.J. 438=26 P.L.R. 304=6 Lah. 171=A.I.R. 1925 Lah. 399.**

———Oral statements by witnesses in Police investigation which do not corroborate their evidence at the trial are inadmissible. (*Wallace and Madhavan Nair, JJ.*). VENKATASUBBIAH *v.* EMPEROR. **85 I.C. 209=26 Cr.L.J. 721=48 Mad. 640=21 M.L.W. 190=1925 M.W.N. 68=A.I.R. 1925 Mad. 579=48 M.L.J. 195.**

EVIDENCE ACT (1872), S. 159—Account-books.

———*Deputy Superintendent of Police.*

A statement, made to the Deputy Superintendent of Police, in which the informant gave an account of what occurred is admissible in evidence as the Deputy Superintendent of Police is an officer legally competent to investigate the facts of a murder and dacoity, within the meaning of S. 157. (*Ayling and Odgers, JJ.*). THACHROTH HYDROSS, *In re.* **75 I.C. 695=18 M.L.W. 113=1923 M.W.N. 860=25 Cr.L.J. 7=A.I.R. 1923 Mad. 694=45 M.L.J. 279.**

———Where a statement made to a police officer is not the first information under S. 154 of Cr. P. C. the Magistrate must take from the police officer, a statement, that the particular statement was made to him. (*Beachcroft and Ghose, JJ.*). SABIN SARDAR *v.* EMPEROR. **61 I.C. 650=22 Cr.L.J. 410 (Cal.).**

———*If the section is overridden by S. 162, Cr.P.C.*

Although the written record of statements made to the police in the course of an investigation could not be used as evidence, S. 162 does not exclude oral evidence of the statements, whether they had been taken down in writing or not: 35 Mad. 247 and 35 Mad. 397, *Rel. on.*

Section 162 does not override the general provisions of the Evidence Act as to oral evidence of such statements to corroborate the evidence of a witness: 39 Bom. 58 and 36 Cal. 281, *Rel. on.* (*Miller, C.J. and Adami, J.*). BALDEO KOERI *v.* KING EMPEROR. **61 I.C. 785=2 P.L.T. 565=6 P.L.J. 241=22 Cr.L.J. 433=A.I.R. 1921 Pat. 122.**

—S. 158—Opinion of Court.

———The question whether a witness is entitled to credit or not must be decided by a Court on the evidence before it, and not on what another Court thought of the witness in another case, and therefore opinion of Court in another case as to the witness cannot be put in to impeach his credit. (*Das and Foster, JJ.*). CHANDRESHWAR PRASAD NARAIN SINGH *v.* BISHESHWAR PRATAB NARAIN SINGH. **101 I.C. 289=5 Pat. 777=8 P.L.T. 510=A.I.R. 1927 Pat. 61.**

—S. 158—Previous statements.

———Previous statement not made in Court can be used for limited purpose of corroborating or contradicting witness only and not as substantive evidence: 26 Mad. 191 and 25 A.L.J. 994, *Foll.* (*Jai Lal and Abdul Qadir, JJ.*). NIAMAT KHAN *v.* EMPEROR. **31 P.L.R. 411=A.I.R. 1930 Lah. 409.**

—S. 158—Statement to police.

———Section 158 places a person whose statement has been used as evidence under S. 32 in the same category as a witness actually produced in Court for the purpose of contradicting his statement by a previous statement made by him. Therefore a statement which has been admitted in evidence under S. 32 may be contradicted by another statement of the same person made to police during investigation. (*Harrison and Jai Lal, JJ.*). HARI RAM *v.* EMPEROR. **89 I.C. 897=26 Cr.L.J. 1425=A.I.R. 1926 Lah. 122.**

—S. 159—Account-books.

———*Produced at late stage not admitted in evidence but party allowed to refresh his memory by reference to them—Procedure is proper.*

EVIDENCE ACT (1872), S. 159—Convincing document.

Where in a suit in which the amount payable by one party to the other was in dispute and there was omission on the part of both parties to produce their account books within the proper time, and in consequence the Subordinate Judge regarded with great suspicion the books the defendant produced, and he refused to allow the plaintiff's books to be put into evidence though he permitted him to refresh his memory by reference to their entries.

Held, that the Subordinate Judge was right in the view he took and that the procedure was justified by S. 159. The weight of the evidence, the objection to the document upon the ground that its not having been produced at the proper time renders its authenticity the subject of suspicion, and all other grounds upon which a document can be successfully impeached still remain open, but refusal to permit a man to refresh his memory by proper relevant contemporaneous documents might lead to a grave injustice. (*Lord Buckmaster.*) JEWAN LAL DAGA *v.* NILMANI CHAUDHURI.

107 I.C. 337=7 Pat. 305=55 I.A. 107=26 A.L.J. 124=30 Bom.L R. 305=47 C.L.J. 302=28 M.W.N. 154=32 C.W.N. 565=27 M.L.W. 740=A. I. R. 1928 P.C. 80=54 M. L.J. 325 (P.C.).

—S. 159—Convincing document.

———When the writing brings to the mind of the witness neither any recollection of the facts mentioned in it, nor any recollection of the writing itself, but which nevertheless enables him to swear to a particular fact from the conviction of his mind on seeing a writing, which he knows to be genuine, the witness may refresh his memory by referring to the writing. (*Newbould and Suhrawardy, JJ.*). ABDUL SALIM *v.* EMPEROR. **69 I.C. 143=40 Cal. 573=35 C.L.J. 279=26 C.W.N. 680=23 Cr. L.J. 657=A.I.R. 1922 Cal. 107.**

—S. 159—Document by others.

———*Document read at or near the transaction.*

When a witness wants to refresh his memory under S. 159, he is to do so by referring in Court to the document which he had read at or near the time of the transaction, and it is the fact that he had known it to be correct when he read it that is the justification for his doing so. It is quite immaterial that a document to which the witness refers in Court was not printed by the witness himself or in his presence. It is essential only that he should have read it at or soon after the transaction to which it relates. (*Hilton, J.*). RAMCHANDRA *v.* EMPEROR. **120 I.C. 798=1930 Cr. C. 331=31 Cr. L.J. 168=A.I.R. 1930 Lah. 371.**

—S. 159—Documents giving dates.

———*Recitals in old document are admissible to refresh memory.*

The plaintiff in order to show that his father died before the property had been acquired, produced a mortgage bond which had been executed by him on the 28th October, 1892, in which he was described as the son of Khan Mahomed Akonda deceased,

Held, the deed is admissible to refresh memory as to when the father died. (*Mookerjee, C. J. and Rankin, J.*). SAYERUDDIN AKONDA *v.* SAMESUDIN AKONDA. **72 I.C. 985=A. I. R. 1923 Cal. 378.**

—S. 159—Duty of witness.

———If upon any question a witness suffers from a *bona fide* lapse of memory, and that failure of memory can be remedied by reference to any memorandum or other writing prepared by the witness at the time, and the Court invites the witness to refresh his memory with reference to the writing, the witness is, under an obvious obligation to do so. (*Piggott and Walsh, JJ.*). HARKHU *v.* EMPEROR. **65 I.C. 575=19 A.L.J. 76=23 Cr. L.J. 143=A.I.R. 1921 All. 86.**

EVIDENCE ACT (1872), S. 159—Notes of speech.

—S. 159—Horoscopes.

———*Rule explained.*

Very great confusion of thought or rather lack of thought is frequently shown in Civil Courts in regard to the admission in evidence of horoscopes and similar documents. A horoscope is often accepted as substantive evidence of the date of the birth of the person mentioned in it, perhaps with a vague idea of reference to S. 32. No part of that section can make any statement of a date in such a document a relevant fact. A horoscope can be used to help in proving the date of birth stated in it only under S. 159 or S. 160 and then of course only if the person who wrote it or a person who read it soon after it was written is examined as a witness. Very nearly the same remarks will apply to other documents in which the age of a person is stated, such as the deed of adoption or rather of initiation as a "chela." (*Hallifax, A. J. C.*). SHANKERGIR GURU MOTIGIR *v.* CHINNUJI.

71 I.C. 140=6 N.L.J. 1=A.I.R. 1923 Nag. 164.

—S. 159—Investigating officer.

———*Practice explained.*

Where the counsel for accused asked in the course of cross-examination the investigating officers if a certain witness made or not a particular statement to them,

Held, that though the language of S. 155 (3) is *prima facie* wide enough to permit of such questions, yet where the evidence has been reduced to writing, it is undesirable to permit the putting of such questions as, if the witness in replying from his memory alone, there is little value in what he may say. If he is refreshing his memory by looking at the diary, the procedure is outside the scope and intent of S. 159, Evidence Act. (*Mears, C.J. and Mukerji, J.*). KASHIRAM *v.* EMPEROR.

103 I. C. 120=29 Cr. L.J. 472=9 L.R.A. Cr. 30=9 A. I. Cr. R. 249=26 A.L.J 139=A.I.R. 1928 All. 280.

—S. 159—List of articles.

———Lists of discovery of stolen articles can be used by the persons in order to refresh their memory at the time of giving evidence, but the lists are not themselves evidence. (*Scott-Smith, A.C.J.*). HAZARA SINGH *v.* THE CROWN. **82 I. C. 707=25 Cr. L.J. 1347=6 L.L.J. 370=A.I.R. 1924 Lah. 727.**

—S. 159—Memorandum.

———Memoranda kept by a witness can be used in evidence not by itself but as corroborating a witness or refreshing his memory: 10 N.L.R. 44 at p. 47, *Rel. on.* (*Subhedar, A. J. C.*). KEYARSOSP *v.* GARBAD. **120 I.C. 224=A.I.R. 1930 Nag. 24.**

—S. 159—Mode of proof.

———Statement of the person injured by the accused, made before certain villagers and recorded in full by the Patwari, is not to be proved by producing the witten record of it. The proper method is that given in S. 159. (*Hallifax and Mitchell, A.J.Cs.*). EMPEROR *v.* AKAIA. **101 I. C. 599=23 N.L.R. 23=28 Cr. L.J. 471=8 A I. Cr. R. 66=A.I.R. 1927 Nag. 222.**

—S. 159—Notes of speech.

———Section 159 does not render the notes of a speech inadmissible in evidence. (*Tapp, J.*). OM PARKASH *v.* EMPEROR. **A.I.R. 1930 Lah. 867.**

EVIDENCE ACT (1872), S. 159—Police diary.

—S. 159—Police diary.

———*Defence entitled to inspect only portion refreshed and not whole diary.*

There is nothing in the law which entitles the defence to an inspection of anything more than that portion of the police diary from which the witness refreshed his memory and there is no illegality or irregularity in the procedure of the Magistrate who disallows the application for the inspection of the whole diary. (*Coutts and Das, JJ.*). LACHMI SINGH *v.* EMPEROR.

68 I.C. 623=2 Pat. 74=23 Cr.L.J. 591=3 P. L.T. 562=A.I.R. 1922 Pat. 562.

—S. 159—Post-mortem notes.

———*If can go on the record* en bloc.

Per *Rupchand, A.J.C.*—Sections 159 to 161 permit limited use being made of post-mortem notes of Medical Officer, namely that they be used by the witness who made them for refreshing his memory or by a party for the purpose of contradicting the witness. It is extremely undesirable that such notes of post-mortem examination be put in evidence through the Medical Officer *en bloc* as it is prejudicial to both parties.

Per *Percival, J. C.*—When pleader for accused takes no objection to the post-mortem notes going on the record and when there is no discrepancy between the post-mortem notes and the evidence of the Medical Officer, the placing of the post-mortem notes does not do the accused any harm: 9 Cal. 455 and 27 Cal. 295, *Ref.* (*Wild, A. J. C.*) *on difference between Percival, J.C. and Rupchand, A.J.C.*). MOHAMMAD YUSIF *v.* EMPEROR.

1930 Cr. C. 865=A.I.R. 1930 Sind 225.

—S. 159—Prior deposition.

———*Evidence recorded during absence of accused can't be used—Where witness is unable to remember details of occurrence but his memory can be refreshed under.*

Where the deposition recorded under S. 512, Cr. P. C., of a witness who is unable to remember the details of the occurrence is sought to be given in evidence. The proper procedure in such a case is to read out his previous deposition to the witness under the provisions of S. 159 to refresh his memory and then to ask him whether he remembers the details of the occurrence. (*Scott-Smith, J.*). BHIKA *v.* KING EMPEROR.

76 I.C. 31=25 Cr.L.J. 95=A.I.R. 1924 Lah. 605.

—S. 159—Statement of injuries.

———A copy of the statement of injuries recorded in the register of medico-legal cases may be used by the medical witness for the purpose of refreshing his memory but it cannot be treated as evidence: 9 Cal. 455, *Ref.* (*Zafar Ali, J.*). MAHOMED SADIQ *v.* EMPEROR. **89 I.C. 458=26 P.L.R. 533=26 Cr.L.J. 1370=A.I.R. 1926 Lah. 51.**

—S. 159—Unstamped receipt.

———A copy of an unstamped Receipt, though inadmissible in evidence, can be used by a witness to refresh his memory by referring to it. (*Hallifax, A.J.C.*). CHOUDHURI RAMPRASAD *v.* NATHURAM.

68 I.C. 494=A.I.R. 1923 Nag. 32.

—S. 159—' Writing.'

———The word "writing" used in S. 159 includes also printed matter. (*Hilton, J.*). RAMCHANDRA *v.* EMPEROR. **120 I.C. 798=1930 Cr. C. 331=31 Cr.L.J. 168=A.I.R. 1930 Lah. 371.**

—S. 160—Engineer's report.

———In a suit for damages for negligence in supervising a building, an engineer's report is admissible to prove quantity of damages, provided the Engineer makes the contents of the report a part of his deposition by using it to refresh his memory. (*Walmsley and Chakravarti, JJ.*). NAGENDRA NATH SINGH *v.* SRIMATI NAGENDRA BALA. **97 I. C. 200=43 C.L.J. 479=A.I.R. 1926 Cal. 988.**

EVIDENCE ACT (1872), S. 163—Non-production.

—S. 162—Procedure.

———In order to ascertain whether certain public documents are privileged or not, the proper procedure to follow is as follows: The Court should issue summonses to the Record Keeper and the person who is in possession of such documents to produce them and on receipt of the summons it is the duty of those persons to appear in Court with those documents and there raise such objections as they might have had to their production or admissibility, and the Magistrate should then decide whether the objections were valid under Ss. 123 and 124, Evidence Act. They can then plead privilege under S. 123 or produce a proper privilege certificate from the head of their department that all or any of the documents summoned related to "affairs of State" and were privileged. (*Tek Chand and Agha Haidar, JJ.*). EMPEROR *v.* KARTAR SINGH. **110 I.C. 785=10 A I. Cr.R. 557=29 Cr.L.J. 753.**

—S. 163—Account-books.

———When a party to a suit calls the opposite party to produce the account-books as evidence and on their being produced inspects them, the account-books should be taken as evidence of both the parties without any further proof and should be admitted *in toto*. 5 Bom. L.R. 380 and 9 All. 713 (P.C.), *Rel. on.* (*Kinkhede, A.J.C.*). KISAN GHULE *v.* PURANSA. **106 I.C. 305=A.I.R. 1928 Nag. 119.**

—S. 163—Appeal.

———A party producing documents at the appellate stage in Court under O. XIV, R. 4, C.P.C., at the instance of his adversary cannot insist on their being used in evidence under S. 163 all at once. (*Kinkhede, A.J.C.*). TRIMBAK *v.* SITARAM MAHARAJ SANSTHAN. **89 I.C. 1016=A.I.R. 1926 Nag. 60.**

—S. 163—Departmental enquiry.

———*Crown—Can also claim benefit of section.*

Application of S. 163 is not restricted to civil proceedings only. It is applicable also to criminal trials and even though the Crown is the prosecutor.

Where, therefore, notice to produce statements made to a Magistrate during departmental enquiries is given to the Crown by the defence and such statements are produced, inspected and used for cross-examination of several witnesses, the Crown is entitled to have the whole of the statements as evidence. The Crown as prosecutor is not a different person from the Crown that recorded the statement and the statements cannot be said to be not in exclusive possession of the Crown. (*Pearson and Patterson, JJ.*). GOVERNMENT OF BENGAL *v.* SANTIRAM MONDAL. **A.I.R. 1930 Cal. 370.**

———Departmental enquiry by a Magistrate in his executive capacity is not judicial enquiry and statements recorded therein is not evidence taken on oath. Such statements, therefore, are not public documents, and S. 163 can be applied to such statements. (*Pearson and Patterson, JJ.*). GOVT. OF BENGAL *v.* SANTIRAM MONDAL.

A.I.R. 1930 Cal. 370.

—S. 163—Non-production.

———*Adverse inference—When permissible.*

Where a suit is brought on a bond or mortgage no adverse inference is permissible against the

EVIDENCE ACT (1872), S. 163—Proof of documents.

plaintiff for non-production of his account-books unless the other party has called upon him to produce such account-books and he has failed to comply with a demand. (*Kinkhede, A.J.C.*). KISAN GHULE *v.* PURANSA. **106 I.C. 305= A.I.R. 1928 Nag. 119.**

—S. 163—Proof of documents.

———Section 163 does not render proof of the document to be exhibited unnecessary or alter the normal incidence of that burden. (*Oldfield and Venkatasubba Rao, JJ.*). RAJAGOPALA *v.* RAMANUJA. **72 I.C. 459=1923 M.W.N. 292= 18 M.L.W. 165=A.I.R. 1923 Mad. 607.**

—S. 165—Court witnesses.

———*Applicability of section.*

The section applies to Court witnesses. The expression "any witness" includes a Court witness also. If the Judge were examining a Court witness and Counsel on either side were to object to the putting of a particular question, the Judge would rely upon S. 165 of the Evidence Act.

Where a Court witness made an important statement which was against the case of the appellants,

Held, that the appellants should have been given opportunity to cross-examine that witness. Parties have no absolute right without the permission of the Court to cross-examine a Court witness: 24 C. 288; 29 C. 387; 35 C. 243; 3 Bom. L.R. 145 at p. 158, *Diss.* (*Simpson, A.J.C.*). MAKUND SINGH *v.* MT. GHAFOOR-UN-NISSA. **74 I.C. 108= A.I.R. 1924 Oudh 182.**

—S. 165—Inadmissible evidence.

———The power conferred on the Judge under S. 165 cannot be exercised for the purpose of introducing evidence in contravention of the law.(*N. R. Chatterjea and B. B. Ghose, JJ.*). KERAMAT MANDAL *v.* EMPEROR. **92 I.C.453=42 C.L.J. 528= 27 Cr. L. J. 277= A.I.R 1926 Cal. 147.**

—S. 165—Intervention with questions.

———*Court intervening with questions to witnesses—Unless counsel's legitimate work was so impeded as to amount to mis-trial, no grievance can be made out of this.*

The fact that the Trial Judge intervened with questions during the examination and cross-examination of witnesses, misled Counsel and left him under the impression that the Court was not prepared to accept the statements made by the witnesses concerned, is obviously not a matter which can be set right on appeal, unless it is established that the intervention of the Judge with questions, with a view to clear up obscurities, to fill up lacunae, to supplement deficiencies, and generally to elicit the truth, exceeded the bounds of even the comprehensive provisions of S. 165 of the Evidence Act, and so impeded the legitimate work of Counsel engaged in the cause as to amount to a mis-trial, leading to failure of justice.

During the progress of the trial, it is not wise for Counsel to anticipate the final opinion of the Judge even as to the veracity of a witness, which may have to be judged, not solely from his individual statements, but from the testimony taken in conjunction with all the other facts brought out in the course of the litigation. (*Mookerjee and Fletcher, JJ.*). SURENDRA KRISHNA *v.* RANEE DASSEE. **59 I. C. 814=33 C. L. J. 34= A.I.R. 1921 Cal. 677.**

—S. 165—Production of documents.

———Under S. 165 of the Evidence Act, the Judge may himself, in order to discover or obtain proof of relevant facts, order the production of any document, where O. 13, Rr. 1 and 2, or S. 151, C. P. C., do not serve his purpose. (*Ashworth, J. C.*). SHANKAR LAL *v.* MAHBUB SHAH. **70 I. C. 278= 25 O. C. 286= A.I.R. 1923 Oudh 59.**

—S. 165—Scope.

———The provisions of S. 165 cannot be used in contravention of S. 162 of the Criminal Procedure Code. (*Otter, J.*). MAUNG HTIN GYAW *v.* MAUNG PO SEIN. **99 I. C. 1019=4 Rang. 471= 28 Cr. L. J. 219=7 A. I. Cr. R. 373= A. I. R. 1927 Rang. 74.**

—S. 167—Allocation of onus.

———Wrong allocation of *onus* of proof is not material when the decision has not been affected on the merits. (*Martineau, J.*). AHMADYAR *v.* MUHAMMAD ALI. **3 L. L. J. 445= A.I.R. 1921 Lah. 162.**

—S. 167—Duty of appellate Court.

———*Reception of inadmissible evidence.*

What a Court of appeal, has to consider is whether the reception of inadmissible evidence influenced the minds of the jury so seriously as to lead them to a conclusion which might have been different but for its reception. Hence where inadmissible evidence has been admitted, there are two points for consideration firstly whether the reception of the inadmissible evidence has in fact occasioned a failure of justice, and secondly whether if it is excluded, there was sufficient evidence to justify the verdict of the jury. (*Sanderson and Choltzner, JJ.*). HARENDRA NATH *v.* EMPEROR. **84 I.C. 451=40 C.L. J. 313=26 Cr.L.J. 307= A.I.R. 1925 Cal. 161.**

—S. 167—Objection about admissibility.

———*C. P. C., S.* 100—*Objection can be taken for first time in second appeal.*

An erroneous omission to object to inadmissible evidence does not make it admissible. The omission to take objection to the admissibility of a document becomes fatal only in cases where if the objection is taken in time, any defect in its admissibility can be cured and the document made admissible. In other cases objection as to inadmissibility can be raised even in second appeal though it was not raised in the lower Courts : 19 All. 76 (P. C.), *Foll.* (*Suhrawardy and Cuming, JJ.*). CHOONI LAL KHEMANI *v.* NILMADHAB BARIK. **86 I.C. 734=41 C.L.J. 374= A.I.R. 1925 Cal. 1034.**

—S. 167—Omission to object.

———Evidence admitted in Trial Court without objection cannot be attacked in appeal. (*Chatterjea and Pearson, JJ.*). RAJESWARI DASI *v.* PULIN BEHARI MITTER. **62 I.C. 647=25 C.W.N. 881= A.I.R. 1921 Cal. 71.**

—S. 167—Other evidence sufficient.

———Under S. 167 it is permissible for High Court in spite of the improper admission of a confession in evidence to uphold the conviction if independently of the evidence objected to there is sufficient evidence to justify the decision of the Sessions Judge. (*Macleod, C. J. and Fawcett, J.*). KING EMPEROR *v.* MAHABLI RAMA SAI. **87 I. C. 520= 26 Bom. L.R. 706=26 Cr L.J. 984= A.I.R. 1924 Bom. 480.**

—S. 167—Revision.

———*Practice explained.*

The High Court in revision, ordinarily speaking will remand a case for a finding with reference to admissible evidence only, where the lower Court being competent to deal with facts has not adopted the course of ignoring the evidence wrongly admitted and considering whether there still remains enough evidence to support the judgment.

EVIDENCE ACT (1872), S. 167—Second appeal.

If the Court takes the view that irrespective of the improperly admitted evidence the decision is sustained by sufficient evidence, the decision cannot be reversed merely on the ground of the improper admission of evidence. (*Venkatasubba Rao, J.*). SANKAR CHENNA BASAPPA *v.* K. MANAPPA.
82 I.C. 283=21 M.L.W. 87=25 Cr. L.J. 1275=A.I.R. 1925 Mad. 243.

—S. 167—Second appeal.

——There is great difficulty in applying the provisions of S. 167 to the generality of cases which come before the High Court on second appeal. When evidence has been improperly admitted, the High Court, not being a Court of fact, cannot decide whether the remaining evidence in the case is sufficient to warrant the finding, but should remand the case to the lower Court for re-hearing. (*Sanderson, C. J., Panton and Graham, JJ.*). BROJENDRA KISHORE *v.* MOHIM CHANDRA.
99 I. C. 189=31 C. W. N. 32=A. I. R. 1927 Cal. 1.

——Where an Appellate Court has relied for its decision upon a document which is inadmissible in evidence, a Court of second appeal would be justified in remanding the case for decision to the first Appellate Court with a direction to exclude that document from its consideration. (*Zafar Ali, J.*). HEM RAJ *v.* NIHAL SINGH.
90 I. C. 678=7 L. L. J. 352=26 P.L.R. 632= A. I. R. 1925 Lah. 506.

——In second appeal the Court is not in possession of all the evidence or in a position to be able to weigh it and see whether in fact apart from the objectionable evidence there was sufficient evidence to entitle the lower Court to come to the decision which it did, so as to enable the High Court to affirm that decision under S. 167. (*Dawson-Miller, C.J. and Mullick, J.*). SUMITRA KUER *v.* RAM KHAIR CHOUBEY. **1921 P.H.C. C. 17=A. I. R. 1921 Pat. 61.**

EXAMINATION.

See EVIDENCE ACT, Ss. 132-153.

EXAMINATION OF ACCUSED.

See (1) CR. P. CODE, SS. 164, 256, 342, 364 AND 365.
(2) CRIMINAL TRIAL.

EXAMINATION OF WITNESSES.

See (1) C. P. CODE, O. 16 AND O. 26.
(2) EVIDENCE.
(3) EVIDENCE ACT, SS. 118-134.

EXCESS PROFITS DUTY ACT (10 of 1919).

—S. 2—Business.

——*Royal Calcutta Turf Club carries on business and is liable to excess profits duty on collections from non-members—Test explained.*

The Royal Calcutta Turf Club is carrying on an "adventure or concern in the nature of trade" and consequently is carrying on a "business" within the meaning of S. 3 of the Act, in respect of sums received from persons other than members of the Club, under the following heads:—(1) Entrance fees to the stand paddocks and enclosures or gate-money; (2) Entrance fees paid by owners of horses; (3) Book-makers license fees; and (4) Percentage on the totalisators. *Carlisle and Silloth Golf Club* v. *Smith*, 2 K. B. 177, *Foll.*

The fact that the members of the Club do not receive any profit out of the transactions which are carried on by the Club, and that the admitted surplus is used for the purpose of subscribing to charities, is not material.

The test is whether the moneys are received by the Club and in exchange for something which is given by the Club and in respect of which profit is made. (*Sanderson, C. J., Teunon and Richardson, JJ.*). THE ROYAL CALCUTTA-TURF CLUB *v.* SECY. OF STATE. **66 I. C. 473=25 C. W. N. 734=A. I. R. 1921 Cal. 633.**

EXCESS PROFITS DUTY ACT (1919), S. 18—Rules under R. 24 (3).

——*Turf club—Carries on 'business' and liable to excess profits duty on collections from non-members—Test pointed out.*

A turf club is liable to excess profits duty in respect of the following sources of income in so far as the sums received under these heads are not paid by the members of the club;

(1) Entrance fees to the stand, paddocks, and enclosures, or gate money,
(2) Entrance fees paid by owners of horses,
(3) Book-makers' license fees,
(4) Percentages on the totalisators.

It must be held that the Turf Club is carrying on an "adventure or concern in the nature of trade" and is consequently carrying on a "business" within the meaning of S. 3 of the Act, in respect of sums received under the four heads mentioned from persons other than members. It is not material what is the ultimate destination of the surplus, if any, which the Turf Club receives in respect of these matters. The test is whether moneys are received by the club from non-members of the club and in exchange for something which is given by the club and in respect of which profit is made. *Carlisle and Selloth Golf Club* v. *Smith*, (1912) 2 K.B. 177, *Affirmed on appeal*; (1913) 3 K.B. 74, *Foll.* (*Sanderson, C.J., Teunon and Richardson, JJ.*). CALCUTTA TURF CLUB *v.* SECY. OF STATE' **48 Cal. 844=A. I. R. 1921 Cal. 44.**

—S. 4—Assessment.

——The Excess Profits Duty Act, 1919, does not require the duty to be assessed within the year for which the duty is imposed. (*Wallis, C.J., Ayling and Krishnan, JJ.*). DEPUTY COMMISSIONER, INCOME-TAX *v.* LAKSHMIDAS PURUSHOTHAM AND CO. **63 I.C. 420=1921 M.W.N. 513=14 M.L.W. 57=44 Mad. 768=A.I.R. 1921 Mad. 228=41 M.L.J. 189 (S.B.).**

—S. 5—Capital.

——Moneys invested in shares in public companies and Government securities which have been treated as part of the capital of the firm, are "capital employed in the business of the firm" and consequently, as such must be included in the capital computation both for the accounting period and "the standard years". Similarly loans to individuals and business concerns must be treated as capital. (*Sanderson, C.J., Woodroffe and Richardson, JJ.*). MARTIN AND CO. *v.* SECY. OF STATE. **67 I.C. 909=25 C.W.N. 875=A.I.R. 1921 Cal. 639.**

—S. 6—Capital.

——An Income-Tax Assessee who wishes to avail himself of the exemption on the ground of an increase in the average capital, must put before the Collector and the Board of Revenue satisfactory evidence that his capital had been increased as alleged by him. (*Wallis, C. J., Ayling and Krishnan, JJ.*). DEPUTY COMMR. AND SECY. TO THE CHIEF COMMR. OF INCOME-TAX, MADRAS *v.* ABDULLA SAHIB AND CO. **70 I.C. 30=14 M.L.W. 413=A.I.R. 1921 Mad. 717 (F.B.).**

—S. 18—Rules under R. 24 (3).

——*Interpretation.*

The words "proceedings for the recovery of any sum "in sub-rule (3) of R. 24 mean the proceedings taken under sub-rule (1) of that rule after de-

EXCESS PROFITS DUTY ACT (1919), S. 19—Application of.

fault has been made in payment. (*Martineau, J.*). GIAN SINGH BAHADUR SINGH *v.* THE CROWN.
73 I.C. 106=4 Lah. 165=
A.I.R. 1924 Lah. 54.

—S. 19—Application of.

———*S. 19 does not apply to cases chargeable under this Act only.*

Section 19 merely provides for the protection of the tax-payer, that the profits of any business shall not be chargeable both with super-tax and excess profits duty, but with whichever is the higher, and has no application to a case in which profits are chargeable only with excess profits duty and not with super-tax. It does not relieve profits from the liability to Excess Profits Duty by S. 4 unless such profits are chargeable with super-tax and the super-tax exceeds the Excess Profits Duty. (*Wallis, C.J., Ayling and Krishnan, JJ.*). DEPUTY COMMISSIONER, INCOME-TAX *v.* LAKSHMIDAS PURUSHOTTAM AND CO. **63 I.C. 420=1921 M.W.N. 513=**
14 M.L.W. 57=44 Mad. 768=
A.I.R. 1921 Mad. 223=41 M.L.J. 189 (S.B.).

—S. 20—Deductions.

———*Costs to find out duty cannot be deducted.*

Though the amount of the Excess Profits Duty is to be allowed as a deduction in respect of profits of a business for the purpose of income-tax, the costs of arriving at the Excess Profits Duty can not be so allowed. Further this has got to be for a specified year and does not apply to any later year. (*Schwabe, C. J., and Coutts Trotter, J.*). SECRETARY, BOARD OF REVENUE *v.* B. MUNISWAMI CHETTY. **77 I.C. 39=18 M. L. W. 792=**
33 M. L. T. 122=47 Mad. 653=
A.I.R. 1924 Mad. 205=45 M. L. J. 711 (S.B.).

—Sch. 1—Employed in business.

———*Firm carrying business as managing agents on another Company for Commission varying on the profits—Exception does not apply.*

The proviso in Sch. I should be read as governing generally the three kinds of businesses which are enumerated under headings 1, 2 and 3 or, put in another way, as including the businesses mentioned therein as within the terms of S. 3 of the Act. Agents, secretaries and treasurers, or agent of a mill company under the usual form of agreement and remunerated by a commission which would depend either on the out-turn or on the amount of profits are not to be considered as carrying on a business excepted under Sch. I.

Where all that the agreement provides for is that subject to the control of the Directors of a certain Company a certain firm shall have the general conduct and management of the business and affairs of the company the firm are not officers of the company, in the strict sense of the word, nor are they servants. They are a firm which for a certain agreed remuneration has consented to do the work which is detailed in the agreement. There is nothing whatever in the agreement which would prevent the firm from carrying on any other business so long as they carried on the work under the agreement in the proper manner. (*Macleod, C. J. and Fawcett, J.*). *In the matter of* THE SPECIFIC RELIEF ACT.
63 I.C. 775=45 Bom. 1064=23 Bom. L. R. 603=
A.I.R. 1921 Bom. 452.

—Sch. 2, R. 1—'Employed in' business.

———*Meaning of.*

The words "employed in the business" in the proviso to R. 1 of Sch. 2 *prima facie* bear their natural meaning of "actually employed in the business," and cannot properly be construed as if the words were "employed or intended to be employed in the business." (*Macleod, C. J. and Fawcett, J.*). *In the matter of* THE EXCESS PROFITS DUTY ACT, 1919. **60 I.C. 964=**
45 Bom. 881=23 Bom. L. R. 139=
A.I.R. 1921 Bom. 119.

EXCHANGE.

See also T. P. ACT, S. 118.

—Rate of.

———*Suit for recovery of sterling in Indian Currency—Rate of exchange is that prevailing on date of the foreign judgment.*

The plaintiffs obtained a judgment against the defendants for a certain amount in sterling in the King's Bench Division of the High Court of Justice in England for costs. The defendants having failed to pay the amounts, the plaintiffs filed a suit in Bombay to recover the equivalent in rupees of the amount as converted at the rate of exchange ruling on 23rd February, 1921. The defendants contended that the rate of exchange should be held to be that prevailing on the day of the judgment against them in the suit filed in Bombay.

Held, the rate of exchange prevailing at the date of the foreign judgment sued on is the one to be taken. (*Fawcett, J.*). MADHAVJI VISHRAM *v.* RAMNIKLAL VADILAL. **70 I. C. 474=**
47 Bom. 487=25 Bom. L.R. 173=
A.I.R. 1923 Bom. 437.

EXCISE ACT.

See (1) BENGAL EXCISE ACT, VII OF 1878.
,, ,, V OF 1909.
(2) EASTERN BENGAL AND ASSAM EXCISE ACT, I OF 1910.
(3) BIHAR AND ORISSA EXCISE ACT, II OF 1915.
(4) BURMA EXCISE ACT, V OF 1917.
(5) PUNJAB EXCISE ACT, I OF 1914.
(6) U. P. EXCISE ACT, IV OF 1910.

EXCLUSIVE POSSESSION.

See (1) ADVERSE POSSESSION.
(2) CO-SHARER.
(3) HINDU LAW—JOINT-FAMILY.

EX-COMMUNICATIONS.

See (1) C. P. C., S. 9.
(2) CASTE DISABILITIES REMOVAL ACT.
(3) HINDU LAW.
(4) TORT.

EXECUTING COURT.

See C. P. C., S. 21.

EXECUTION.

See also (1) CIVIL P. C., S. 47 AND O. 21.
(2) DECREE.

Application.
Attachment.
Bar to.
Completion of.
Compromise decree.
Construction of decree.
Decree binding.
Decree not to be varied.
Decree null and void.
Duty of Court.
Executability of decree.
Execution by Collector.
Jurisdiction.
Legal representatives.
Limitation.
Mesne profits.
Mode of.
Restitution.
Restoration—*See* CIVIL P. C., S. 151.

EXECUTION—Application.

Right to.
Satisfaction.
Scope of.
Setting aside.
Stay of—*See also* O. 41, R. 5.
Step-in-aid of—*See* LIM. ACT, ART. 185 (5).
Miscellaneous.

—Application.

———*Application for execution of decree.*

When certain decrees were sought to be executed the judgment-debtor objected that he was not liable. The objection having been substantially upheld the execution was permitted only in respect of certain small items. Thereupon the judgment-debtor preferred appeals to the High Court. Subsequently the execution proceedings, were dismissed for default. The appeals having later on ended in favour of the decree-holder the decree-holder again applied for execution this time varying the list of properties against which the decrees were to be attached,

Held, that the original execution applications were revived and that what happened after the Court upheld the objection was immaterial and that the decree-holder could consequently execute the decrees, *in toto*. (*Mukerji and Guha, JJ.*). KUMAR SARAT KUMAR ROY *v.* HARIPADO CHATTERJEE. **34 C.W.N. 897.**

———An application for amendment of a pending application for execution made after the decree sought to be executed had become barred by limitation cannot be entertained. 17 Cal. 631 (F. B.); A. I. R. 1924 Cal. 131, *Rel. on*; 27 C. L. J. 398, *Not foll.*; A. I. R. 1927 Pat. 223; A. I. R. 1923 Pat. 224, *Cons.* and *Dist.* (*Kulwant Sahay and Macpherson, JJ.*). JAGANNATH DAS *v.* CHAMU RAGHUNATH. **119 I.C. 411=8 Pat. 462=A.I.R. 1929 Pat. 407.**

———*Concurrent applications for execution of a decree against different properties may be made.*

While one application for execution of a decree is pending, other independent applications for execution against other properties of the judgment-debtor may be filed. Concurrent applications for execution of a decree against different properties may be made: 37 Mad. 231; A. I. R. 1916 P. C. 16 and A. I. R. 1923 Pat. 224, *Ref.* (*Wallace and Thiruvenkatachariar, JJ.*). TANDAVAMURTI *v.* DURGAMBA. **113 I.C. 260=A.I.R. 1928 Mad. 1154.**

———*Application not fully disposed of by Court—Next application for same relief should be deemed as continuation of the prior one.*

An assignee of a preliminary decree applied for recognizing his transfer and also for making the decree final and the Court finally made the order thereon: "Transfer proved already accepted." There was no order refusing or rejecting his application in respect of the passing of the final decree,

Held, that later execution application in respect of the same relief should be properly treated as a mere continuation of the previous proceedings: A.I.R. 1922 Mad. 65, *Dist.* (*Srinivasa Ayyangar, J.*). MALLIKARAJA PUDU *v.* NALLA VENKAYA. **109 I.C. 375=A.I.R. 1928 Mad. 971.**

———No special application is necessary to revive the first application which is pending before the Court and where there has been no dismissal of the original application for execution: 22 C. W. N. 766, *Dist.* (*Greaves and Panton, JJ.*). AKSHOY KUMAR DE PATWARI *v.* NALINI KUMAR MAJUMDAR. **94 I.C. 80 (Cal.).**

EXECUTION—Application.

———*Proclamation for sale.*

Any application by a decree-holder in respect of the property which shall be proclaimed for sale is one to be decided by the Execution Court. It may decide it rightly or wrongly; its order on such application is final if not appealed against. (*Ashworth and Neave, A. J. Cs.*). SITAPAT RAM *v.* MOHAMMAD ASGHAR. **92 I.C. 29=A.I.R. 1926 Oudh 193.**

———*No amendment after registration—What amounts to amendment.*

No amendment of an execution petition should be allowed after it has been registered. 17 Cal. 631 (F. B.), *Foll.*

However, where a mortgagee decree-holder simply notifies to the Court that the sale of the mortgaged properties should not affect the *merasi* rights or interests of certain defendants and makes no further prayer with respect to them in the execution application, his action does not amount to an amendment of the petition. (*Suhrawardy and Duval, JJ.*). ABDUL HASMAT AHAMAD *v.* HRISHIKESH DAS. **85 I.C. 742=A.I.R. 1925 Cal. 1048.**

———Where the properties sought to be attached in two applications are different, the latter is not the continuation of the former, nor where the former application has been dismissed for default of the decree-holder. (*Das and Ross, JJ.*). MT. RESHMA KUMARI *v.* RAMESHWAR OJHA. **79 I. C. 897=A.I.R. 1925 Pat. 197.**

———*Successive applications for execution when and to what extent barred.*

There is nothing to prevent several applications being made, directed against and linked into partnership of private property. There is nothing to prevent a succession of applications directed against persons who are ascertained to be, or believed to be partners in the particular venture out of which the decree has arisen. The limitation however that is imposed on all these applications is that, if there has been a previous application, in which there has been a definite decision affecting a particular piece of property, or a particular person, and from that decision nothing has been done by way of appeal or institution of suit if either of these methods were available, that decision is a final decision between the parties, and if in any subsequent proceedings, the point again becomes material the parties are bound by that previous decision, and the matter cannot be reopened. To that extent, and that extent only, is there limitation on the successive applications in execution. (*Mears, C.J. and Piggott, J.*). KAPUR CHAND *v.* LALA KANAHAIYA. **74 I.C. 513=21 A.L.J. 641=4 L.R.A. Civ. 441=45 All. 735=A.I.R. 1924 All. 34.**

———*No revival occurs where decree-holder himself is at fault but it occurs where progress is arrested in spite of decree-holder.*

An application for execution may in certain contingencies be treated as one to revive and carry through a pending execution; thus the second application might be treated as one not to initiate a new proceeding, but to revive the previous proceeding when the latter was arrested by reason of circumstances over which the decree-holder had no control. Where the difficulty has been created entirely by the decree-holder himself as he ignored the order made by the Executing Court in the first proceeding, the principle has clearly no application. 5 Cal. 595; 29 Cal. 682, *Foll.*; 5 All. 236,

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Dist. (*Mookerjee and Panton, JJ.*). RAJINI BANDHU CHATTERJEE *v.* KALEE PRASANNA CHATTERJEE. **74 I. C. 279=A.I.R. 1924 Cal. 419.**

———*Dismissal for want of Court-fees on decree—Order wrong.*

Where a proper complete decree had been drawn up and the execution Court dismissed the application for execution on the ground that there was no decree as no necessary Court-fees had been paid and it did not appear how any Court-fees were necessary, *held*, the order dismissing the application for execution was wrong. (*Shah and Crump, JJ.*). GANDHI VADILAL CHHAGANLAL *v.* GANDHI MANAK LAL CHHAGANLAL. **79 I.C. 489=A.I.R. 1923 Bom. 41.**

———*Award—Instalments conditional on security—Default—Application proper.*

By an award the judgment-debtor was allowed to pay up the amount by instalments on giving security and if he failed to give the first instalment in time it was to be paid along with the second. The judgment-debtor failed to give security and on his failure to pay the first instalment, but before the time of the second instalment, the decree-holder filed an application for execution for the recovery of the first instalment,

Held, the payment by instalments was conditional on the execution of security and the application was proper. (*Martineau, J.*). BHAGWAN DAS *v.* MUTSADDI LAL. **A.I.R. 1923 Lah. 445.**

—Attachment.

———The Collector has no jurisdiction to withdraw the attachment effected by the order of the Civil Court. (*Mukerji and Bennet, JJ.*). JAGANNATH PRASAD *v.* SHEO NARAIN. **123 I.C. 105=A.I.R. 1930 All. 281.**

———*Objection to attachment.*

Where an objection to an attachment of property during execution proceedings is dismissed and during the pendency of appeal preferred against the dismissal of order, property is already sold, appeal is infructuous as the decision would not be binding on the purchaser: 15 I. C. 529, *Foll.* (*Bhide, J.*). KHAN JAHAN *v.* DAS MAL. **110 I.C. 246=10 L.L.J. 328.**

———*Money paid in satisfaction of a particular decree.*

Where the judgment-debtor pays in the money in satisfaction of the decree, it is a final discharge of his obligation, and no money can be said to be lying to his credit so as to be liable to the attachment by other creditors, and it is not a fraud on other creditors even though nothing is left to them for proceeding against: (1916) 1 M.W.N. 195, *Foll.* (*Jackson, J.*). V. CHINNAMALU *v.* C. KUNHI KANNA MENON. **100 I. C. 24=A. I. R. 1927 Mad. 625.**

———*Property under attachment, disposed of by officer appoinetd* pendente lite—*Officer should refund.*

Where during the continuance of an attachment in execution, a person disposes of the property under the orders of a Court and the Court's orders are set aside in appeal, the proper person to make a refund is the person who has disposed of the property and not the party at whose instance that person was appointed by the Court to act as he did. (*Sulaiman and Mukerji, JJ.*). JWALA PRASAD *v.* SHEIKH CHUTTAN. **85 I.C. 161=6 L.R.A. Civ. 36=A.I.R. 1925 All. 328.**

———*Rents—No one can collect rents except receiver.*

Court has no authority to empower any one to collect the rents except by duly appointing him as a receiver. It has no power to order the tenants to pay their rent to the decree-holder and if they refuse to pay it they cannot be prosecuted, and the Court has no power to authorise any one but a receiver to file suits for the recovery of rents. (*Carr and Brown, JJ.*). MAUNG THEIN *v.* S. A. S. FIRM. **89 I.C. 794=3 Rang. 235=A.I.R. 1925 Rang. 318.**

EXECUTION—Bar to.

———*Future rents.*

Where in execution proceedings the Court attached future rents and authorised the decree-holder to collect them after directing him to give security for the re-payment of the rents with 6 per cent. interest if the attachment should be removed,

Held, the Court had taken upon itself to lend the decree-holder this money at that rate of interest. It had no power to do this. (*Carr and Brown, JJ.*). MAUNG THEIN *v.* S. A. S. FIRM. **89 I.C. 794=3 Rang. 235=A.I.R. 1925 Rang. 318.**

———*Dismissal and restoration of execution case—Effect.*

Where an attachment is already in force when the execution case is dismissed for default and is restored the same day, and where the dismissal for default is known to nobody except decree-holder's pleader, a sale held subsequently is not vitiated. (*Hallifax, A.J.C.*). SHANKAR RAO *v.* MANICK RAO. **68 I.C. 643=A.I.R. 1923 Nag. 18.**

———*Land.*

Where the land was formerly in the name of previous *Gaddi Nashin*, and after his death it was mutated, not in the name of the new *Gaddi Nashin*, but in the name of the shrine in order to protect it from attachment in execution, it should be attached as requested by the decree-holder leaving the shrine or persons interested to prefer objections if any in the usual course. (*Chevis, J.*). FIRM OF GANDA MAL CO. *v.* GANGA NATH. **4 L. L. J. 49=A.I.R. 1922 Lah. 147.**

———A suit by the rightful owner for wrongful attachment of property, which is attached in execution as being the property of the judgment-debtor is maintainable against the decree-holder, in spite of a subsequent order that the property should not be released and returned to the true owner, pending the decision of the suit by decree-holder that the property is liable to attachment. (*Mookerjee, A.C.J. and Fletcher, J.*). BHUSHAN CHANDRA PAL *v.* NARENDRANATH KOOR. **60 I.C. 280=32 C.L.J. 236.**

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———*Interest.*

Where a decree-holder has failed to claim for a portion of interest accrued due in a previous application for execution, he cannot be allowed to claim that portion in a subsequent application on the principle that a portion of an entire decree for which execution is not claimed cannot form part of a subsequent claim in execution. (*Mukerjee and Guha, JJ.*). SHYAMA CHARAN *v.* PROTAP CHANDRA DAS. **51 C.L.J. 280=A.I.R. 1930 Cal. 349.**

———*Constructive* res judicata—*Notice of execution served on judgment-debtor—Judgment-debtor failing to appear—Question of executability of decree is* res judicata.

When an application is made for execution of a decree and notice of the application is served on the judgment-debtors, they are bound to appear and show cause why the decree should not be executed. If they fail to appear and show cause, and

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if on such failure an order *ex parte* should be made by the Court directing execution, then the question of the executability of the decree should, according to the law of constructive *res judicata*, be regarded as having been decided by the Court in favour of the decree-holder and the rule of constructive *res judicata* will be available even if the parties are not personally served.

All that is necessary under the law is that they should be properly served, served according to the rules relating to service. (*Srinivasa Ayyangar, J.*). SUNDARARAJULU NAIDU *v.* NARAYANASWAMI NAIDU. **103 I.C. 825=39 M.L.T. 34=26 M.L.W. 481=A. I. R. 1927 Mad. 813.**

———*Decree for rent—Sale in execution of, subject to liabilities under another decree—Decree-holder himself purchasing properties—Execution against other properties of debtor in respect of the other decree is not barred.*

After a holding has been once sold in execution of a rent decree and has passed out of the possession of the tenant it cannot ordinarily be again sold in execution of any other decree for rent due by the same tenant. An exception however has been made in cases where the executing Court, although ir regularly, allows the holding to be sold subject to a liability to satisfy another outstanding decree; in such cases the auction-purchaser is concluded by *res judicata* and the landlord is competent to proceed in the first instance against the holding and to call upon the auction-purchaser to discharge the liability which he has undertaken. But the principle has no application at all where the decree-holder is himself the purchaser. 6 C.W.N. 877, *Dist.* Even in a case where the landlord decree-holder purchased subject to liability to satisfy his other decree for arrears of rent, he may bring to sale the other property of the tenant in execution of his unsatisfied decree. (*Mullick and Macpherson, JJ.*). JUGAL KISHORE NARAYAN SINGH *v.* BHATU MODI. **80 I.C. 377=1923 P.H.C.C. 205=1 P. L.R. 311=2 Pat. 720=4 P.L.T. 640=A.I.R. 1923 Pat. 517.**

———Res judicata—*Principle of.*

Where the Court, decided after due notice upon the judgment-debtors that the execution was in order and that it should proceed.

Held, that the order is binding upon the judgment-debtors. It is an order deciding as between the parties that the execution was not barred by limitation. Such an order operates as *res judicata* and whether right or wrong, the order cannot be challenged in subsequent execution proceedings. (*Jwala Prasad and Bucknill, JJ.*). GOUR CHANDRA ROY *v.* JONADAN PRASAD THAKUR. **68 I.C. 337=4 P.L.T. 204=A.I.R. 1923 Pat. 180.**

———*Pre-decree agreement cannot be pleaded as a bar in execution proceedings.*

An agreement made before the passing of a decree, which, if raised in the suit, would negative wholly or partially a defendant's liability to meet the plaintiff's claim, is one which would constitute a valid defence to the suit; but such an agreement cannot be pleaded as a defence to an execution application: 40 M. 233; 43 M. 725; 8 L.W. 205, *Rel. on.* (*Spencer and Ramesam, JJ.*). (KOONAMNENI) MALLAYYA *v.* (KANNEGATI) CHINA KOTAYYA. **64 I.C. 148=14 M.L.W. 317=1921 M.W.N. 382=A.I.R. 1921 Mad. 616.**

—Completion of.

———No one can execute a satisfied decree. A puisne mortgagee who was subrogated to the decree charge obtained by the prior mortgagee on the property by

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paying the amount of the execution sale before confirmation cannot execute the decree because it had been satisfied on account of that sale. (*Wallace, J.*). PARVATI AMMAL *v.* VENKATARAM IYER. **81 I.C. 771=20 M.L.W. 278=1924 M.W.N. 510=A.I.R. 1925 Mad. 80=47 M.L.J. 316.**

———*Statement on the return.*

Where the statement on the return was that delivery was complete, the decree-holders, acceptance of it as such must be taken in its natural meaning, the only meaning which is recognized in the Code, that the delivery was complete absolutely and against the world. It is quite clear that delivery of possession to the decree-holder involves that no person other than the decree-holder remains in possession. That will not be less so, if delivery is symbolical, since the physical possession of the tenants in such cases is of course not in question. (*Oldfield and Venkatasubba Rao, JJ.*). IBRAMIM SAHIB *v.* KONAMMAL. **70 I.C. 755=31 M.L.T. 356=A.I.R. 1923 Mad. 25=43 M.L.J. 179.**

—Compromise decree.

———It is open to the executing Court to examine the terms of a compromise decree before enforcing it and to see whether the penal clause, if there is any, is to be enforced *in toto* or not. *Case-law referred.* (*Sulaiman and Mukerji, JJ.*). B. KISHEN PRASAD *v.* KUNJ BEHARI LAL. **91 I. C. 790=24 A.L.J. 210=A. I. R. 1926 All. 278.**

———*Power to modify terms.*

An executing Court can modify a penalty which has been fixed in a compromise or contract, even if that compromise or contract is subsequently embodied in a decree. But while dealing with an award which is in no sense of the word a compromise or a contract, the executing Court has no power to modify the terms of such award. 35 Bom. 239: 24 C.W.N. 545, *Dist.* (*Harrison, J.*). KESHO RAM *v.* THAKUR DAS. **78 I. C. 80=A.I.R. 1925 Lah. 180.**

———A compromise decree cannot be challenged in execution proceedings exactly as if it had been a decree passed after contest. (*Phillips and Odgers, JJ.*). KOTHANDARAMASWAMI NAIDU *v.* PAPAMMAL. **79 I.C. 891=A. I. R. 1925 Mad. 218.**

———*Illegal condition in a compromise decree cannot be enforced.*

Where a decree based on a compromise contained a condition that trees on *sir* land which were not transferable apart from the land were to pass.

Held, that the condition was inoperative and the decree could not be executed with respect to the trees. (*Prideaux, A.J.C.*). PARASHRAM *v.* SITARAM. **78 I.C. 357=20 N.L.R. 1=A. I. R. 1924 Nag. 84.**

———*Execution in the nature of specific performance will not be allowed long after the time fixed by decree has passed.*

A compromise decree provided for the pulling down of the plaintiff's wall and for the payment by the defendant of a certain sum of money and the building of a new wall within two months from the date of that compromise. Admittedly the money was not paid nor the wall built within the two months. Nothing was done by either party until the defendant took out the execution against plaintiff for pulling down the wall as per terms of the decree. There was no evidence at all of any intervening acts of the parties after the date of the decree. There was therefore, a lapse of time of just

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over one year from the date fixed by the compromise for the performance of the acts,

Held, that time was the essence of the contract; the defendant was out of Court because he was a year out of time and no waiver or a new agreement had been shown to have taken place. But supposing time was not of essence of the contract the defendant could not even then, after an unexplained delay of one year obtain specific performance of this agreement. (*Marten and Fawcett, JJ.*). SHANKAR SAKHARAM JAGDALE *v.* RATANJI PREMJI SHET. **79 I. C. 226=47 Bom. 607=25 Bom.L.R. 328=A.I.R. 1923 Bom. 441.**

———Partition suit—Order for sale made with the consent of parties that it should be with certain guarantee—Consent as to guarantee cannot be withdrawn after order for sale is made.(*Wallis, C.J. and Ramesam, J.*). O. M. AKILANDAMMAL *v.* V. RANGANATHAM CHETTY. **62 I.C. 730=13 M. L.W. 429.**

—Construction of decree.

———*Interest allowed in judgment but omitted in decree.*

Where interest has been omitted in the decree though allowed in the judgment, it is a case of pure omission and not one of any ambiguity. Hence the rule that, where a decree is ambiguous, the Court should put such construction upon it as would make it in accordance with law, has no application to such a case and the decree should be amended to bring it on line of judgment. 21 All. 361, *Dist.* (*Mukerji and Guha, JJ.*). SHYAMA CHARAN *v.* PROTAP CHANDRA DAS.

51 C.L.J. 280=A.I.R. 1930 Cal. 349.

———Executing Court can interpret a decree by referring to judgments as well as pleadings in the case. 1 Pat. L. T. 471, *Foll.* (*Jwala Prasad, J.*). BHADO MANDER *v.* KHODABUX.

A.I.R. 1929 Pat. 746.

———*Mortgage suit—Compromise decree.*

A prior mortgagee brought suit on his mortgage. He impleaded, besides the mortgagors, the puisne mortgagees. By means of a compromise, certain property belonging to the mortgagors was to be considered as sold to the plaintiff for a certain sum. Out of this sum, plaintiff was to pay the amount due to puisne mortgagees. It was stipulated that the puisne mortgagees were to recover the same from the plaintiff by execution or by a fresh suit. Until payment, the property of the plaintiff was to remain charged with the sum fixed for payment to him. A decree was accordingly passed in terms of the compromise. Plaintiff did not pay. Thereupon the puisne mortgagees put in an application for a final decree. It was contended that the Court had no jurisdiction to pass the final decree in their favour because it had passed a decree originally embodying the terms of the compromise against them,

Held, that it would be placing altogether too narrow a construction on the decree to hold that it was only passed against the mortgagors and the fact that it was stipulated that the puisne mortgagees could take out execution of this decree or bring a new suit tended to support the view that the decree was meant to be in their favour against the plaintiff. (*Dalip Singh, J.*). ROOP NARAIN *v.* HUKAM CHAND *v.* JAGADHAR MUL.

10 L.L.J. 319=A. I. R. 1928 Lah. 829.

———If the decree is ambiguous, the judgment may be consulted and the decree construed in the light of the plaint and judgment. (1915) M. W. N. 914 and 33 I. C. 561, *Rel. on.* (*Odgers and Curgenven, JJ.*). THUSHTU BALAKRISHNA CHETTIAR *v.* V. KRISHNAMURTHI AIYAR. **100 I.C. 841=38 M.L.T. 143=1927 M.W.N. 202=A.I.R. 1927 Mad. 416=52 M.L.J. 182.**

EXECUTION—Construction of decree.

———Although an Executing Court cannot go behind the decree yet that Court ought to interpret the decree when an application for execution is placed before it, and for that purpose it ought to refer to the pleadings in the case and to the judgment passed by the Court. (*Das and Ross, JJ.*). SAHAI MISTRI *v.* SATULI DARJI. **92 I.C. 133=A.I.R. 1927 Pat. 141.**

———Although an executing Court cannot go behind a decree it is permissible to it to interpret it with reference to the proceedings anterior to the decree in order to find out its true meaning. (*Kinkhede, A. J. C.*). DHANNU *v.* HARBHAJAN.

97 I.C. 584=9 N.L.J. 140=A.I.R. 1926 Nag. 480.

———*Interest—Method of calculation.*

Where the executing Court continues to apply the same method of calculation in the matter of accumulating interest from the date of final decree onwards as had been applied in drawing up the final decree for sale, the judgment-debtors cannot take objection to it in the execution proceedings. (*Piggott and Walsh, JJ.*). DUTT PRASAD SINGH *v.* SRI NARAIN. **74 I.C. 557=21 A.L.J. 340=4 L.R.A. Civ. 195=A.I.R. 1923 All. 503.**

———*Reciprocal reliefs—Decree held executable.*

A decree provided "that the plaintiff's claim be and is hereby decreed for cancellation of the bond in suit but the defendant shall have the right to recover Rs. 5,000 from the plaintiff's property,"

Held, that the latter portion of the decree was not a mere declaratory decree incapable of execution and that the defendant could execute it. (*Kanhaiya Lal, J. C.*). JHANDA SINGH *v.* MD. ANWAR KHAN. **77 I. C. 776=A. I. R. 1923 Oudh 160.**

———Where the decree was against the joint family property including the separate property of a certain member of a joint family and the member quitted the family,

Held, all of his property that remains liable for the satisfaction of the decree is (1) his share in the joint-family property (2) his separate property such as it was up to the date on which he quitted the family. His separate property acquired after he quitted the family is not and never was joint family property. (*Le Rossignol and Campbell, JJ.*). GOKUL CHAND *v.* HUKAM CHAND. **65 I.C. 731=3 Lah. 14=A.I.R. 1922 Lah. 84.**

———*Execution Court cannot deal with matter not dealt with by Trial Court.*

The mere fact that the plaintiff prayed that the shares with all subsequent issues should be transferred to him on payment of mortgage money of the shares mortgaged does not give the execution Court power to deal with subsequent issues, if there was no evidence before the Trial Court of subsequent issues and if it could not be said that they were mentioned in the suit. (*Macleod, C. J. and Shah, J.*). MOTILAL HIRABHAI *v.* BAI MANI.

87 I.C. 269=46 Bom. 529=23 Bom. L.R. 1279=A.I.R. 1922 Bom. 370.

———*Mistake in recitals.*

Where in the recital part of a decree, the nature of the claim as set forth in the plaint is inadequately recited, the executing Court is not in any way bound by it and it is within the competence of such Court to examine the record and to ascertain for itself what the actual facts are. (*Dawson-*

EXECUTION—Construction of decree.

Miller, C. J. and Mullick, J.). RAMESHWAR SINGH v. SAHU LAL JHA. **59 I.C. 25=2 P.L.T. 7= A.I.R. 1921 Pat. 360.**

———*In general, appellate decree is the one to be executed.*

In general, the rule must be that the appellate Court's decree, if properly drawn, is the sole decree to be executed in the case but there may be cases in which that general and ordinary rule cannot and should not be invariably enforced, and in particular circumstances it may be incumbent upon to the Courts to permit execution of the decree of the original Court. 14 M.I.A. 465 ; 6 Ben. L. R. 52 ; 13 Cal. 13 ; 11 All. 267; (F. B.); 39 Cal. 925; 39 Bom. 175, *Foll.* (*Robinson, C.J. and Duckworth, J.*). S. C. DAS GUPTA v. THE BURMA RAILWAYS CO., LTD. **11 L.B.R. 163=A.I.R. 1921 L.B. 37.**

———*If declaratory.*

Where the decree directs the principal judgment-debtors to pay a certain sum and this is the decree which the decree-holder wishes to execute, the fact that, in a certain view of the matter, further proceedings might be necessary to ascertain what set off the judgment-debtor was entitled to against the decree in adjustment that has been made, does not make the decree a declaratory decree. (*Kennedy, J.C. and Madgavkar, A.J.C.*). DONALD GRAHAM AND CO. v. KEWALRAM. **79 I.C. 477= 16 S.L.R. 245=A.I.R. 1921 Sind 132.**

—Decree binding.
Going behind the decree.
Items.
New plea.
Objections.
Power of executing Court.
Representatives.

—Decree binding—Going behind the decree.

———*Order for mesne profits—Wrong procedure.*

If the Court passes an order in contravention of O. 20, R. 12, it is not a nullity owing to total want of jurisdiction. It is a case of mere irregular exercise of jurisdiction and from this it follows that the executing Court cannot go behind the decree to which it is bound to give effect in execution : A.I.R. 1929 Bom. 217, *Rel. on* ; 37 I.C. 997, *Doubted.* (*Venkatasubba Rao and Madhavan Nair, JJ.*). KEMGAMSWAMY v. VADDADI SUBBAMMA. **30 M.L.W. 810=A.I.R. 1930 Mad. 30= 57 M. L. J. 728.**

———The Court executing the decree has no power to go behind it. It cannot annul the decree or enter into any questions which are beyond the scope of the decree. (*Raza, J.*). NAGESHWAR v. TALUK SINGH. **114 I. C. 809=6 O.W.N. 49= A.I.R. 1930 Oudh 195.**

———*Civil P. C., S. 47—Lunatic properly described in plaint and guardian nominated for him—Lack of formal order—Decree not a nullity.*

Per *Kulwant Sahay, J.*—It is open to the Court executing the decree to refuse to execute it, if it finds that the decree was a nullity.

If a minor or a lunatic is properly described in the plaint and if a guardian is nominated for him, the Court has jurisdiction to entertain the suit. If the minor or lunatic was effectively represented in the suit, the lack of a formal order appointing a guardian would only amount to an irregularity of procedure which would not be fatal to the suit. The decree rendered in such suit is not a nullity. Hence the Court executing the decree could not go behind the decree and examine the validity thereof. 50 I. C. 529 (F.B.) and A.I.R. 1925 Cal. 907 (F.B.), *Rel. on*; 30 Cal. 1021 (P.C.), *Expl.* and *Rel. on*; A. I. R. 1923 Pat. 242, *Appr.* and 32 Cal. 296, *Dist.* (*Kulwant Sahay and Macpherson, JJ.*). TIKA RAM v. TULA RAM. **11 P.L.T. 185= A. I. R. 1930 Pat. 480.**

EXECUTION—Decree binding—Going behind the decree.

———*Court ordering profits to be ascertained in execution—Order irregular—Executing Court — Must ascertain the mesne profits.*

No doubt under O. 20, R. 12, the amount of the mesne profits must be determined during the course of the suit and an enquiry as to mesne profits under this rule is not a proceeding in execution, but a proceeding in continuation of the original suit. But if the Court instead of passing an order under O. 20, R. 12, orders the mesne profits to be recovered in execution then the decree though irregular is binding between the parties. In such a case there is not any want of jurisdiction in the Court passing an order in contravention of O. 20, R. 12, but it is merely an erroneous or irregular exercise of jurisdiction. Executing Court has no jurisdiction to go into the question whether the Court passing the decree committed any error in the exercise of its jurisdiction. It is incumbent on the executing Court to ascertain the mesne profits: 38 Bom. 194; 43 Mad. 675 (F.B.), *Foll.*; A.I.R. 1925 Cal. 907 (F.B.), *Dist.* and *Not foll.* (*Patkar and Murphy, JJ.*). LAKSHMIBAI ANANT v. RAVJI BHIKAJI. **118 I.C. 700=31 Bom. L.R. 400= A. I. R. 1929 Bom. 217.**

———The Court executing the decree cannot go behind the decree and find for itself whether the decree is correct and if it ought to have been passed in the form in which it stands. It has to take the decree as it is. If any party is aggrieved his remedy is not to object in execution proceedings but to seek such other means as may be open to him in law. (*Kulwant Sahay and Macpherson, JJ.*). RAJNANDAN SINGH v. SANT PRASAD SINGH. **118 I.C. 143 (Pat.).**

———It is impossible, to contend that for the purpose of execution one is entitled to go behind the decree and show that it is not only a decree personally against the judgment-debtor, but binding on other persons or on the properties of others. (*Srinivasa Iyengar, J.*). SUBRAMANIAN v. SIVASWAMI CHETTY. **109 I.C. 557=27 M.L.W. 804= A.I.R. 1928 Mad. 362=54 M.L.J. 278.**

———A Court executing a decree cannot go behind the terms of the decree and must execute the decree as it stands: 40 Mad. 233 (F.B.), *Dist.* (*Shadi Lal, C.J. and Broadway, J.*). DILSUKH RAI v. LACHMAN DAS. **100 I.C. 156=9 L.L.J. 7= 28 P.L.R. 71=A.I.R. 1927 Lah. 894.**

———It is not open to the executing Court to go behind the decree itself and to find that there was a contemporaneous arrangement that the decree should not be executed. (*Cuming and B. B. Ghose, JJ.*). DWARKA NATH KARMAKAR v. LALIT MOHAN KARMAKAR. **97 I. C. 576 (Cal.).**

———The executing Court cannot go behind the decree. (*Addison, J.*). DUVAN CHAND v. ANJUMAN INDADI KARYA. **99 I. C. 535= 27 P.L.R. 750.**

———*Executing Court cannot go behind the decree and cannot refuse to execute it until it is set aside.*

A Court executing a decree must take the decree as it stands and has no power to go behind the decree. Until that decree is satisfied according to law or is set aside, it stands and the executing Court cannot refuse to execute it. (*Addison, J.*). MT. FATIMA BIBI v. ABDUL RAOOF KHAN. **99 I.C. 999=27 P.L.R. 232,**

EXECUTION—Decree binding—Going behind the decree.

———A decree was passed in terms of an award. There was a clear mistake in the map filed with the award. The executing Court examined the head arbitrator who deposed that the map was incorrect,

Held, that the procedure adopted by the executing Court was wrong and his order passed thereon must be set aside. (*Walsh and Kanhaiya Lal, JJ.*). HAR PRASAD *v.* RAGHUBAR DAYAL.

74 I.C. 817=45 All. 628=21 A.L.J. 541=4 L.R.A. (Civ.) 553=A.I.R. 1924 All. 62.

———The Court to which application for execution of a decree is made is bound by its terms as are the parties to it and has no power to go behind it or to enter into questions beyond its scope. 7 A. 107, *Foll.* (*Campbell, J.*). FAQIR MUHAMMAD KHAN *v.* PIRDAD KHAN. **75 I. C. 844=A.I.R. 1924 Lah. 615.**

———An executing Court has only to interpret the decree under execution. It cannot go behind it or interpret it in a manner wholly repugnant to the tenor of the judgment on which it is based. (*Kinkhede, A.J.C.*). MT. BANI *v.* NARSOO.

78 I.C. 639=A.I.R. 1924 Nag. 378.

———An executing Court cannot go beyond the decree for enquiring whether the Court that passed the decree was entitled to do so in view of what was actually alleged by the plaintiff. It can interpret a decree but cannot say that it should not have been passed by the Court. (*Das and Ross, JJ.*). HAKIM MOHAMMAD IDRIS *v.* LACHMAN DAS.

78 I.C. 303=5 P.L.T. 368=1924 P.H.C.C. 25=A.I.R. 1924 Pat. 504.

———The Executing Court cannot go behind the decree and discuss its validity. (*Ayling and Odgers, JJ.*). SAMI MUDALIAR *v.* MUTHIAH CHETTY.

69 I.C. 465=16 M.L.W. 314=1922 M.W.N. 597=A.I.R. 1923 Mad. 212=43 M.L.J. 293.

———*Decree varied in appeal—Defendant not party to appeal affected—Executing Court cannot go behind the decree.*

A mortgage-decree was passed against *A* and *B* making the property of *B* primarily liable for the decree amount. *B* appealed against the decree without making *A* party thereto and the decree was varied by releasing the liability of *B*'s property when the decree-holder thereupon began to execute the decree against *A*'s property. *A* objected saying that he was not bound by the appellate decree and that *B*'s property must be sold first,

Held, as *A* took no steps to get the order of the appellate Court set aside the only decree that could be executed was the decree which directed that properties other than property of *B* should be sold in default of payment of decretal amount. It is not for the executing Court to enter into the merits or demerits of a decree. Its only functions are to carry out the directions of the Court. (*Macleod, C.J. and Shah, J.*). GUMANJI DHIRAJI MARWADI *v.* VISHVANATH PARBHU HINGMIRE.

69 I.C. 55=46 Bom. 243=23 Bom. L.R. 1072=A.I.R. 1922 Bom. 195.

———The Court executing a decree must take it as it stands. It has no power to go behind the decree, in other words, it cannot entertain any objection as to the legality or correctness of the decree, the reason being that a decree, though it may not be according to law, is binding and conclusive between the parties if not appealed from. (*Broadway, J.*). RAM DAS *v.* S. P. NITTO. **67 I.C. 753=64 P.L.R. 1922=4 U.P.L.R. Lah. 93.**

EXECUTION—Decree binding—Objections.

———The Court executing the decree cannot deal with the question whether the decree should stand or whether it should be set aside on any of the grounds on which a decree can be set aside on A. I. R, 1921 Bom. 228, *Foll.* (*Macleod, C. J. and Fawcett, J.*). RAMNATH MULCHAND *v.* GAJANAN PANDURANG. **45 Bom. 946=A.I.R. 1921 Bom. 229.**

———It is the duty of an executing Court to look in the first instance at the decree and if the terms of the decree are clear and unambiguous, an executing Court is bound to give effect to it, even though it may regard it as erroneous. (*Leslie Jones and Broadway, JJ.*). KAKA SINGH *v.* LACHMAN DAS. **67 I.C. 740=3 L.L.J. 263.**

———A Court executing a decree must take it as it stands and has no power to go behind it. It cannot entertain any objection as to the legality or correctness of it.

The mere fact that a decree is in some respects difficult to execute does not render it incapable of execution. (*Broadway and Moti Sagar, JJ.*). JIWAN MAL *v.* NANAKCHAND. **63 I. C. 975 (Lah.).**

—Decree binding—Items.

———*Judgment-debtor cannot insist on exclusion of particular item of assets.*

Where the decree contained clear words that the plaintiff was to recover the amount from the income and assets of the *Ullurai Kattlai*,

Held, that the defendant cannot urge in the executing Court that a particular item of income, or assets should be excluded. 43 Mad. 675 (F. B.), *Ref.* (*Venkatasubba Rao and Madhavan Nair, JJ.*). VAITHILINGA MUDALIAR *v.* CHIDAMBARAM PILLAI. **91 I.C. 720=1925 M.W.N. 774=A.I.R. 1926 Mad. 113=49 M.L.J. 520.**

—Decree binding—New plea.

———*Executing Court can't allow plea of bar of limitation where the decree directs execution to proceed.*

Where the decree of the Privy Council in an execution matter directed execution to proceed no objection can be entertained by the executing Court, to the execution of the decree of the Privy Council on the ground that the Privy Council failed to consider an objection to execution on the ground of limitation. (*Phillips and Odgers, JJ.*). KALAYANI PILLAI *v.* THIRUVENKATASWAMY AIYENGAR. **80 I.C. 85=20 M.L.W. 99=1924 M.W.N. 439=47 Mad. 618=35 M.L.T. 50=A.I.R. 1924 Mad. 695=47 M.L.J. 154.**

—Decree binding—Objections.

———*Decree against father cannot be challenged merely on ground of unconscionable rate of interest.*

As a Hindu son cannot challenge his father's transaction merely on the ground that it was not for legal necessity, and since the question as to rate of interest falls under the head of legal necessity, once a decree has been passed against a Hindu father, his son cannot challenge it on the ground of its being unconscionable to save the family property from sale. A.I.R. 1924 P.C. 50; A.I.R. 1926 Oudh 321; 17 O.C. 318, *Rel. on*; 4 O.L.J. 157, *Diss. from.* (*Pullan, J.*). SOBHA SINGH *v.* KESHO SINGH. **A.I.R. 1930 Oudh 234.**

———*Decree void—Objection can be taken in execution.*

Per *Kumaraswamy Sastri, J.* (*In Order of Reference*).—"A distinction must be drawn in cases where the decree is void against the minor or is only voidable and if the decree is void, it is difficult to see why the matter should not be raised in

EXECUTION—Decree binding—Objection.

execution." (*Coutts Trotter, C.J., Madhavan Nair and Jackson, JJ.*). VENKATA SOMESWARA RAO *v.* LAKSHMANASWAMI. **115 I.C. 801= 52 Mad. 275=29 M.L.W. 125= A.I.R. 1929 Mad. 213=56 M.L.J. 175 (F.B.).**

———Per *Devadoss, J.* (*In Order of Reference*).—Where there is a guardian appointed under the Guardians and Wards Act and another person is appointed as guardian *ad litem* and a decree is obtained against the minor, in such cases there should be no decree against the minor as he was not properly represented in the suit, and an objection may be taken to execution on the ground that there is no decree against the minor. (*Coutts-Trotter, C. J., Madhavan Nair and Jackson, JJ.*). MADDURI VENKATA SOMESHWARA RAO *v.* PULAVARTY LAKSHMANASWAMI. **115 I.C. 801= 29 M. L. W. 125=52 Mad. 275= A.I.R. 1929 Mad. 213=56 M.L.J. 175 (F.B.).**

———*Objection by judgment-debtor—Decree-holder absent—No adjudication on merits—Order allowing objection is set aside.*

In objection by the judgment-debtor to the execution of a decree the decree-holder was absent; the judgment-debtor was present by his pleader and the Judge passed the following order: "The petitioner's pleader is present. The execution case is hereby dismissed for default and petitioner's objection is allowed". The merits of the application of objection were not argued before the Judge *ex parte* nor did the Judge really come to any adjudication on the merits of that application,

Held, that the further order "petitioners' objection is allowed," must be set aside. (*Duval and Mitter, JJ.*). MATANJINI DEVI *v.* BEHARI LAL BANERJI. **104 I.C. 571=46 C.L.J. 116= A.I.R. 1927 Cal. 935.**

———*That decree is preliminary and not final is not open.*

A judgment-debtor cannot object to the execution of a decree on the ground that it is preliminary and not final when he has not raised that objection in previous execution proceedings: A.I.R. 1925 Lah. 640, *Foll.*; 1919 P. H. C. C. 105 (F. B.), *Dist.* (*Coldstream, J.*). JAGIRI MAL *v.* RAMCHAND. **99 I.C. 870=A.I.R. 1927 Lah. 780.**

———*Mortgage-decree directing sale of certain property—Objection as to its saleability cannot be taken in execution.*

It is, no doubt, true that a judgment-debtor may, in certain cases, offer objection to the effect that certain property of his is not saleable in the case of a money decree, and such objection may, in certain circumstances, be urged even after the confirmation of the sale. The case of a mortgage decree is, however, different. An attack on such a mortgage decree to the effect that property ordered to be sold by it is not legally saleable, is, in reality, an attack upon the validity of the decree. The executing Court is bound to assume in this connexion that the decree has been made with jurisdiction and to allow an executing Court to hold that property specifically ordered to be sold by it was, in reality, not saleable, would amount to rendering the said decree so far a nullity. (*Findlay, J.C.*). BABHUTMAL *v.* MADHOJI. **102 I.C. 121=10 N.L.J. 87=A.I.R. 1927 Nag. 216.**

———Objections should be taken in the Court passing the decree and not in transferee Court for execution. (*Prideaux, A.J.C.*). RAMPRASAD *v.* HARIDAS. **97 I.C. 768=A.I.R 1927 Nag. 31.**

———Parties in an execution case cannot call in question the validity of a decree as actually framed or impugn the jurisdiction of the Court that framed it, nor is it open to a party to an execution case to go behind the plain and obvious meaning of a decree: 47 Cal. 485 (P.C.), *Rel. on.* (*Ashworth and Gokaran Nath Misra, JJ.*). SHANKER BAKHSH *v.* MT. TALUQDEI. **92 I.C. 722=2 Luck. 169= 29 O.C. 276=13 O.L.J. 320=3 O.W.N. 375= A.I.R. 1927 Oudh 33.**

EXECUTION—Decree binding—Powers of executing Court.

———*Prior decree agreement.*

An objection based on an agreement prior to the passing of the decree is not maintainable in the Court executing the decree. If parties wish to enter into such arrangements, the only proper course is to have the terms embodied in a decree passed by consent: A.I.R. 1926 Rang. 140, *Rel. on.* (*Carr, J.*). MAUNG BA *v.* DOW THIT. **98 I.C. 1056= 5 Bur. L J. 142=A. I. R. 1927 Rang. 48.**

———An objection that a decree was wrongly passed against the heirs of a deceased defendant after abatement of suit cannot be taken in execution proceedings. (*Greaves and Mukerjee, JJ.*). MATIUR RASUL *v.* ABDUL SAID. **89 I.C. 765= 30 C.W.N. 86=A.I.R. 1926 Cal. 109.**

———*Mortgage decree—Objection that property ordered to be sold is not saleable—Cannot be entertained.*

Where the jurisdiction of the executing Court is based on a decree for sale it is not open to the executing Court to refuse to carry out the sale so long as the decree exists in full force and effect. An objection that the property is not saleable can be made by the judgment-debtor in the case of a money decree either before, and under certain circumstances even after, confirmation, but in the case of a mortgage decree the objection cannot be taken in an execution proceedings because it is an attack upon the validity of the decree: 28 Mad. 84, *Diss.* (*Mullick and Ross, JJ.*). AMRIT LAL SEAL *v.* JAGAT CHANDRA. **93 I.C. 935=4 Pat. 696=7 P.L.T. 468= A. I. R. 1926 Pat. 202.**

———An objection to the validity of a decree cannot be entertained by an executing Court. (*Kinkhede, A.J.C.*). DURGAPRASAD *v.* THAKURPRASAD. **87 I.C. 72=A.I.R. 1925 Nag. 377.**

———The validity of a decree cannot be objected to in execution proceedings following such decree though the Court in passing has contravened some provision of law. (*N. R. Chatterji and Newbould, JJ.*). HEMCHENDRA CHOUDHURY *v.* CHANDRA MOHAN NAMODAS. **60 I.C. 204=24 C.W.N. 1070.**

—Decree binding—Powers of executing Court.

———*Civil P. C., S. 42—Transfer decree.*

A Court executing a transfer decree cannot entertain any objection regarding the legality or propriety of the order directing execution: 7 All. 330; 21 Bom. 456; 5 Cal. 736 and 156 P.L.R. 1905, *Rel. on*; A.I.R. 1925 Pat. 807 and 1 Pat. L. W. 582, *Dist.* (*Johnstone, J.*). PAIRA MAL *v.* MEHR CHAND. **123 I.C. 531=A.I.R. 1930 Lah. 143.**

———Executing Court can only refuse to execute a decree which was a nullity as passed without jurisdiction either territorial or pecuniary or with reference to the persons before it. Otherwise it is quite clear that an executing Court cannot refuse to execute any decree. It has no jurisdiction to question the legality or correctness of the decree which is sought to be executed: A.I.R. 1925 Cal. 907 (F.B.), *Foll.* (*Ghose and Cammiade, JJ.*). DWIJENDRA MOHAN SHAHA *v.* LALIT MOHAN SHAHA. **110 I.C. 510 (Cal.).**

———When a decree is not passed without jurisdiction, an Executing Court cannot consider whether

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the decree is nvalid or not. A.I.R. 1925 Cal. 907 (F.B.), *Dist.* (*Dalip Singh, J.*). MIR MAHOMED *v.* SURJAN MAL & CO. **103 I.C. 673= A.I.R. 1927 Lah. 651.**

———*Compromise decree—Executability—Principles governing.*

When a decree is based on a compromise and when it contains a condition which cannot be legally enforced, the decree, so far as that condition is concerned, is inoperative and, so to speak, the illegal part of it cannot be executed. A.I.R. 1924 Nag. 84, *Foll.*

But there is no good ground for extending this principle to all other decrees passed by a Court and therefore when a decree is not a compromise decree the executing Court cannot go into the question of saleability of the land ordered under the decree to be sold. 22 W. R. 460; 9 C. P. L. R. 136 and 15 C. P. L. R. 134, *Ref.* (*Findlay, J. C.*) SHEOKISAN *v.* HARAYAN WASUDEO. **101 I.C. 756= A.I.R. 1927 Nag. 242.**

———It is not open to the Executing Court to go behind the decree and decide any question of minority of the judgment-debtor. The proper Court to deal with any question of this kind is the Court who passed the decree: 44 Cal. 627, *Foll.* (*Greaves and Panton, JJ.*). ABDUL RAHMAN HAJEE HOSSEIN *v.* GOURHARI GHOSE. **95 I.C. 629 (Cal.).**

———*Maintenance decree — Interest — Executing Court cannot grant, but separate suit lies.*

In a suit for maintenance a decree was passed for a certain sum but there was no mention in it that the plaintiff was entitled to interest on the sum decreed. The executing Court on the application of the decree-holder allowed interest at the rate of 6 per cent. per annum on the arrears from the time they fell due,

Held, that the executing Court had no such power but the decree-holder may bring a suit for damages for detention of the decretal amount: 3 Cal. 602 and 15 C.L.J. 684, *Ref.* (*Suhrawardy and Duval, JJ.*). NARESH CHANDRA BOSE *v.* KRISHNA BHABINI DASI. **94 I. C. 997=53 Cal. 42= A.I R. 1926 Cal. 505.**

———A Court executing an award under the Co-operative Societies Act has no power to do anything except to execute the award as if it were a decree of the executing Court: S. A. No. 695 of 1923, *Foll.* (*Addison, J.*). AHMAD YAR *v.* CO-OPERATIVE CREDIT SOCIETY. **97 I.C. 288=8 L. L. J. 310= 27 P.L.R 706=A.I.R. 1926 Lah. 547.**

———*Marshalling.*

When the right of marshalling has been decided in the judgment it cannot be re-opened again in execution proceedings: 24 L. W. 257, *Ref. to.* (*Wallace, J.*). SUBBA AIYAR *v.* PICHUMANI AIYAR. **97 I. C. 601=24 M. L. W. 260= A. I. R. 1926 Mad. 1144.**

———*Court cannot question its own decree for jurisdiction of Court passing a decree.*

It is well-established law that the executing Court has no power to question the jurisdiction of the Court that lawfully sends to it a decree for execution. Nor can a Court when executing its own decree question, *qua* execution Court, its own power to have framed that decree. *A fortiori* it cannot question a decree framed by its own appellate Court. (*Ashworth and Neave, JJ.*). AHMAD MIRZA BEG *v.* ALLHABAD BANK LTD., LUCKNOW. **94 I.C. 317=29 O. C. 26=A.I.R. 1926 Oudh 385.**

———Once a decree is passed, the judgment-debtor cannot, in execution, contend that the suit was not maintainable. (*Ross and Sen, JJ.*). THE OFFICIAL ASSIGNEE OF THE H. C. OF JUDICATURE, BENGAL *v.* MT. JAGA BIBI. **85 I.C. 488= A.I.R. 1925 Pat. 516.**

EXECUTION—Decree binding—Representatives.

———An executing Court has no jurisdiction to criticise or go behind the decree; all that concerns it is the execution of it. If the decree should be annulled that is not the function of an executing Court: 44 C. 627, *Foll.* (*Shadi Lal, C. J. and Le Rossignol, J.*). THE LAHORE BANK LTD. IN LIQUIDATION *v.* GHULAM JILANI MINOR THROUGH MT. ZAIWAR NISHAN. **78 I.C. 460= 5 Lah. 54=A.I.R. 1924 Lah. 443.**

———The executing Court can only add execution costs to a decree in the course of execution proceedings; it cannot add to or amend the decree under execution. (*Ryves and Gokul Prasad, JJ.*). DAMBAR SINGH *v.* B. KALLYAN SINGH. **65 I.C. 799=44 All. 350=20 A.L.J. 170= A.I.R. 1922 All. 27.**

———*Amendment.*

An executing Court cannot decide whether particular amendment of a decree is *ultra vires* of otherwise. (*Greaves and B. B. Ghose, JJ.*). RAJAKOTI KUMAR MUKERJI *v.* TINCOWRI CHAKRABARTI. **70 I. C. 293= A.I.R. 1922 Cal. 136.**

———*Direction to build a bund.*

It is the duty of the executing Court to execute the decree as it stands and it is open to the Court to direct something to be done not directed by the decree on the ground that literal compliance with the decree was impossible. An executing Court has no right to direct a decree holder build a bund at any point other than that provided by the decree. (*Scott-Smith, J.*). ALI MAHOMED *v.* JAHAN KHAN. **65 I.C. 126=15 P.W.R. 1922.**

———It is not open to the executing order to reduce the actual amount payable under the decree or the rate of interest if such is awarded in the decree. What is open to him to do is to direct that the decretal amount to be paid by instalments instead of being recorded immediately by sales. (*Kennedy, J. C. and Madgaonkar, A. J. C.*). SANGATMAL LILARAM *v.* JAN MAHOMED GULAM KHAN. **79 I.C. 553=16 S.L.R. 260= A. I. R. 1921 Sind 102.**

—Decree binding—Representatives.

———*Heirs—Service of notice in final decree application—Non-appearance—Objection in execution that the decree is not valid as the abatement was not properly set aside not maintainable.*

Where the heirs of a deceased defendant in a mortgage suit, questioned the validity of the final decree, which was under execution on the ground that the abatement of the suit, resulting from the death of the defendant, was not properly set aside at the time the final decree was made and that the heirs were not properly brought on the record,

Held, that it was not open to the heirs to raise the objection in execution proceedings since when the final decree was passed, they were served with notices and as they did not appear, the decree was made final against them. The result of the order of the Court in making the decree final was in substance and in fact to pass the final decree against such heirs. The mere omission to mention them formally in the decree, when their names were already mentioned in the application for the final decree did not render the decree invalid. (*Shah and Percival, JJ.*). SITHARAM DATTAJI *v.* ANANT HARI KAMAT. **101 I.C. 129=29 Bom. L.R. 244= A.I.R. 1927 Bom. 156.**

EXECUTION—Decree binding—Representatives

———*Buddhist husband and wife—Joint business—Mortgage-decree against husband alone—Wife also bound.*

Where a Buddhist husband and wife carried on a ginning business and part of the joint property was in the name of the husband only and he mortgaged it and the mortgagee brought a suit in which the property was brought to sale without impleading the wife,

Held, that the husband was not only the managing partner, but also the benamidar of the wife in respect of any interest she may have had in the mortgaged property, and that she was bound by the decree passed against the husband : 10 L. B. R. 36 (F. B.), *Dist. (Heald and Chari, JJ.)*. M. E. MYA *v.* JAPAN COTTON COMPANY.

101 I. C. 354=5 Bur. L. J. 218= A.I.R. 1927 Rang. 119.

—Decree not to be varied.

———*Rate of interest.*

That as a Court of equity the Court has wide powers to do what is just, does not mean that it has power to alter the terms of the decree either with regard to the decretal amount or the rate of interest which was to be paid thereon. So an executing Court has no power to make an order enhancing the rate of interest fixed by the decree: A. I. R. 1922 Bom. 170, *Expl.* (*Macleod, C. J. and Coyaji, J.*). RAGHUNATH *v.* NARAYAN. **95 I.C. 261= 28 Bom. L. R. 543=A.I. R. 1926 Bom. 368.**

———An executing Court cannot give a relief which is not given by the decree itself. (*Martineau, J.*). MT. HUSSAIN BIBI *v.* NUR HUSSAIN SHAH.

94 I.C. 212 (Lah.).

———*Decree awarding mesne profits but silent as to interest thereon—Executing Court cannot award that interest.*

Where a decree declares that the plaintiff is entitled to mesne profits and says nothing about interest, if the amount of mesne profits is left for determination by the Court of execution, the decree-holder is entitled to interest upon the mesne profits and to have such interest added to the mesne profits when they are ascertained. But if the Court which ascertains the mesne profits has omitted to allow interest, it is not open to the Court which executes the decree for mesne profits to allow interest in execution proceedings: 6 C. L. J. 462 and *Wallace, J.*, in No. 74 of 1924, *Foll.*; A. I. R. 1922 All. 117, *Not foll.*(*Madhavan Nair, J.*). RAMAN MENON *v.* PANGUNNI MENON. **96 I.C. 697= A.I.R. 1926 Mad. 952=50 M.L.J. 563.**

———In execution, the Court may modify the decree by directing payments by instalments: 8 B. 303, *Ref.* (*Macleod, C. J. and Crump, J.*).SIDAGAVADA KANAGAVADA *v.* RAMACHANDRA BABAJI.

A.I.R. 1924 Bom. 118.

—Decree null and void.

———Where a person, carrying on business in firm's-name, dies during the pendency of a suit framed against the firm's name, and a decree is passed, the executing Court has jurisdiction to enquire into the question whether the decree is a nullity or not. (*B. B. Ghose and S. K. Ghose, JJ.*). HARI BANDHU *v.* HARI MOHAN.

51 C.L.J. 30=34 C.W.N. 36= A.I.R. 1930 Cal. 327.

———Where the lunatic was effectively represented in a suit though the next friend was not appointed,

Held, that the validity of the decree could not be impugned before the executing Court. Difference between invalid and void decree pointed out.

EXECUTION—Duty of Court.

(*Kulwant Sahay and Macpherson, JJ.*). TIKA RAM *v.* TULA RAM. **11 P.L.T. 185=A.I.R. 1930 Pat. 480.**

———*Distinction between a void and voidable decree pointed out.*

But it is important to bear in mind the distinction between a decree which is void or is a nullity and a decree which is merely voidable. A decree can be said to be void where there is a total want of jurisdiction in the Court to pass it. If the Court had no jurisdiction to entertain the suit, it cannot possibly have jurisdiction to pass a decree in the suit. If however, the Court had jurisdiction to entertain the suit but acted irregularly or illegally in the exercise of its jurisdiction, the decree passed by it may be erroneous or illegal but cannot be said to be without jurisdiction. (*Kulwant Sahay and Macpherson, JJ.*). TIKA RAM *v.* TULA RAM. **11 P.L.T. 185=A.I.R. 1930 Pat. 480.**

———*Suit for declaring execution proceedings null and void.*

No Court has jurisdiction to entertain a suit to declare proceedings in execution of a decree passed by a competent Court null and void so long as the decree itself is not set aside either on appeal or in a regular suit on the ground of fraud under conditions under which the law allows such a decree to be so challenged. (*Tek Chand, J.*). AMAR SINGH *v.* CHAJJUMAL. **108 I.C. 55= A.I.R. 1928 Lah. 766.**

———In execution proceedings the objection can be put forward that the decree was a nullity on the ground that one of the judgment-debtors had died before the decree was passed. (*Adami and Macpherson, JJ.*). JAMILA KHATOON *v.* DAYANAND THAKUR. **107 I. C. 848= 7 Pat. 331=A.I.R. 1928 Pat. 272.**

———*Amount exceeding pecuniary jurisdiction—Decree is not a nullity.*

The mere fact that a decree is for an amount exceeding the pecuniary jurisdiction of the Court which passed the decree, is not *ipso facto* proof that it was beyond jurisdiction and a nullity, and the Court is wrong in questioning in execution the validity of such a decree: 8 Bom. 31; and 10 Bom. 200, *Foll.* (*Fawcett and Madgavkar, JJ.*). AMBADAS HARIRAO *v.* VISHNU GOVIND.

100 I. C. 109=50 Bom. 839= 28 Bom. L.R. 1461=A.I.R. 1927 Bom. 83.

———*Objection that decree against dead person is a nullity.*

A decree passed against a dead man is a nullity and it is not essential for a separate suit to be brought to challenge the fact: 26 Bom. 317; 40 All. 423 and A.I.R. 1925 Bom. 290, *Considered.* (*Marten, C.J. and Percival, J.*). SHIVAJI SAYAJI GAOKAR *v.* VITHAL NARAYAN MIRASHI.

98 I.C. 927=28 Bom. L.R. 1367= A.I.R. 1927 Bom. 53.

—Duty of Court.

———*Equitable execution should not ordinarily be allowed.*

Although it is not always necessary that legal execution should be exhausted before the appointment of a Receiver by way of equitable execution can be obtained, "equitable execution" should not under ordinary circumstances be allowed when there is no impediment to execution being levied in the ordinary way. (*Rankin, C.J. and C. C. Ghose, J.*). (RAJA) PROMOTHANATH MALIA *v.* H.V. LOW AND CO. **34 C.W.N. 238=51 C.L.J. 209= A.I.R. 1930 Cal. 502.**

———It is the duty of an executing Court to consider not only the decree but also the judgment

EXECUTION—Duty of Court.

and the pleadings in the suit. (*Beasley, C.J., Sundaram Chetty and Walsh, JJ.*). ABDUL SAC *v.* SUNDARA MUDALIAR. **1930 M.W.N. 779 (F.B.).**

———*Meaning of decree clear—Executing Court cannot attribute some other meaning to it.*

A Court which executes a decree has to execute it according to its terms, and if for that purpose it is called upon to construe the decree, it has to do so according to the plain meaning of the words of the decree. When the words to be construed are clear enough, the executing Court cannot attribute some other meaning to it unless it has to do so in virtue of any enactment or rule having the force of law applicable to the particular case before it. (*Wallace and Thiruvenkatachariar, JJ.*). BALAKRISHNA MENON *v.* MANAKKAL UMA.

114 I.C. 825=52 Mad. 263=28 M.L.W 719= A. I. R. 1929 Mad. 105=55 M.L.J. 873.

———Fresh application likely to be barred under C.P. Code, S. 48—Court should allow decree-holder to exhaust all lawful means for realizing his decree before dismissing pending application. (*Jai Lal, J.*). JAICHAND *v.* CHIRAGH DIN.

95 I.C. 956=A. I. R. 1926 Lah. 544.

———No Court which executes a decree can pass such an order "Proceedings closed" or "Petition lodged' or "The matter is held over" for statistical purposes. It is the duty of the executing Court to execute a decree and it can dismiss the application, only if the creditor does not take proper steps and does not help the Court in executing the decree. (*Devadoss and Waller, JJ.*). RAMNATHAN CHETTY *v.* NALLA VEERAPPA. **91 I.C. 880= 22 M.L W. 815= A.I.R. 1926 Mad. 272.**

———When the question arises as to what is included in a decree in execution proceedings the execution Court has got to go into the question as to what was decreed. (*B. B. Ghose, J.*). GOLAM NABI CHAPAWALA *v.* F. W. NEEDHAM.

85 I. C. 1004=A.I.R. 1925 Cal. 1243.

———An executing Court has no power to set aside the decree though passed against the wrong party and in a suit wrongly framed. (*Greaves and Graham, JJ.*). KUDRATULLA SARKAR *v.* UPENDRA KUMAR CHOWDHARY. **84 I.C. 999=40 C.L.J. 254= A.I.R. 1925 Cal. 203.**

———*Should guard against playing into the hands of scheming judgment-debtors.*

Courts in India have to be careful to see that the process of the Court and the law of procedure are not abused by judgment-debtors in such a way as to make Courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights. (*Dalal, J.C. and Wazir Hasan, A.J.C.*). KUER JANG BAHADUR *v,* BANK OF UPPER INDIA, LUCKNOW. **87 I.C. 21= 12 O.L.J. 146=2 O.W.N. 73=28 O.C. 330= A.I.R. 1925 Oudh 448.**

———It is the duty of the Court executing a decree to see that parties to the proceedings are properly before it. (*Das and Ross, JJ.*). SIDHESWARI PRASAD NARAYAN SINHA *v.* MT. DULHIN RADHA DULARI KUAR. **80 I.C. 716=6 P. L. T. 164= 3 P.L.R. 242=A. I. R. 1925 Pat. 160.**

———*Terms if can be ordered.*

It is for the judgment-creditor to elect his remedies in execution, subject to such rules as governed the case and the Court cannot stay execution of money decree against the person of the judgment debtor on condition of the latter paying some amount and the judgment-creditor proceeding against the judgment debtor's immovable property. (*Schwabe, C. J. and Waller, J.*). AGAJAN SAHEB *v.* ABDUL MAJID KHAN. **77 I.C. 764= 19 M.L.W. 164=1924 M.W.N. 265= A.I.R. 1924 Mad. 512.**

EXECUTION—Executability of decree.

———*Declaratory decree by appellate Court.*

It is the duty of an appellate Court frequently, and all that it can do, to make a declaration and then the form in which that declaration is conceived and the words in which the order is framed, amount to a direction to the Court below to clothe that declaration in the proper form of a mandatory order, and to give effect to the mandatory order so expressed : 18 W. R. 175, *Foll.*; 19 Cal. 139, *Ref. to.* (*Daniels and Wazir Hasan, A. J. Cs*). RANI BEJAI RAJ KOER *v.* JAI INDRA BAHADUR SINGH. **66 I. C. 982=9 O.L.J. 5= A.I.R. 1922 Oudh 34.**

———*Money paid into Court in pursuance of an order—Source is not to be considered by Court.*

The Courts are not concerned with the source from which money comes which is paid into Court under any order. Whether it comes from the pocket of a party or an outsider, it is money paid into credit of the proceedings, and can be dealt with only on an application made in the regular course by one of the parties. If there are any persons in whose favour any interest in the money so lying in Court has been created by any of the parties, they can then be heard. (*Macleod, C. J. and Fawcett, J.*). ISMAIL ALLARAKHIRA *v.* DUTTATRAYA RAMCHANDRA. **61 I.C. 403= 45 Bom. 967=23 Bom. L.R. 291= A. I. R. 1921 Bom. 30.**

—Executability of decree.

———*Injunction granted preventing withdrawal of principal—Suit dismissed—Injunction ordered by High Court conditionally on paying interest from dismissal of suit—Order is executable.*

The respondents filed a suit calling in question the validity of petitioner's decree against a common debtor *N* and for an injunction to prevent petitioner from drawing an amount deposited by *N*. The respondent's suit was dismissed by the Subordinate Judge on 22nd December, 1915, and the High Court ordered a new trial on 19th October, 1916. Previously on 28th January, 1916, the High Court granted an injunction on condition that the respondents paid 9 per cent. interest to the petitioner from 22nd December, 1915, the date of the dismissal of their suit by the Subordinate Judge. On 28th October, 1919, the High Court finally dismissed the respondents' suit. On 1st October, 1920, the injunction was dissolved on an appeal to the Privy Council being abandoned. The petitioner applied for execution together with 9 per cent. interest on 23rd February, 1922.

Held, that the order was an executable order and the interest could be recovered in execution : 2 I.A. 219 (P.C.) and A I.R. 1927 Mad. 416, *Rel. on.* (*Odgers and Curgenven, JJ.*). VENKATARAMA *v.* S.I. BANK, TINNEVELLY.

104 I.C. 750=1927 M.W.N. 529= 39 M.L.T. 394=A.I.R. 1927 Mad. 927.

———*Decree declaring a charge on certain property of defendant—Charge can be enforced in execution.*

It is not necessary that in every case where it is sought to enforce a charge created by a declaratory decree the person for whose benefit the charge is created must resort to the procedure for enforcement of claims under a mortgage : 2 P. L. J. 55, *Foll.*; 1 P.L.W. 69, *Dist.* and 22 Cal. 859, *Not foll.*

Plaintiff obtained a decree declaring that she was entitled to a certain maintenance allowance from

EXECUTION—Executability of decree.

the defendant to be recovered from certain properties belonging to the defendant. In execution of this decree the plaintiff made an application for the recovery of a certain sum on account of arrears of maintenance by sale of the properties charged.

Held, that although the decree obtained by the plaintiff was declaratory in form it was capable of execution and the decree obtained by the plaintiff being a money decree the interest of the judgment-debtor in the properties charged with the payment of maintenance allowance could be sold in execution of the decree. The provision of R. 14 of O. 34 of the C. P. Code did not apply to such a case. (*Mullick and Ross, JJ.*). HARI SHANKAR RAI *v.* TAPAI KUER. **88 I. C. 923=4 Pat. 693=6 P. L. T. 802=A.I.R. 1926 Pat. 31.**

———*Objection to—Transferee Court.*

The omission to take objection to assignment of the decree and to its transmission to another Court for execution does not preclude the judgment-debtor from raising the question in the executing Court that the decree was not then executable in the manner proposed by the decree-holder. (*Spencer and Venkatasubba Rao, JJ.*). NATESA *v.* ANNAMALAI. **73 I. C. 213=17 M.L.W. 319=32 M.L.T. 157=A. I. R. 1923 Mad. 487.**

—Execution by Collector.

———*Once the Collector executes a partition decree, the Court cannot re-send the case to him for re-partition—Collector must follow the terms of the decree.*

Where once the Collector effects a partition the Court cannot send the case back to him for re-partition. But if the Collector disregards the terms of the decree and divides the property in contravention of its terms, clearly the Court is entitled to interfere. 42 Bom. 689, *Expl.* The Collector, when asked to partition lands in accordance with a decree, must follow the terms of the decree, and he is not at liberty to read the decree together with the judgment so that he partitions the lands in a manner which is not contemplated by the decree. (*Macleod, C.J. and Coyajee, J.*). TIMMANNA *v.* GOVIND. **94 I.C. 656=28 Bom.L.R. 523=A. I. R. 1926 Bom. 258.**

—Jurisdiction.

———*Executing Court can decide whether Court passing decree had jurisdiction.*

No doubt executing Court cannot question the validity or legality of a decree if there is a decree in existence. But it must be able to decide whether a decree exists at all and therefore where the Court has no inherent jurisdiction to pass the so-called decree, the decree has no real existence in law and the executing Court within those narrow limits can decide whether the decree was passed by a Court which, for lack of inherent jurisdiction, could not pass such a decree; for that point settles the question as to whether there is an existing decree upon which the executing Court can take action. A. I. R. 1925 Cal. 907 (F.B.), *Rel. on.* (*Dalip Singh, J.*). ROOP NARAIN *v.* HUKAM CHAND JAGADHAR MUL. **10 L.L.J. 319=A.I.R. 1928 Lah. 829.**

———*Final decree in mortgage suit without a preliminary decree.*

Merely because the Court in a mortgage suit, passes a final decree without passing a preliminary decree, its decree does not become one without jurisdiction if otherwise it has jurisdiction. At the most it commits an irregularity or illegality in passing such a decree and the decree cannot be challenged in execution proceedings. (*Cuming and*

EXECUTION—Jurisdiction.

B. B. Ghose, JJ.). ABDUL HALIM ABDUL HOSSAIN *v.* HEMENDRA KUMAR RAY. **96 I.C. 686=A.I.R. 1926 Cal. 1179.**

———*Applicability of S. 24, C. P. Code to execution proceedings.*

In regard to suits competency is not referred to in the section in the sense of territorial or local or pecuniary competency. There may be other kinds of incompetency so far as an executing Court is concerned. S. 24 applies to execution proceedings: 39 Mad. 485; 22 Bom. 778 and A.I.R. 1925 All.276 (2), *Foll.* Contention that S. 39 gives to the Court that passed the decree a power to transfer, whereas S. 24 gives a similar power, and no higher power to a superior Court is wrong. This construction is far-fetched and if adopted will render S. 24, so far as execution proceedings are concerned almost useless. (*Venkatasubba Rao and Madhavan Nair, JJ.*). RAJAGOPALA PANDARATHAR *v.* TIRUPATHIA PILLAI. **95 I.C. 12=49 Mad. 746=A.I.R. 1926 Mad. 421=50 M.L.J. 161.**

———*Consequences of default—Relief against.*

Although an executing Court cannot modify or vary the terms of a decree, it has power to relieve a party to a decree against the consequences of his default in not observing the obligations imposed upon him by a decree. (*Macleod, C. J. and Coyajee, J.*). KRISHNARAO PANDURANG BARVE *v.* BALWANT KESHAV PATIL. **89 I.C. 217=27 Bom. L.R. 678=A.I.R. 1925 Bom. 404.**

———*Court trying suit without jurisdiction—Executing Court can refuse to execute decree.*

Where the decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction, *i. e.*, within these narrow limits the executing Court is authorised to question the validity of a decree. (*Walmsley, C. C. Ghose, Suhrawardy, B. B. Ghose and Duval, JJ.*). GORA CHAND *v.* PROFULLA KUMAR. **89 I. C. 685=29 C.W.N. 948=42 C.L.J. 1=53 Cal. 166=A.I.R. 1925 Cal. 907 (F.B.).**

———*Second application for delivery of possession.*

Even where a decree-holder has got possession in execution of the original decree if subsequently he was wrongly dispossessed before the final decree of the appellate Court restored the original decree of the Dt. Munsif he would be entitled to apply for delivery of possession a second time. 7 M.L.T. 107, *Foll.* (*Spencer and Venkatasubba Rao, JJ.*). VENKAT LAKSHMI AMMAL *v.* SADASIVA AIYAR. **76 I. C. 861=18 M. L. W. 883=A.I.R. 1924 Mad. 200.**

———A Court which sells immovable property must have territorial jurisdiction over such property. 17 Cal. 699; 42 Mad. 813; 42 Mad. 821; 11 M.L.W. 63 (F.B.), *Foll.* (*Spencer and Devadoss, JJ.*). VIKRAM DEV. *v.* LAKSHMI NARASIMHA. **76 I C. 269=18 M.L.W. 747=A.I.R. 1924 Mad. 144.**

———The objection that the executing Court has no jurisdiction to order sale of the property should be raised before the Court proceeds to sell the property. (*Das and Kulwant Sahai, JJ.*). HIRJI JIVRAJ BALDEO *v.* RAMJAS AGARWALA. **72 I.C. 670=A.I.R. 1924 Pat. 182.**

———When the money was received by the Lahore Branch of the Bank from the Kasauli Branch where it was attached by order of execution Court of Lahore as the agent of the decree-holder,

EXECUTION—Jurisdiction.

Held, the money when received by the Bank in Lahore, belonged to the decree-holder and it was no longer within the jurisdiction of the execution Court in Lahore to deal with it in any way, *e.g.*, issuing prohibitory order for not paying to decree-holder. (*Scott-Smith, J.*). P.W. FITZHOLMES *v.* WARYAN SINGH. **75 I C. 419= A.I.R. 1923 Lah. 514.**

———*Declaratory decree in terms of compromise.*

Where the claim sprang from the compromise entered into between the parties, the object of which was to put an end to all disputes between them; and it was never contemplated that another action should be brought in respect of any of the matters which formed the subject-matter of the settlement,

Held, the execution Court has jurisdiction, though decree merely declares the rights of the parties *inter se* and does not direct any act to be done. (*Shadi Lal, C. J. and Abdul Qadir, J.*). MOHAMMUD ZAQI *v.* ABDUL RAHIMAN. **73 I.C. 281= A.I.R. 1923 Lah. 151.**

———*Award of damages for a future uncertain event is illegal and cannot be executed—Even if executable, subsequent orders of Court without application by decree-holder cannot save limitation.*

In execution proceedings the Court, while allowing postponement of sale on the application of judgment debtor, ordered for payment of damages in the event of a fresh application for postponement being made at some future date. Later on after the judgment-debtor applied for postponement again, the Court directed the damages to be incorporated in the main decree, and in the objection of the judgment-debtor the Court excluded it from the general account and directed that the damages may be recovered by separate execution,

Held, the Court had no jurisdiction to make an order awarding damages for an event which might or might not occur at some future time.

Neither the order of the executing Court directing a certain sum as damages to be incorporated in the general account of the main decree, nor the further order that the damages should be excluded from the general account, is an order awarding damages and capable of execution, nor could these orders save limitation for the purpose of executing the order awarding damages assuming that the order could be executed. (*Das and Kulwant Sahay, JJ.*). JAIMAL AHMAD *v.* KESHO DAS. **72 I.C. 1035=1923 P.H.C.C. 202= A.I.R. 1923 Pat. 407.**

———*Dismissal of execution application.*

An order dismissing an execution application without notice to decree-holder is without jurisdiction. No order can be passed to the prejudice of a party without having given him an opportunity to be heard. (*Jwala Prasad and Bucknill, JJ.*). GOUR CHANDRA ROY *v.* JANARDAN PRASAD THAKUR. **68 I.C. 337=4 P.L.T. 204= A.I.R. 1923 Pat. 180.**

———*Power to refund money paid under mistake after a decree was satisfied.*

Where after the satisfaction of the decree by one judgment-debtor by deposit of money and taking certificate, another judgment-debtor unknowingly deposited the decretal amount and after the discovery of the satisfaction of the decree applied for refund of the money,

Held, notwithstanding the fact that the decree had already been executed, the execution Court has jurisdiction to entertain the application. (*Dawson*

EXECUTION—Legal representatives.

Miller, C. J. and Jwala Prasad, J.). GOPAL RAI *v.* RAMBHANJAN RAI. **65 I.C. 307=1 Pat. 336= 1922 P.H.C.C. 53=3 P.L.T. 754= A.I.R. 1922 Pat. 166.**

—Legal representatives.

———*Application for substitution in transferee Court—Acquiescence by L. Rs.'—Legality of proceedings cannot be impugned.*

If the judgment-debtor dies, before a certificate, as is required by S. 41 is issued, the Court of transfer does not lose its jurisdiction over the execution proceeding, which does not abate by reason of the death. But before execution can proceed against the legal representative of the deceased judgment-debtor, the decree-holder must get an order for substitution from the Court which passed the decree. This is a matter of procedure and not of jurisdiction. The jurisdiction over the subject-matter continues as before, but a certain procedure is prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure, *e.g.*, if the application for substitution is made to the Court to whom decree is transferred instead of to the Court passing the decree, the defect might be waived; and the party who has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings: 22 Cal. 558; 27 Cal. 488 and 28 Mad. 466, *Expl.*; A.I.R. 1925 Oudh 448, *Affirmed.* (*Sir Lancelot Sanderson.*) (KUNWAR) JANG BAHADUR *v.* BANK OF UPPER INDIA LTD., LUCKNOW, IN LIQUIDATION. **109 I.C. 417=5 O.W.N. 502= 26 A.L.J. 681=48 C.L.J. 23=32 C.W.N. 790= 55 I.A. 227=28 M.L.W. 25=3 Luck. 314= 30 Bom. L.R. 1373=1928 M.W.N. 863= A.I.R. 1928 P.C. 162=55 M.L.J. 545 (P.C.).**

———*Executing Court must decide question of legal representative and cannot refer party to separate proceedings—C. P. Code, S. 47.*

When a decree-holder has died and some persons appear asking to be allowed to execute that decree as representing the decree-holder, then it is under S. 47, C.P. Code necessary that the Court itself should decide who the legal representative of the deceased person is. If the claimant who claims to be the legal representative produces a probate or a letter of administration or any such general conclusive proof of his status, then the Court certainly need not go further and should accept that as conclusive. But if there is no such evidence then it is not for the Court to refer the applicant to separate proceedings but it must itself make up its mind after such inquiry as may be possible. (*Kennedy, J. C. and Tyabji, A. J. C.*). PARUMAL THAWERDAS *v.* MT. MHAKAN. **92 I.C. 575=21 S.L.R. 20= A.I.R. 1926 Sind 113.**

———*Mortgagee dying after redemption decree under the T. P. Act.*

Proceedings after a redemption decree obtained under the T. P. Act, Ss. 92, 93 are proceedings in execution and where the mortgagee dies after a redemption decree, the rights of the mortgagor are not barred by his not bringing the legal representatives of the mortgagee on record within time. (*Daniels, A.J.C.*). RAM RUP *v.* GHANI AHMAD. **74 I.C. 162=9 O.L.J. 624= A. I. R. 1923 Oudh 156.**

———*When to be impleaded.*

The decree-holder entitled to apply for the execution of his decree is bound to implead a representative of a deceased judgment-debtor, for the purpose of such application, only when a default under the

EXECUTION—Limitation.

decree occurs and execution becomes necessary. Merely because execution has been unnecessary for 20 years, decree-holder cannot be held to be debarred from it. (*Oldfield and Ramesam, JJ.*). ANDAL AMMAL *v.* VIJIA NAIDU. **14 M.L.W. 632= A.I.R. 1921 Mad. 693.**

—Limitation.

———*Construction of robkar sanctioning transfer application.*

In a suit decree was given on 13th June, 1913. The execution proceedings began on 13th January, 1925, *i.e.*, within 12 years under S 48, C. P. Code During these proceedings the decree-holder applied for the transfer of the execution under S. 39. The robkar in sanctioning the transfer application ran : "In my opinion the issue regarding the limitation period does not arise in such a transfer and the proceedings will be the same. The fact that this decree will have to be transmitted to the other Court is an intermediate proceeding since the property is situate outside the jurisdiction of the Court,"

Held, that the transmitting Court did intend to decide that no objection as to limitation could possibly arise by reason of the transfer and by holding that the proceedings before the transferee Court were only intermediate proceedings, it practically did intend to order execution as distinct from mere transfer. (*Dalip Singh, J.*). DEVI DAS *v.* MD. AKBAR KHAN. **11 L.L.J. 501= A.I.R. 1930 Lah. 118.**

———Where a party is directed by a judgment to pay additional Court fee before execution is taken out for the purposes of limitation, the period runs from the date of the judgment and not from the date on which the Court-fee is paid ; A. I. R. 1924 Cal. 351, *Foll.* (*Dalal, J.*). BUDDHU KHAN *v.* A. BARNER. **100 I.C. 476=A.I.R. 1927 All. 335.**

———The filing of the appeal by objector against the order dismissing his objection against the execution of the decree does not operate as a bar to the decree-holder taking out fresh execution and, therefore, limitation for fresh application begins from the date of dismissal of the objection. (*Adami and Kulwant Sahay, JJ.*). IBRAHIM HUSSAIN KHAN *v.* SHEOPRATAP NARAIN. **89 I. C. 886= A.I.R. 1926 Pat. 129.**

———*Legislature's policy.*

It is the policy of the legislature that questions arising in execution should be investigated and decided by the Courts without the least possible delay. (*Pearson and Graham, JJ.*). HARIPADA HALDAR *v.* BARADAPROSAD ROY CHOWDHURY. **82 I. C. 322=51 Cal. 1014= A.I.R. 1925 Cal. 351.**

———*Limitation is not revived by transfer of decree to another Court even with consent of judgment-debtor.*

Transfer of a decree for execution to another Court does not constitute a revivor even though the transfer is with consent of the judgment-debtor since the Court transmitting the decree is not the Court to decide objections on the part of the judgment-debtor such that the decree is incapable of execution or that execution is barred by limitation. The Court of execution must determine such objection : 43 Cal. 903, *Foll.* (*Richardson and Page, JJ.*). NARAIN DAS DUTT *v.* BANKU BEHARI CHATTOPADHYA. **78 I.C. 1001= A.I.R. 1925 Cal. 213.**

———*Continuing absence from jurisdiction.*

A new starting point is created at any stage of the execution owing to a fraud on the part of the judgment-debtor. This continued absence of the judgment-debtor from the jurisdiction of the executing Court is a continuing fraud and a new starting point is created from the last day when the judgment-debtor entered the jurisdiction of the Court. (*Kinkhede, A.J.C.*). KHAIRULLA *v.* SETH DHANRUPMAL. **80 I. C. 905=22 N.L.R. 67= A. I. R. 1925 Nag. 82.**

EXECUTION—Mesne profits.

———The period during which the execution proceedings are stayed (an injunction having been obtained by the judgment-debtor) should be deducted. (*Chatterje , and Panton, JJ.*). JYOTI PRAKASH NANDI *v.* MUKTI PRAKASH NANDI. **81 I.C. 734=51 Cal. 150= A.I.R. 1924 Cal. 485.**

———*Payment after date fixed without extension of time disentitles decree-holder to execute decree.*

Where a decree ordered payment by the appellants of a sum of money into Court by a certain date upon which the respondents were directed to reconvey the land to them and where the appellants failed to pay the money within time and did not obtain extension of time,

Held, that though the appellants subsequently paid the money they were debarred from executing the decree. (*Young and Baguley, JJ.*). MA PU MAI *v.* KO-SIT TIN. **85 I.C. 352=3 Bur. L.J. 163= A.I.R. 1924 Rang. 375.**

———It has never been held necessary that an execution application in order to save limitation should be directed to the same property or even indeed the same person. (*Daniels, J.*). GOPI NATH SHUKUL *v.* SAT NARAIN SHUKUL. **74 I.C. 1014=A.I.R. 1923 All. 384.**

———*Decree incapable of execution.*

Until a decree is capable of execution, limitation does not begin. Where the costs though taxed were not entered in the decree, an application praying that they be included is not one for amendment of decree but for supplying the defect, and in any case limitation begins only from the date the costs are included. (*Greaves and B. B. Ghose, JJ.*). RAJAKOTI KUMAR MUKERJI *v.* TINCOWRI CHAKRABARTI. **70 I.C. 293=A.I.R. 1922 Cal. 136.**

———*Sale set aside—A second application.*

A second application for execution made after the sale held on the basis of the first application has been set aside at the instance of the judgment-debtor, is in essence an application to revive and continue the earlier application, and from this point of view no question of limitation really arises. (*Mookerjee and Panton, JJ.*). JIRA BIBI *v.* MAJIRUDDIN CHOWDHURY. **64 I.C. 849= 35 C. L. J. 135=A.I.R. 1921 Cal. 594.**

———Application to attach immovable property refused—Second application to appoint Collector under S. 22, Dekkan Agriculturists' Relief Act, made while first application pending—Second application also disallowed—Limitation for appeal runs from dismissal of second application. (*Fawcett, J.C. and Raymond, A.J.C.*). CHOITHRAM KALINDAS *v.* LALBUX. **63 I. C. 310= 15 S.L.R. 47=A.I.R. 1921 Sind 29.**

—Mesne profits.

———*Awarded in kind—Executing Court can convert at market rate and can award interest.*

Where in a suit for recovery of a certain land the decree awarded possession with mesne profits at the rate of 6 garces 27 putties per annum but did not fix the rate at which the grain was to be converted into money and there was also no order as to interest on the profits,

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Held, (1) that the execution Court rightly adopted the average market rate to get the correct money equivalent in spite of the fact that the decree-holder had given a certain rate; and (2) that the executing Court was competent to grant interest, although no express provision for interest, was made in the decree. (*Odgers and Curgenven, JJ.*). RAJA OF BOBBILI *v.* AYYAGARI SODEMMA. **105 I.C. 34=26 M.L.W. 367=1927 M.W. N. 661=39 M.L.T. 499= A I. R. 1927 Mad. 954=53 M. L. J. 619.**

—Mode of.

———*Court when can mortgage judgment-debtor's land.*

The Court has jurisdiction to mortgage land but ordinarily such a course should not be adopted. Where judgment-debtor is in possession of movable property sufficient to satisfy a decree but has successfully resisted the execution for about 10 years, and where the executing Court mortgages the land of the judgment-debtor for the decretal amount, the case is an exceptional one and the Court exercises its discretion properly: 1 Lah. 192; A.I.R. 1929 Lah. 660 and 92 I. C. 949, *Rel. on*; 2 Lah. 78, *Ref.*(*Addison, J.*). NASAR DIN *v.* BUTAMAL. **119 I.C. 231=A.I.R. 1930 Lah. 77.**

———The High Court has the power in appropriate cases to appoint a receiver and to direct him to sell the property in the mofussil. (*Rankin, C. J. and Buckland, J.*). RAJA PRAMATHA NATH MALIA *v.* H. V. LOW & CO. **51 C. L. J. 270.**

———*Property charged for decretal amount.*

Immovable property charged with the payment of the amount of a decree need not be attached by the decree-holder. The proper mode of enforcing the charge would be to treat the decree as if it were a preliminary decree for sale and afterwards, on default being committed and an application being made for the sale of the property to pass an order in the nature of a decree absolute for sale: 41 Mad. 327, *Rel. on*; 6 L. W. 701, *Expl.* (*Srinivasa Aiyangar, J.*). M. A. ANATHALWAR *v.* NARAYAN PRASAD. **99 I.C. 656=24 M. L. W. 836=A.I.R. 1927 Mad. 190.**

———*Decree for possession of land.*

It is not within the province of the executing Court to order the debtor to dismantle buildings on the land as to which the decree was silent, even when ordering the debtor to give up possession of the said land in terms of the decree: (1873) 18 W. R. 527, *Foll.* (*Duckworth, J.*). KAUK SIKE *v.* ONG HOCK SEIN. **100 I. C. 301=5 Bur. L. J. 201=A.I.R. 1927 Rang. 82.**

———*Instalment decree.*

Where an instalment decree is passed and there is a condition in the decree that on default of payment of any instalment the whole balance would become due, then if the decree-holder waives a default by the judgment-debtor and accepts the instalment in respect of which a default has been made, he is not competent afterwards to turn round and take advantage of the default clause and execute the decree for the whole amount. (*Jai Lal, J.*). GOPAL MAL *v.* FIRM GOPAL. **96 I.C. 784=A. I. R. 1926 Lah. 632.**

———*Transfer of Property Act, S.* 81.

Executing Court can determine the order in which property would be sold in execution of a mortgage-decree when the question has not been decided during trial. (*Phillips and Madhavan Nair, JJ.*). CHOKKALINGA TAMBIRAN *v.* RAMANADAN. **97 I. C. 586=1927 M. W. N. 254=24 M.L.W. 257=A.I.R. 1926 Mad. 1031.**

EXECUTION—Mode of.

———*Part of a decree can be executed if that part is independent of the other parts.*

Though a plaintiff cannot voluntarily split up his decree and take out execution of only a portion thereof while deliberately refraining from executing the other portion in which the benefit was subject to an onerous condition, still where part of the decree has by efflux of time, for which the decree-holders are in no way responsible, becomes impossible of execution the plaintiff is in no way debarred from executing the other portions of the decree, which are entirely independent of such part: 10 C.P.L.R. 83, *Disc.* (*Findlay, Offg. J. C.*). JAIRAM *v.* ADKU. **89 I.C. 135=21 N.L.R. 148=A.I.R. 1926 Nag. 138.**

———Court cannct arrest though it can serve notice on the defendant unless he is within the jurisdiction of the Court. (*Rupchand Bilaram, A.J.C.*). FATEH CHAND MADAN GOPAL *v.* UTANMAL JHAMANDAS. **89 I. C. 401=A. I. R. 1926 Sind 51.**

———*Mortgage-decree — Execution Court cannot order properties to be sold in particular order.*

The execution Court ought not ordinarily to fetter the discretion of the decree-holder to put to sale whatever property he wished first to sell.

Where subsequent to the execution of a mortgage, a certain portion of the property was purchased by another and where there was a suit on the mortgage and the suit was decreed and in the executing Court the subsequent purchaser applied that the items purchased by him should be sold only if the other items were insufficient,

Held, that the question turned on the form of the contract between the vendor and the purchaser, namely whether the property was sold subject to the encumbrance or not and as in the present case it appeared that the sale was subject to the mortgage, there was no ground for interfering with the rights of the mortgagee to sell the property in any order he pleased. (*Case-law discussed.*) (*Mullick and Ross, JJ.*). KHIRODHAR SINGH *v.* GAJADHAR LAL MAHTO. **91 I.C. 221=6 P.L.T. 393=1925 P H.C.C. 164=A.I.R. 1925 Pat. 484.**

———*Collector.*

Where a decree is transferred for execution to the Collector he has absolute jurisdiction to choose the best method allowed to him by law for raising money to satisfy the decree but beyond that it is not within his province to decide how much money is due to the decree-holder and how much of the decree has been satisfied. (*Stuart and Mukerji, JJ.*). ABDUL SHAKUR *v.* SYED MUHAMMAD. **78 I.C. 429=22 A.L J. 202=5 L.R.A. Civ. 93=46 All. 414=A. I. R. 1924 All. 307.**

———*Mortgage-decree—All the property covered by the mortgage should be put up for sale.*

The decree-holder is entitled to have all the properties mortgaged to him put up for sale but it is entirely in the discretion of the Court to direct in which order the properties should be sold; otherwise costs may be thrown away. All the properties must be advertised for sale and when they are actually brought into execution and become subject to sale it would be then for the Court to decide on just and equitable principles which property ought to be first sold. 15 C.W.N. 80, *Ref.* (*Das and Ross, JJ.*). BHAGWAN CHANDRA DAS *v.* RAI SAHIB DHARAM NARAIN DAS. **84 I. C. 203=3 Pat. 962=2 P. L.R. Civ. 242=1925 P. H. C. C. 62=6 P. L. T. 392=A.I.R. 1924 Pat. 802.**

EXECUTION—Mode of.

———*Surety.*

The surety is bound so long as the judgment-debtor is bound. The judgment-debtor is bound so long as any payments which he may have made are not certified. Execution therefore can be taken against the surety till the payments are certified. (*Woodroffe and Ghose, JJ.*). ONKARMAL AGARWALA *v.* NRITYA GOPAL CHAKI.
67 I.C. 885=A.I.R. 1923 Cal. 313.

———A Civil Court can order the temporary alienation of the land of a member of an agricultural tribe in satisfaction of a money decree. 1 Lah. 292 (F. B.) and 1 P. R. 1919 (Rev.), *Foll.* (*Scott-Smith and Dundas, JJ.*). SAIN DITTA *v.* NUR AHMAD.
74 I.C. 194=4 L.L.J. 476.

—Restitution.

———*Additional Court-fee.*

A decree-holder, applying for execution of a decree within 3 years but paying additional Court-fee which he is directed to pay, after 3 years, cannot recover the amount of Court-fee in execution. (*Dalal, J.*). BUDDHU KHAN *v.* A. BONER.
100 I.C. 476= A.I.R.1927 All. 335.

———Where the suit was brought against two sets of defendants, one deriving title from the other, if the plaintiff was wrongly given possession contrary to the decree, it was open to either of them to apply for restitution. (*Daniels, J.C.*). DORILAL *v.* MT. JAMAGA.
72 I.C. 879= A.I.R 1923 Oudh 16.

—Right to.

———A mortgagee cannot, at his own option, abandon his right of selling some of the properties mentioned in the decree before proceeding against other properties of the judgment-debtor. But, if it appears that judgment-debtor has no saleable interest in the properties directed to be sold, the decree-holder need not go through the farce of putting them up for sale. (*Ramesam and Jackson, JJ.*). SRINIVASA AYYANGAR *v.* BAPPU IYER.
121 I. C. 844 (Mad.).

———*Mere small inadvertance.*

The result of holding, that even though an execution application for a large amount might come to be dismissed by the first Court for non-appearance or for failure to put in some paper or some such formal defect the Court has absolutely no power at all to set aside the order of dismissal under any provisions of law, would be virtually to hold that a person by some such small inadvertance would be entirely losing the benefit of a decree passed in his favour by a Court of law : A.I.R. 1926 Mad. 980, *Doubted.* (*Wallace and Srinivasa Aiyangar, JJ.*). MUHTHU CHETTIAR *v.* NARAYANAN.
110 I.C. 63=51 Mad. 672=28 M.L.W. 297= A.I.R. 1928 Mad. 528=55 M.L.J. 274.

———A darkhastdar, who has no title whatever to execute the decree at the time of the darkhast, cannot remedy the defect by completing the title after the date of darkhast, and then try to execute the decree by virtue of that title. (*Macleod, C. J. and Coyajee, J.*). PANDUJOTI KADAM *v.* SAVLA PIRAJI KATE. **90 I.C. 561=27 Bom L.R. 1109= A. I. R. 1925 Bom. 472.**

———*Instalment decree.*

Where a decree payable by instalments provided for full payment on default,

Held, that such decree ceased to be instalment decree on a default taking place. (*Macleod, C. J. and Crump, J.*). GULABRAO YESWANT HARPHALE *v.* MAGAN GHELABHAI GUJARATHI. **87 I.C. 769= 27 Bom. L.R. 461=A.I.R. 1925 Bom. 326.**

EXECUTION—Right to.

———The fact that on some previous occasion the decree-holder's agent had endorsed on a notice of sale that property need not be sold does not estop the decree-holder from executing the decree against such property. (*Jackson, J.*). RAJAH PARTHASARADHI APPA RAO *v.* MUHAMMAD ABDUL WAHAB SAHEB.
82 I. C. 434= A. I. R. 1925 Mad. 270.

———*Decree for specific performance of contract to sell.*

Where the plaintiff got a decree for specific performance of an agreement to sell immovable property against defendant but did not want to execute the decree,

Held, that the defendents were also 'decree-holders' within S. 2 (3) of the C. P. Code and as such could take out execution of the plaintiff. (*Macleod, C.J. and Coyajee, J.*). BAI KARIMABIBI *v.* ABDUREHMAN SAYAD BANU. **67 I.C. 667= 46 Bom. 990=24 Bom. L. R. 496= A. I. R. 1923 Bom. 26.**

———*Partition decree.*

In execution of a decree for partition of house and lands, at the instance of the plaintiff a Commissioner was appointed to effect a division of a house first. The Commissioner made a report, but before the report could be given effect to, the house was burnt down. The plaintiff thereupon applied to drop the execution proceedings, but the defendant insisted to carry on the same execution proceedings.

Held, that the defendant should be allowed to continue the application for execution and need not issue a fresh darkhast. (*Macleod, C. J. and Coyajee, J.*). CHUNILAL JAMNADAS *v.* MULCHAND HARJIVANDAS. **67 I.C. 417=46 Bom. 937= 24 Bom. L. R. 440=A.I.R. 1923 Bom. 23.**

———*Beneficial owner can be added as a party.*

A beneficial owner can ask to be added as a party to a pending execution application. A part transferee of a decree can apply to execute it even though there was an agreement to the contrary. The principle is clear that parties should be allowed to join the record when their rights are in danger. (*Krishnan, J.*). RUKMANI AMMAL *v.* RAMACHANDRA.
72 I.C. 874=17 M. L. W.67= A. I. R. 1923 Mad. 317=44 M. L. J. 122.

———The second mortgagee who discharges the prior mortgage and the decree obtained on that mortgage is not an assignee of the decree and he is not entitled to execute the decree. (*Banerji and Gokul Prasad, JJ.*). BORA SHIB LAL *v.* MUNNI LAL. **63 I. C. 604=44 All. 67=19 A.L.J.840= A.I.R. 1922 All. 153.**

———*Maintenance decree creating charge.*

The language of R. 14, O. 34, C. P. Code makes it clear that the rule does not apply unless the decree, falls within the description of a decree for payment of money in satisfaction of a claim arising under the mortgage or charge. The mortgage or charge mentioned in this rule must obviously be a mortgage or charge existing prior to the date of the decree and not one created by the decree.

It is not obligatory upon a person to take recourse to a suit to enforce a charge on immovable property created by a consent decree. (1919) 43 Bom. 631, *Distinguished.* A decree for maintenance may be made in such a form as to entitle the plaintiff to realise in execution not only the arrears, which had accrued due at the date of the institution of the suit but also future maintenance

EXECUTION—Satisfaction.

as it accrues due from time to time. (*Mukerjee and Panton, JJ.*) INDRAMANI DASI *v.* SURENDRA NATH MANDAL. **64 I.C. 852=35 C. L. J. 61= A. I. R. 1922 Cal. 35.**

—Satisfaction.

———Every payment on account of a debt is perfectly lawful payment irrespective of its effect upon the other creditors: 26 Mad. 792, *Foll.* (*Jackson, J.*). V. CHINNAMALU *v.* KUNHIKANNA MENON. **100 I.C. 24=A.I.R. 1927 Mad. 625.**

———*Proof of full satisfaction necessary.*

Where the decree-holder repeatedly makes default in executing the decree and in appearing before the Court though ordered by the Court to do so and warned that the execution case would be filed as fully satisfied if the decree-holder makes default, and where there is no proof that the decree has, as a matter of fact, been fully satisfied, the Court cannot file the execution case as fully satisfied though the decree-holder can be penalised in other ways for his default. (*Jai Lal, J.*) BHAGWAN DAS *v.* RAHIM DAD KHAN. **89 I.C. 979= 7 L.L.J. 226=26 P. L R. 515= A.I.R. 1925 Lah. 453.**

———*Judgment-debtor granting lease of his land to decree-holder for 20 years in satisfaction of decree—Executing Court cannot afterwards curtail the period.*

A money-decree was fully satisfied in 1912 by the grant of a lease for 20 years to the decree holder of some land belonging to the judgment-debtor. Some years later the executing Court on the application of the judgment-debtor, cancelled the remaining period of the lease and directed that possession of the land be restored to the judgment-debtor on payment to the decree-holder a certain sum found on calculation to be due to the decree-holder.

Held, that the executing Court had become *functus officio* as soon as the lease was executed and the decree was fully satisfied and was not therefore, competent subsequently to reduce the term of the lease which had been given in full satisfaction of the decree in 1912. (*Martineau, J.*). HIRA SINGH *v.* MADHAO. **75 I.C. 870= A.I.R. 1924 Lah. 634.**

—Scope of.

———*Compromise in execution proceedings—Limitation.*

A compromise can be entered into much in the same manner as in a regular suit in execution proceedings, which does not extinguish the decree; and the Court executing the decree is bound, subject to the conditions indicated by O. 23, R. 3, C.P. Code to give effect to the compromise; and after recording such a compromise the decree is adjusted and the decree to be executed is the adjusted decree. The limitation applicable in such a case is that contained under Art. 182, Cl. (4), and under Cl. (6) of the same article there would be a period of three years allowed for the issue of the notice to the judgment-debtor to pay under the decree. (*Prideaux, A.J.C.*). RAMPRASAD *v.* HARIDAS. **97 I.C. 768=A.I.R. 1927 Nag. 31.**

———*Plea of non-transferability.*

If the mortgagors fail to raise the plea of non-transferability before the decree is passed, their failure to raise it does not prevent them from raising this point in the execution department: A.I.R. 1924 All. 328 (F.B.), *Foll.* (*Sulaiman and Mukerji, JJ.*). BALLABHA DAS *v.* MURAT NARAIN SINGH. **95 I.C. 1048=48 All. 385= 24 A.L.J. 489=A.I.R. 1926 All. 432.**

———Execution of a rent-decree against some of the tenants is limited to their right, title and interest and does not affect the holding: 42 C.L.J. 232, *Rel. on.* (*Suhrawardy and Page, JJ.*). RAMPADA NAG MADAK *v.* KANAI RAI. **98 I.C 206=44 C.L.J. 167= A I.R. 1926 Cal. 1219.**

EXECUTION—Miscellaneous.

———A declaratory decree is not capable of being executed. (*Martineau, J.*). MALUKE *v.* SUNDER SINGH. **59 I.C. 594=25 P.L.R. 1921= A.I.R. 1921 Lah. 376.**

—Setting aside.

———A judgment-debtor who once acquiesces in the execution of a decree, cannot subsequently object to its execution. (*Riggs, J.*). LALL DWARKADAS *v.* BURMA RAILWAYS CO. **62 I.C. 299=10 L.B.R. 280=13 Bur. L. T. 173.**

—Stay of.

———An order purporting to shelve papers does not amount to dismissal of an application for execution but only to staying the proceedings for the time being (*Mukerji and Bennett, JJ.*). JAGANNATH PRASAD *v.* SHEO NARAIN. **123 I.C. 105=A.I.R. 1930 All. 281.**

———Execution of decree as to costs awarded in preliminary decree in partition suit need not be stayed till the passing of final decree. (*Jai Lal, J.*). RIKHI KESH *v.* MELA RAM. **96 I.C. 416= A.I.R. 1926 Lah. 605.**

———*Practice pointed out.*

It is not right for a Judge, upon the making of a decree to stay the execution of it unconditionally without very much better cause being shown by the defendant than that his property is tied up and that he cannot lay his hands upon it for the moment. That may be a ground for staying execution conditionally on the judgment-creditor being in some way secured. It is not correct, under these circumstances, to stay execution unconditionally, or by imposing a simple condition as to giving security for a small amount for defendant's appearance in six months' time. (*Schwabe, C. J. and Ramesam, J.*). SUNDARAM MUDALIAR *v.* MUTHUSWAMI PILLAI. **88 I.C. 439=21 M.L.W. 635= A.I.R. 1925 Mad. 908.**

———No application for execution need be pending to enable a Court to suspend execution of a decree for it can do so in anticipation of an application for execution. Hence the period when execution was set aside, although no application for execution was pending, must be excluded. (*Abdur Rahim and Odgers, JJ.*). GOVINDARAJULU NAIDU *v.* RANGA RAO. **62 I.C. 255=13 M.L.W. 97= 1921 M.W.N. 98=A.I.R. 1921 Mad. 113= 40 M.L.J. 124.**

—Miscellaneous.

———*Agency Court—Validity of decree can be questioned.*

Civil Procedure Code not being applicable to Agency Courts the ordinary rule that an executing Court will not canvass the legality of the decree is not applicable. An Agency Court may refuse to sell property within its jurisdiction under a decree not passed by an Agency Court and therefore not by a Court having jurisdiction. (*Krishnan and Venkatasubba Rao, JJ.*). K. PERRAZU *v.* N. M. CHANDRA RAZU. **69 I. C. 559=16 M.L.W. 669= 1922 M.W.N. 728=A.I.R. 1923 Mad. 114.**

———*Simultaneous execution under all the Codes including that of* 1882 *was recognised.*

Under the Civil Procedure Codes of 1859, 1877 and 1882, the legality of concurrent execution has always been recognised though in practice it was

EXECUTION—Miscellaneous.

not generally carried out. (*Case-law discussed*). (*Mullick and Kulwant Sahay, JJ.*). RAM SUMRAN PRASAD *v.* RAM BAHADUR. **71 I.C. 741= 2 Pat. 328=4 P.L.T. 99= 1923 P.H.C.C. 61=A.I.R. 1923 Pat. 224.**

———*Practice—Duty of Court—Complaints should be considered only when made to Court directly in open Court and not through a subordinate officer.*

Complaints such as those by a judgment-debtor that bidders had not come or that the process-server had wrongly proclaimed that the sale would be held at some place other than the place at which it was to be held in fact, should be considered by the Court only when they are made to it in open Court in the usual way and not through a subordinate officer. (*Oldfield and Seshagiri Aiyar, JJ.*). JAYARAMA AIYAR *v.* VRIDHAGIRI AIYAR. **59 I.C. 167=44 Mad. 35=A.I.R. 1921 Mad. 583.**

EXECUTION APPLICATION.

See (1) C. P. CODE, S. 47 AND O. 21, R. 11.
(2) LIMITATION ACT, ART. 181.

EXECUTION OF DECREE.

See (1) CIVIL P. C., S. 47.
(2) DECREE-EXECUTION.

—Certification.

See CIVIL P. C., S. 41.

EXECUTION OF DOCUMENT.

See (1) DEED, EXECUTION.
(2) WILL, EXECUTION.

EXECUTION PROCEEDINGS.

See (1) C. P. CODE., O. 21.
(2) EXECUTION.

EXECUTION SALE.

Accounts.
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—Accounts.

———*Appointment for definite poriod—Management continuing after expiry of period—Suit for account—Liability to account for entire period.*

Where executors were appointed for a certain period but they continued to manage the estate even after the expiry of that period.

Held, that they were liable to account for the entire period of their management. (*Rankin, C. J. and B. B. Ghose, J.*). KANTI CHANDRA TARAFDAR *v.* RADHA RAMAN SARKAR. **34 C.W.N. 275.**

—Bids.

———It is no part of the duty of a bidder to inform the Court of the existence of the amount of incumbrance. (*Fawcett and Madgavkar, JJ.*). D. DHARMAPPA *v.* P. VENKAPPA. **91 I. C. 426= 27 Bom. L. R. 1318=A.I.R. 1926 Bom. 33.**

———*Highest bid—Discretion of Court to accept or reject.*

By reason of the third condition on the back of the sale proclamation a discretion is reserved to the Court to accept or not to accept a bid in view of the particular circumstances disclosed in the case, and it shall be in the discretion of the Court or the officer holding the sale to decline acceptance

EXECUTION SALE—Certificate.

of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so, but while not accepting a sale or ordering a re-sale the Court should state some reasons for its so doing: 21 C. L. J. 174 and A.I.R. 1928 Cal. 316, *Appl.* (*Mukerji, J.*). RAMSAKHI *v.* RADHANATH. **94 I. C. 46=A.I. R. 1926 Cal. 827.**

———*Bidders are presumed to bid on the understanding that the sale would be concluded soon.*

Bidders in auction-sale should be presumed to make an offer on the condition that it would be accepted or rejected within the period during which such sales ordinarily last and in the absence of anything to show that they consented to the period being protracted to any length of time it must be held that the offer was not intended to be open, for a number of days (in this case 6 weeks.) (*Walmsley and Mukerji, JJ.*). TULARAM BHUTANIAR *v.* PURNENDRA NARAIN RAI. **78 I.C. 710= A. I. R. 1925 Cal. 557.**

———*Property knocked down—Court can order a re sale notwithstanding.*

Sale is not concluded when a property is knocked down and the deposit made. Having regard to the provisions of the third condition of sale set out in Form No. 29, Appendix E of the First Schedule of the Civil Procedure Code, the Court has discretion in the matter and the order directing a re-sale of the property is within the Court's jurisdiction. (*Newbould, J.*). FAZIL MEAH *v.* PROSANNA KUMAR ROY. **68 I.C. 305=A.I.R. 1923 Cal. 316.**

—Binding nature of.

———*Wrong property sold—Procedure.*

Where plaintiff allows by mistake one of his properties to be sold at a Court-auction along with other properties of his,

Held, (1) that the Court sale was not a nullity, (2) that without setting aside the sale a mere suit to recover the property from the purchaser does not lie. (*Macleod, C. J. and Coyajee, J.*). NAGA BHATTA *v.* NAGAPPA. **67 I. C. 857= 24 Bom. L.R. 423=46 Bom. 914= A.I.R. 1923 Bom. 62.**

———*Sale in execution is not binding on persons not parties.*

Persons who are not parties to a decree are not bound by it, and ordinarily therefore a sale in execution of a decree does not operate to pass the property of any person who is not bound by the decree. A Court has no jurisdiction to sell the property of persons who are not parties to the proceedings or properly represented on the record. As against such persons decree and sales would be a nullity and might be disregarded without any proceedings being taken to set them aside. (*Lindsay, J.C.*). JADUNATH SINGH *v.* MST. AFZAL KHANAM. **8 O.L.J. 191=A.I.R. 1921 Oudh 150.**

—Certificate.

———*Rights of parties to sale are determined by certificate of sale.*

The rights of the parties to the sale proceedings are determined by the certificate of sale, which finally vests the property in the auction-purchaser, and subject to any mistakes in the certificate of sale, which it is always open to the Court or officer granting the certificate of sale to correct, the title so acquired cannot be afterwards disturbed in any subsequent proceeding at the instance of any person who was a party to the confirmation of the sale. (*Kanhaiya Lal and Ashworth, JJ.*). NANDKISHORE *v.* BADANSINGH. **95 I.C. 578= 48 All. 568=24 A.L.J. 687= A.I.R. 1926 All. 575.**

EXECUTION SALE—Certificate.

———The sale certificate is not essential for the reaction of the title in the auction-purchaser. It is merely a piece of evidence. So, adverse possession against an auction purchaser begins at least from confirmation of sale. (*Wazir Hasan, J.C. and Neave, A. J. C.*). MT. MAHMUD-UN-NISSA *v.* SYED LAHID RAZA. **84 I.C. 98=11 O.L.J. 466= A.I.R. 1925 Oudh 20.**

———*Ambiguity.*

Where there are in the sale certificate two descriptions of the property which cannot be reconciled it is open to the Court to look at the decree in the suit and to determine which of these descriptions really governs the sale. 19 C.L.J. 182, *Foll.* (*Daniels, J.*). MUKHBAR AHMAD *v.* KABI AHMAD. **78 I.C. 666=A.I.R. 1924 All. 856.**

—Confirmation of.

———*Private satisfaction of decree after sale but before confirmation—Practice explained.*

A private satisfaction of a decree certified in Court after the sale of immovable property has been held and before the confirmation of the sale is ordered, does extinguish the decree and prevent the Court from confirming the sale in favour of the auction-purchaser, if he be the decree-holder himself; but it does not extinguish the decree and prevent the Court from confirming the sale, where a third person has purchased the property *bona fide* at the auction sale: 10 All. 166 (P.C.,) *Appl.*; A.I.R. 1928 Nag. 43, *Not appr.*; 10 All. 88; 35 Bom. 516, *Dist.*; A. I. R. 1926 Nag. 298; Nag. C. R. 201 of 1925 and A. I. R. 1928 Nag. 136 (2), *Appr.*; Nag. S. A. 405 and 406 of 1923 *Diss. from*; A. I. R. 1922 Nag. 248, *held too widely enunciated.* (*Findlay, J. C. and Kinkhede and Prideaux, A. J. Cs.*). SHANKAR *v.* JAWAHARLAL. **111 I. C. 895= 24 N.L R. 127=11 N.L.J. 142= A. I. R. 1928 Nag. 265 (F.B.).**

———*Parties to decree settling their claim before confirmation.*

Where the judgment-debtor and the decree-holder come to a settlement before the sale has been confirmed, there is no decree left capable of execution and executing Court is *functus officio* and cannot thereafter confirm the sale. The position would be very different if the sale has been confirmed and the parties to the decree come to a settlement while legal proceedings for the reversal of the order of confirmation are in progress; S. A. No. 405 of 1923, *Foll.* (*Findlay, J. C. and Prideaux, A. J. C.*). MAROTI *v.* VITHOBA. **100 I. C. 565=A.I.R. 1928 Nag. 43.**

———*Gurudwaras Act—Order is not appealable.*

The executing Court can pass an order in spite of the fact that the sale had been confirmed, setting aside the confirmation of the sale on the ground that the balance of the auction-money had not been paid. (*Addison, J.*). RADHA KISHAN *v.* HARI SINGH. **100 I.C. 800= A.I.R. 1927 Lah. 337.**

———The executing Court has no jurisdiction to set aside a sale which has once been confirmed. (*Addison, J.*). RADHA KISHAN *v.* HARI SINGH. **100 I.C. 800=A. I. R. 1927 Lah. 337.**

———*Court sale is not complete until confirmation.*

When a Court sale takes place, the sale in favour of a particular individual is not complete unless and until it receives the confirmation of the Courts. It is the acceptance of the Court that constitutes the contract. When the person asserts that the Court-officer had power to bind the Court by his acceptance of a bid, he must prove his contention. The mere fact that in the published conditions of sale there is no statement to the effect that it is subject to the confirmation of the Court cannot be treated as implying that the Court had renounced its power of confirming the sale before it could take effect. (*Krishnan and Odgers, JJ.*). RATNASAMI PILLAI *v.* SABAPATHY PILLAI. **82 I.C. 793= A.I.R. 1925 Mad. 318.**

EXECUTION SALE—Rights of purchaser.

———Execution sale takes effect from moment of sale and no confirmation is necessary. (*Spencer and Kumaraswami Sastri, JJ.*). MOLLAYYA PADAYACHI *v.* KRISHNASWAMI IYER. **85 I.C. 855= 21 M.L.W. 336=A.I.R. 1925 Mad. 95= 47 M.L.J. 622.**

———*Effect.*

Though the decree-holder purchaser is unable to obtain possession that would not entitle him to take out further execution for that portion of his purchase-money which is represented by the property puchased by him. Execution comes to an end with the sale of the property and whether or not the auction purchaser obtains possession of the property sold is wholly immaterial for the purpose of the decree and it does not in any way affect it. (*Das and Adami, JJ.*). TRILOKENATH JHA *v.* BAUSMAN JHA. **72 I.C. 938=1 P. L.R. 6= 2 Pat. 249=1923 P.H.C.C. 300=5 P.L.T. 30= A.I.R. 1923 Pat. 22.**

—Duty of Court.

———Executing Court has no jurisdiction to set aside a sale which has once been confirmed: A.I.R. 1927 Lah. 337, *Foll.* (*Addison, J.*). BIHARILAL *v.* RAMCHAND. **110 I.C. 773.**

—Legal representatives.

———*L. R's of decree-holder—Right to proceed with pending execution application.*

Where the legal representatives of the deceased decree-holder and judgment-debtor have been brought on record in execution proceedings, the old application made by the deceased decree-holder for execution remains pending and his representatives can proceed with it. They need not make fresh application under R. 16, O. 21: A.I.R. 1927 All. 165 (F. B.), *Cons.*; A I. R. 1927 Mad. 184, *Ref.*; A. I. R. 1928 P. C. 162 and A. I. R. 1926 Mad. 573, *Foll.* (*Percival, J.C. and Barlee A.J.C.*). SHOUKOMAL *v.* NICHUMAL. **A.I R. 1930 Sind 283.**

———The representatives of a judgment-debtor are bound by attachment and sale held in execution of a decree, although they may not have been formerly made as parties or that wrong persons may have been parties to the decree. 25 Bom. 337 (P.C.), *Foll.* (*Misra, J.*). BABU LAL *v.* MT. SUHKRANI. **99 I.C. 211=13 O.L.J. 813= 3 O.W.N. 771=A. I. R. 1926 Oudh 613.**

—Rights of purchaser.

———*The description given in sale proclamation is not binding.*

In an execution sale the decree-holder may be bound by the description given by him in the sale proclamation, but the purchaser who has purchased the property described in a particular way in the sale proclamation can claim a higher or different right which the judgment-debtor actually had and which the purchaser has really purchased. (*Suhrawardy and Graham, JJ.*). TARINI CHARAN *v.* GRISH CHANDRA. **115 I.C. 81= 56 Cal. 173= 48 C.L.J. 97=32 C.W.N. 587= A.I.R. 1928 Cal. 880.**

———Where after an execution sale it turns out that the judgment-debtor had no interest in the property sold, the auction-purchaser is not entitled to the refund of the purchase money: 10 L.B.R. 76,

EXECUTION SALE—Rights of purchaser.

Rel. on; A.I.R. 1926 Cal. 971, *Expl.* (*Brown, J.*). MAUNG NAUNG *v.* MAUNG BA GYI. **112 I.C. 436= 6 Rang. 468=A.I.R. 1928 Rang. 272.**

———*Sale.*

An auction-purchaser, who is a stranger to the suit, is not bound to look behind the decree of the Court and he acquires an indefeasible right to the property purchased by him in such sale. (*Johnstone, J.*). MT. GURDEVI *v.* KHARAITI MAL. **104 I.C. 222=10 L.L.J. 23= A.I.R. 1927 Lah. 685.**

———A transferee of whole interest in joint family property even in an execution sale under money decree is entitled to contest the validity of a transfer made by one of the members of the family on the ground of want of legal necessity: 33 All. 783 (F.B.), *Appl.* (*Mears, C.J. and King, J.*). RAJ BALLAW PRASAD *v.* DALIP NARAIN SINGH. **97 I.C. 344= A.I.R. 1926 All. 718.**

———Where an auction-sale takes place in the exercise of a jurisdiction vested in a Court, a third party purchaser cannot be bound by the result of any further litigation relating to the decree. (*Mukerji, J.*). ATMA RAM *v.* NANAK CHAND. **92 I.C. 571=A. I. R. 1926 All. 274.**

———*Wrong form of proclamation.*

Where by carelessness or oversight a wrong form is used for the proclamation of sale, in order to find what rights the auction-purchaser obtained under the sale the true meaning of the decree under which the sale took place as well as the proceedings leading up to the sale should be looked into. (*B.B. Ghose and Panton, JJ.*). KALI PROSANNA RAY *v.* PREM CHAND MAHAPATRA. **95 I.C. 853=A. I. R. 1926 Cal. 1062.**

———*Sale in purchase by decree-holders in lieu of decretal amount—One judgment-debtor entitled to interest in decretal amount—Conduct of parties showing purchase was only for benefit of decree-holders—Judgment-debtor is not entitled to any interest in the property.*

It cannot be disputed that as a general proposition of law if only one of several decree-holders purchases the property at auction in lieu of the decretal amount, the purchase, in the absence of anything positive to the contrary, must be deemed to have been made on behalf of all the interested decree-holders: 37 All. 545, *Foll.*

But where a judgment-debtor is interested in the decretal amount he need not necessarily be entitled to any interest in the property purchased by the decree-holders. Even if it be conceded that ordinarily if the purchase is made by the decree-holder in lieu of the decretal amount and the payment is merely set off against the decree, then it may be deemed that the purchase is made on behalf of all the persons interested in the decretal amount whether plaintiffs or defendants, the Court has to see whether that inference can be properly drawn in view of the conduct of both the parties throughout the proceedings in the particular case.

A co-mortgagee had refused to join in the mortgage suit brought by the other mortgagees and had not himself brought any suit within limitation on the basis of the original document which he retained in his possession and the suit had to be brought on the basis of a certified copy. Then he was made a defendant and was not allowed to be transposed as a plaintiff because he had some subsequent mortgages on the property and thus occupied a double capacity, namely of co-mortgagee as well as of subsequent mortgagee. When the decree was passed, permission was granted to the decree-

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holders to bid. The mortgagee in question made no attempt to bid himself. After the sale had taken place he applied to have the sale set aside. In his application he clearly stated that the property had been purchased for decree-holders. He never suggested that the purchase had also been made in his interest.

Held, that having regard to the attitude of both the parties it cannot be held that when the purchase was made it was made on behalf of Mokhan Lal also: 37 All. 545, *Dist.* (*Sulaiman and Ryves, JJ.*). MAKHAN LAL *v.* SOHAN LAL. **87 I.C. 665= 23 A. L. J. 257=A.I.R. 1925 All. 331.**

———*Purchaser need not enquire if decree and sale are valid.*

Where a person purchases the property of a minor at an auction-sale in execution of a decree against a minor,

Held, it was not necessary for the purchaser to enquire whether the decree and the sale thereunder were for valid reasons. (*Walmsley and M.N. Mukerji, JJ.*). UMA CHARAN CHKRAVARTI *v.* GUIRAM BAG. **83 I. C. 1040=39 C.L.J. 394= A.I.R. 1924 Cal. 1008.**

———*Refund of purchase money.*

A suit by auction-purchaser at a sale in execution of a decree for rent, against both the decree-holder and the judgment-debtor for refund of the purchase-money and also for compensation is not maintainable on the ground that the judgment-debtor had no saleable interest in the land. 22 C.W.N. 760, *Foll.* There is no warranty of title in the case of a sale under a rent decree. 17 C.L.J. 652, *Expl.* (*Rankin and B. B. Ghose, JJ.*). BANKA BEHARY DAS *v.* GURDAS DHAR. **80 I.C. 257= 40 C.L.J. 157=28 C.W.N. 20= A.I.R. 1924 Cal. 172.**

———Bona fide *purchasers are not protected where Court has no initial jurisdiction.*

Courts will, as far as possible, protect innocent purchasers from the consequences of irregularities and defects of procedure at Court sales for the reason that strangers are entitled to presume that the proceedings of Courts are regular, but such help cannot be extended to the overlooking of patent want of inherent jurisdiction on the part of the executing Court. (*Spencer and Devadoss, JJ.*). VIKRAM DEY *v.* LAKSHMI NARASIMHA. **76 I.C. 269=18 M.L.W. 747= A.I.R. 1924 Mad. 144.**

———*Properties sold in one lot before decision of High Court that they should be sold in separate lots.*

In the execution of a decree on three mortgage-bonds a sale of all the properties in one lot took place. The High Court, on an objection by one of the transferees of the judgment-debtor,

Held that each property separately mortgaged ought to have been separately sold. The sale having been held before the High Court's decision the decree-holder, auction-purchaser applied for possession in spite of the judgment of the High Court.

Held that he was not entitled to possession. He can, however, apply alternatively by way of amendment of his application for an order or resale of the properties separately in accordance with the High Court's direction. (*Walsh and Ryves, JJ.*). HARBANS NATH *v.* ACHRAJ NATH. **65 I.C. 16= A.I.R. 1922 All. 375.**

———Where a mortgagee of a *raiyati* holding with fixed rates purchases it in execution of his decree on the mortgage, where the original lease subsists and the mortgagee has notice of it, he is bound by the terms of the original *kabuliyat* and must pay

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rent and interest in accordance therewith. 24 Cal. 37, *Dist.*; 32 Cal. 258 (F.B.), *Foll.* (*Teunon and Chaudhuri, JJ.*). BHUT NATH *v*, RAMA NATH.
48 Cal. 93=A.I.R. 1921 Cal. 199.

———*Collusive agreement by mortgagor—Not binding on mortgagee—Auction-purchaser.*

Where the mortgagor in possession entered into an agreement with his tenants after the date of mortgage that they should thenceforward pay him *nagdi* rents and up till the time of the agreement they paid produce rents and the rate settled on compromise was considerably lower than the fair rent, and this low rate was entered into in collusion with tenants after taking heavy *nazarana* because the mortgagor saw no means of saving his property.

Held, that the mortgagee would not be bound by the agreement. 1 P.L.J. 563, *Rel. on.* (*Coutts and Sultan Ahmed, JJ.*). MATHURA RAI *v.* MANDIL DAS. **1921 P.H.C.C. 165=A.I.R. 1921 Pat. 183.**

—Sale subject to incumbrance.

———*Purchaser cannot challenge validity of the mortgage in mortgagee's suit.*

Where a person purchases certain property in execution of a money-decree expressly subject to a mortgage on it and admits the existence of the mortgage it is not subsequently open to him to challenge the mortgage in a suit on the mortgage by the mortgage : A.I.R. 1923 Nag. 282 and 47 Cal. 446, *Rel. on.* (*Findlay, O. J. C.*). GOVINDRAO *v.* HIRCHAND. **95 I.C. 563=A.I.R. 1926 Nag. 446.**

—Setting aside—Ancestral property.

———A sale of ancestral property by a Civil Court is not void in law. (*Stuart and Ryves, JJ.*). DILIP-NARAIN SINGH *v.* PARMAOTI BIBI. **67 I. C. 931=17 A.L.J. 982=42 All. 58.**

—Setting aside—Application.

———*An application to set aside sale is not one in execution.*

An application for setting aside a sale cannot be regarded as an application in a proceeding in execution of a decree or order because when the sale of the property attached in execution has been completed, and the purchase money has been paid into Court, nothing more remains to be done in respect of the execution of the decree as against that property. (*Das and Adami, JJ.*). L. N. NATHSAHI DEO *v.* M. P. U. NATHSAHI DEO. **69 I.C. 613=1922 P.H.C.C. 363=1 P. L.R. 55=2 Pat. 243=4 P.L.T. 367=A.I.R. 1923 Pat. 29.**

———The judgment-debtor is entitled to apply to have the execution sale set aside on the ground of fraud even after the confirmation of the sale. (*Coldstream, J.*). MT. JANNAT *v.* ABDUL RAHMAN KHAN. **112 I.C. 847.**

———*Proof of fraud.*

Where in an application to have an execution sale set aside for fraud, fraud has been established, the onus is on the person who alleges that the application is barred to prove it. (*Coldstream, J.*). MT. JANNAT *v.* ABDUL RAHMAN KHAN. **112 I. C. 847.**

—Setting aside—Fraud.

———No presumption of fraud against the guardian *ad litem* of a minor in a suit can be drawn from the mere fact that he did not defend the suit, especially when the parties mainly concerned in the suit did not choose to defend it. (*Phillips and Madhavan Nair, JJ.*). K. ANANTHACHARIAR *v.* RANGACHARIAR. **98 I.C. 463=A. I. R. 1927 Mad. 209.**

———*Decree obtained by fraud*—Bona fide *purchaser in execution—Rights discussed.*

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In cases of sale in execution of a decree obtained by fraud, where a stranger has purchased, the Court should determine, whether it will be in accordance with the principles of justice, equity and good conscience to set aside the sale. The Court has, in fact, to reconcile two conflicting principles. On the one hand, fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of justice, and avoids all judicial acts, ecclesiastical and temporal. A Court of Equity will wrest property, fraudulently acquired, not only from the perpetrator of the fraud, but from his children and his children's children or, from any persons amongst whom he may have parcelled out the fruits of his fraud, and will restore it to those from whom it has been fraudulently abstracted. On the other hand, against a purchaser for valuable consideration without notice, the Court will not take the least step imaginable ; a purchase without notice for a valuable consideration is a bar to the jurisdiction of the Court. On the facts of each case, the Court has to determine which of these doctrines prevails. In the solution of the problem, we have to bear in mind that the protection given to the *bona fide* purchaser had its origin exclusively in equity and is based entirely upon the conception that a Court of Equity acts solely upon the conscience of litigant parties, by compelling the defendant to do what and only what in *pro consientiae* he is bound to do. If the relations between the two contestants standing before the Court are such that, in equity and good conscience, the plaintiff ought to obtain the aid which he asks, and the defendant ought to do or suffer what is demanded of him, then the Court will interfere and grant the relief ; if the relations are not of this character, then the Court will withhold its hand and will leave the parties where they stand. The protection given to the *bona fide* purchaser, therefore simply means that from the relations subsisting between the two parties, specially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so ; the Court will not, in such an event, aid either party agrinst the other. It does not determine the question of title between parties. It is in most cases available only by way of defence. It is a shield in the hands of a defendant, to protect him against the claim of his adversary. It means that equity will refuse to interfere to aid the plaintiff in his suit, because, under the circumstances of the case it would be unconscionable that the plaintiff should have what he seeks to obtain. It enforces no right, but simply refuses to interfere in the plaintiff's behalf. (*Mookerjee and Rankin, JJ.*). BIRESWAR GHOSH *v.* PANCHCOURI GHOSH. **74 I.C. 975=37 C.L.J. 145=27 C.W.N. 587=A. I. R. 1923 Cal. 538.**

———*Material facts suppressed—Court has inherent power to refuse to confirm the sale.*

The Court has an inherent power to refuse to allow the sale to be carried out if it is satisfied that the Court has been misled either in giving leave to bid or in fixing the reserve price. In order to show that the Court has been misled it is necessary to show either actual mis-statements to the Court or non-disclosure to the Court of relevant facts unknown to the Court and which there was a duty to bring before the Court. Where the decree-holder put in an affidavit of which the tenor was that it was very doubtful whether the judgment-

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debtor had any interest in the property at all which was proposed to be sold, that they had claims to it which were subject to litigation and the outcome of the litigation, like most litigation, was uncertain, and that it was impossible, therefore to give any idea of the market value, and further added that the market value of the lot in question might be fixed at Rs. 3,000, but suppressed a fact well known to him, namely, that the property, in respect of which the judgment-debtors claimed and had since been held by the Court to have, a two thirds interest, had been put up for sale, by the Court before and that the Court had fixed Rs. 45,000 as the reserve price and a bid of Rs. 36,000 had been refused on the ground that it was not great enough.

Held, that there were all the elements necessary for the Court to act on its inherent powers and that the confirmation of sale was rightly refused. O. 21, R. 92, C.P.C., is no bar to the Court interfering to cancel the sale even though no party has applied therefor. (*Schwabe, C. J. and Wallace, J.*). RAGHAVACHARIAR *v.* MURUGESA MUDALI.

72 I.C. 545=46 Mad. 583=17 M.L.W. 750=32 M.L.T. 285=1923 M.W.N. 323=A.I.R. 1923 Mad. 635=44 M.L.J. 680.

———Where at auction sale certain property was sold as non-ancestral, though it was really ancestral; and it was clear that the plaintiff-judgment-debtor had knowledge of the execution and had an opportunity of being heard in the execution Court and afterwards he sought to set aside the auction sale on the ground of fraud.

Held, that this was no evidence of any fraud on the part of the defendants.

Held, further that even if the property was really ancestral, as plaintiff suffered no damage, the sale cannot be set aside. 28 All. 273; 42 All. 68, *Foll.* (*Piggott and Walsh, JJ.*). BHATELAY CHUNNI LAL *v.* CHAKKERPAN. **67 I.C. 934=44 All. 380=20 A.L.J. 281=A.I.R. 1922 All. 56.**

———An execution sale ought not to be set aside merely because the sale was held in execution of an *ex parte* decree obtained by fraud where the purchaser is a stranger who was no party to the fraud and was not aware of it at the time of paying the purchase-money. (*Teunon and Buckland, JJ.*). GOPAL PORAI *v.* SWARNA BEWA. **64 I.C. 611 (Cal.).**

———Though a decree is fraudulently obtained, the execution sale under it is not rendered void, unless the auction purchaser was a party to the fraud in the execution proceedings which vitiated the sale. (*Jwala Prasad, J.*). JAGARNATH PRASAD *v.* BAHURANI. **62 I.C. 594 (Pat.).**

—Setting aside—Grounds for.

———*It is not wise and desirable to interfere on slender grounds.*

It is not wise and desirable to interfere with Court sales on grounds not strong enough. As a matter of ordinary experience, Court sales are not popular and if the impression is created in the minds of the public that such sales can be set aside on slight grounds it will take away a great deal from the security which an act of the Court ought to give to its proceedings, much to the prejudice of the judgment-debtors. (*Suhrawardy and Graham, JJ.*). MAHARAJ BAHADUR SINGH BALUCHAR *v.* SUCHINDRA NATH ROY. **113 I.C. 562=32 C.W.N. 309=A.I.R. 1928 Cal. 328.**

———*Prideaux, A.J.C.*—The fact that one sale took place in execution of two decrees against the same person, is obviously no good reason for setting aside the sale. (*Macnair, A.J.C.*). SHANKAR RAO *v.* GANPAT RAO. **105 I.C. 123=A.I.R. 1928 Nag. 34.**

EXECUTION SALE—Setting aside—Misrepresentation.

———*Minor properly represented till passing of decree but not so represented in execution proceedings—O. 32 is not strictly applied to the stage of execution.*

Even if there was no due representation of the minor in the execution proceedings had in furtherance of a decree in a suit in which the minor was properly represented that fact is not a ground upon which the sale can be set aside.

The provisions of O. 32, relating to suits by or against minors have no direct application in proceedings in execution after the rights of the parties have merged in a good and valid decree. At any rate the rules in O. 32 are not so strictly applied at that stage: A. I. R. 1921 Cal. 476 and A.I.R. 1924 Cal. 847, *Foll.* (*Page and Graham, JJ.*). RAKHAL CHANDRA *v.* KUMADINI DEBYA. **104 I.C. 357=A.I.R. 1927 Cal. 930.**

———Non-representation of an infant by a guardian in execution proceedings is not in itself sufficient ground for avoiding an execution sale: A. I. R. 1926 Cal. 109 and A. I. R. 1921 Cal. 476, *Foll.* (*Graham, J.*). NAKULCHANDRADAS *v.* RAJENDRA CHANDRA. **104 I.C. 196=A.I.R. 1927 Cal. 873.**

———*Sale.*

When a sale takes place in execution of a decree in force at the time, it cannot be set aside against a *bona fide* purchaser on the ground that that decree was afterwards amended: 10 All. 166 (P.C.) and 38 All. 240, *Foll.* (*Sulaiman and Daniels, JJ.*). PIRTHI NATH *v.* MT. KUNJI KOER. **89 I.C. 369=24 A.L.J. 65=6 L.R.A. Civ. 420=A.I.R. 1926 All. 41.**

———*Acquiescence—Plaintiff cannot resile.*

A party, who has submitted to decree (in this case passed by a Foreign Court) and has allowed his property to be sold in execution cannot be allowed to file a suit in order to set aside the sale to the prejudice of the rights of the auction-purchaser on the ground that the whole proceeding with regard to him was null and void (*e.g.*, that he was not served with a summons of the foreign Court. (*Macleod, C. J. and Shah, J.*). MALHAR NARAYAN PRABHU *v.* VISHNU SONU GOVADA. **80 I.C. 754=26 Bom. L.R. 392=A.I.R. 1924 Bom. 351.**

———*Flaw in attachment is no ground.*

When a sale has been duly held, without material irregularity or fraud in publishing or conducting it, it cannot be considered a nullity merely by reason of a flaw in the attachment or the absence of an attachment. 11 Mad. 437, *Foll.* (*Hallifax, A.J.C.*). SHANKAR RAO *v.* MANIK RAO. **68 I.C. 643=A.I.R. 1923 Nag. 18.**

—Setting aside—Irregularity.

———*Consolidated decrees.*

Where two decrees against a judgment-debtor have been consolidated and sale takes place in execution of both the decrees and property is sold by one bid, in order to challenge the sale on the ground of irregularity sales in execution of both the decrees must be challenged. (*Sulaiman and Kendall, JJ.*). INDAR KOER *v.* DHARAM NARAIN. **A.I.R. 1930 All. 556.**

—Setting aside—Misrepresentation.

———Where a suit was brought, to set aside an execution sale on the ground that the sale proclamation contained a misrepresentation but the

EXECUTION SALE—Setting aside—Misrepresentation.

plaint did not make any imputation of fraud against any of the defendant.

Held, Per *Walsh, J.*—(*Lindsay, J., dissenting*) that the suit was maintainable on the ground of equity, justice and good conscience. (*Walsh and Lindsay, JJ.*). GAJADHAR PRASAD *v.* MUHAMMAD ABDUL MAJID. **63 I. C. 425= 19 A. L.J. 530=A.I.R. 1921 All. 327.**

———*Mistake in sale proclamation.*

A sale in execution cannot be set aside in a suit by the auction-purchaser on the ground of a mistake in the sale proclamation as to the extent of the judgment debtor's share in the property, where it is not proved that any misrepresentation was intentionally made by or on behalf of the decree-holders. (*Rafique and Ryves, JJ.*). BAIJNATH PRASAD *v.* NARENDRA BAHADUR. **61 I. C. 74=19 A. L. J 147= A. I. R. 1921 All. 223.**

—Setting aside—Partial.

———A sale in execution can be partially set aside. (*Suhrawardy and Page, JJ.*). RAMPADA NAG *v.* KANAI RAI. **98 I.C. 206=44 C.L.J. 167= A. I. R. 1926 Cal. 1219.**

—Setting aside—Stranger.

———*Decree amended after sale—Sale cannot be set aside if in favour of stranger.*

If a wrong decree is passed by the Court and the sale takes place in execution of it and a third party purchases the property that sale cannot be set aside merely on the ground that that decree is subsequently amended. A stranger having purchased the property, it is no longer a matter relating to execution of a decree exclusively between the original parties to the suit: 10 All. 166 (P.C.), *Rel. on.* (*Lindsay and Sulaiman, JJ.*). AGHA HUSAIN *v.* QASIM ALI. **89 I.C. 1018=48 All. 94= 23 A.L.J. 946=6 L.R.A. Civ 580= A. I. R. 1926 All. 35**

———*Sale to stranger under decree set aside in appeal or satisfied subsequently by judgment-debtor, cannot be set aside.*

A decree is certainly dead as soon as it is satisfied as between the parties to it, but that cannot be allowed to affect the vested rights of others. If the death of a decree by its being set aside in appeal cannot be allowed to interfere with a sale under it to a purchaser who was no party to it, still less can it do so when its death is due only to its satisfaction. 10 All. 166 (P.C.), *Foll.*; A.I.R. 1922 Nag. 248, *Diss. from*; 10 All. 83 and 35 Bom. 516, *Dist.* (*Hallifax, A. J. C.*). RAMCHANDRA *v.* LAKSHMAN. **92 I.C. 803= 9 N. L.J. 3=A.I.R. 1926 Nag. 293.**

———A person who is a stranger to the suit is justified in believing that the Court had authority to attach and sell the property sold by it in execution: 25 Bom. 337, *Foll.* (*Kanhaiya Lal, J.*). MUKAT SINGH *v.* MISRA PARAS RAM. **79 I.C. 106=A.I.R. 1924 All. 726.**

—Stranger purchaser.

———*Auction-sales.*

Auction-sales specially when the purchasers at such sales are strangers and particularly rent sales, which are of constant occurrence, should not be lightly held inoperative, inasmuch as anything which impairs the security of purchasers at such sales tends to lower the prices of properties set up for sale. (*Ross and Fazl Ali, JJ.*). BALDEO DAS *v.* NILMANI NATH. **113 I.C. 681=8 Pat. 122= 9 P.L.T. 627=A.I.R. 1928 Pat. 615.**

EXECUTION SALE—Validity of.

———*Reversioners of judgment-debtor cannot get the sale declared invalid for want of necessity.*

Where an alienee, who is an outsider, finds that the alienor's debt is a decretal debt, he need not make any further inquiry and the reversioners will not be allowed to go behind the decree. The rule is however, not applicable where it is clear that the alienee's suspicions should have been aroused by the surrounding circumstances or where it is proved that he actually had knowledge of the bad faith of the decretal transaction: 21 P.L.R. 1912, *Foll.* (*Chevis and Campbell, JJ.*). RANA SINGH *v.* RULLIA. **68 I.C. 99=3 Lah. 139= 92 P.L.R. 1922=A.I.R. 1922 Lah. 299.**

———*Sale cannot be impugned so long as decree remains valid.*

A *bona fide* auction-purchaser need look only to the decree and order of sale of the executing Court and is not bound to enquire further into the title and, so long as the decree remains valid, the proceedings taken under that decree, so far as they affect third parties in the same position as *bona fide* auction-purchasers, cannot be impugned: 29 Bom. 435 (F.B.) and 10 All. 166; 15 I.A. 12 (P.C), *Foll.* (*Le Rossignol and Campbell, JJ.*). INDAR SINGH *v.* PRABHU LAL. **66 I. C. 4= 3 Lah. 88=A.I.R. 1922 Lah. 277.**

———A *bona fide* purchaser who is not the decree-holder, or any person claiming through him, at an auction-sale in execution of a valid decree acquires a valid title to the property purchased by him and is not affected by the subsequent reversal or modification of the decree: 14 C. 18; 10 A. 166; 26 C. 734; 37 C. 107. *Foll.* (*Broadway and Martineau, JJ.*). TARA CHAND *v.* ABDUL AHAD. **67 I.C. 894 (Lah.).**

—Validity of.

———Want of attachment is a mere irregularity and does not, by itself, vitiate the execution sale. Consequently an execution sale held without attachment is not *per se* void but only can be set aside on proof of injury. (*Bhide, J.*). MAHOMED AKBAR KHAN *v.* AMAR NATH. **122 I.C. 102=12 L. L.J. 71.**

———The fact that the property was not attached before the execution sale would amount merely to an irregularity and would not make the sale void. (*Addison, J.*). MAHOMED ABDULLA *v.* JAMIAT RAI. **121 I.C. 369.**

———Relief on the ground of mistake can be given in the case of sales held through the intervention of Court. (*B.B. Ghose and N.K. Bose, JJ.*). WAZIR ALI *v.* NASIMANNESSA BIBI. **116 I.C. 634= A.I.R. 1928 Cal. 865.**

———The death of a judgment-debtor after attachment of the property and before sale does not necessarily invalidate the sale. Such a sale is good unless appropriate steps are taken to have it set aside. (*Suhrawardy and Graham, JJ.*). HARA PRASAD *v.* GOPALCHANDRA. **100 I.C. 997= 45 C.L.J. 73=31 C.W.N. 299= A.I.R. 1927 Cal. 315.**

———*Sale after death of guardian* ad litem *is not a nullity.*

A sale held in execution of a decree after the death of the guardian *ad litem* of a minor judgment-debtor without appointing a fresh guardian is not a nullity: A.I.R. 1924 Mad. 130, *Rel. on*; 23 Cal. 685, *Foll.* (*Macnair, A.J.C.*). BALDEO PRASAD *v.* KUSAM SINGH. **101 I. C. 238=23 N.L.R 146= 10 N.L.J. 27=A. I. R. 1927 Nag. 198.**

———A sale in execution is good even though at the time the sale was held the application for exe-

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cution was barred. (*Mullick and Scroop, JJ.*). LACHUMAN PANDEY *v.* DWAHI SAHU.
101 I.C. 694=8 P.L.T. 494=A.I.R. 1927 Pat. 261.

———*Stay ordered—Sale held in ignorance of the order is without jurisdiction.*

A sale held in ignorance of the order for stay passed by an appellate Court is without jurisdiction and must be set aside. An order to stay passed by an appellate Court is an order to a Subordinate Court to stay its hand and in that sense it bears no analogy to an injunction which is an order to a party to refrain from doing a certain act. The former takes effect from the time of its pronouncement and its communication is only needed to make it known to the Court which is directed to carry it out. Its force is not suspended till it is formally communicated to the Court concerned. An injunction is however binding on the party to whom it is issued from the time it is communicated for there can be no attempt unless the party concerned knows what he is required to do or to abstain from doing and a Court cannot punish a man for doing what he did not know he was forbidden to do. (*Kanhaiya Lal and Boys, JJ.*). SAHU NAND KISHORE *v.* SHADI RAM. **96 I C. 137=A.I.R. 1926 All. 457.**

———*Mere mis-description.*

A mere mis-description would not necessarily invalidate the sale but would amount to a mere irregularity if the parties concerned knew what had been attached and had been actually sold. (*Findlay, Offg.J.C.*). TIKARAM *v.* NARAYAN.
92 I.C. 44=A.I.R. 1926 Nag. 246.

———*Persons not parties to a decree—Court having no jurisdiction to sell property—Sale is void* ab initio.

Though mere irregularities of procedure in obtaining the decree or in execution thereof do not afford a sufficient ground for setting aside sales in execution, yet where the Court has no jurisdiction to sell the property in suit the sale is void *ab initio*. Persons who are not parties to a decree are not bound by it and ordinarily, therefore, a sale in execution of a decree does not operate to pass the property against any person who is not bound by the decree. (8 O.L J. 191, *Foll.*). A Court has no jurisdiction to sell the property of persons who are not parties to the proceedings or properly represented on the record. As against such persons the decrees or sales would be a nullity and might be disregarded without any proceedings being taken to set them aside : 32 Cal. 396, *Ref. to.* (*Raza, J.*). NAROTAM DAS *v.* MAHOMMAD RAZA.
96 I.C. 14=A.I.R. 1926 Oudh 522.

———*Sale beyond decree.*

Where property in excess of that ordered to be sold by a decree was auctioned.

Held, that the sale of the excess portion was absolutely illegal. (*Sulaiman and Daniels, JJ.*). GANGA DEVI *v.* RAM PRASAD. **88 I.C. 393=23 A.L.J. 558=6 L.R. A. Civ. 464=A.I.R. 1925 All. 551.**

———*Execution-sale is unauthorised if prior to it, the Court has ordered the property to be released, though the sale may be held before the Court's order is known to the Sale Amin.*

The sale of property in execution depends on the existence of the order of the Court directing it to be attached and sold. As soon as this order ceases to exist, no sale can take place and if any is held it is unauthorized and of no effect. 12 All. 96, *Foll.* (*Kotval, A.J.C.*). JITMAL *v.* ZUMBARLAL.
84 I.C. 471=20 N.L.R. 168=A.I.R. 1925 Nag. 60.

EXECUTION SALE—Validity of.

———*Decree against Hindu widow.*

When the question is as to the binding character of a sale in execution of a decree against a Hindu widow, it is the duty of the Court to go behind the decree and examine the form of the suit or possibly even the terms of the document on which the claim for the decree was based. (*Kendall and Pullan, A.J.Cs.*). MT. RAJ KUNWARI *v.* MT. RANI MAHARAJ KUNWARI.
82 I.C. 832=A.I.R. 1925 Oudh 243.

———*Sale of property not saleable under special law, is void.*

It is the duty of the execution Court to see whether it has jurisdiction to sell a certain property and therefore where a sale is prohibited by law, *e.g.*, in this case by the Bundlekhand Land Alienation Act (II of 1903), the execution Court cannot proceed with the sale even though there is a decree for its sale. In such a case no question of estoppel against the defendant really arises. If, therefore, a sale did take place under such a decree it was a mere nullity and could in no sense pass title to the purchasers. 18 A.L.J. 59, *Foll.* (*Sulaiman. J.*). SATDHAR *v.* RAM CHANDRA. **79 I.C. 532=46 All. 153=21 A.L.J. 917=4 L.R.A. Civ. 607=A.I.R. 1924 All. 261.**

———*Sale of site in a village.*

The site under the house of a non-proprietor in a village ordinarily belongs to the proprietors and its sale without the consent of the proprietary body is void and not voidable. (*Scott-Smith, J.*). AZIM KHAN *v.* KARIM. **71 I.C. 822=A.I.R. 1924 Lah. 396.**

———*Representative not on record.*

A sale does not necessarily become a nullity, in consequence of a judgment-debtor being dead and his legal representatives not being on record, when it takes place: 26 M.L.J. 267, *Diss.*; 18 L.W. 577; 43 M. 313 ; 1 L.W. 969; 11 L.W. 59; 16 L.W. 934; 16 L.W. 178 ; 46 Cal. 971 and 61 I.C. 823, *Foll.*; 43 Bom. 235 and 27 Cal. 528, *Diss.*; 42 M. 732 and 10 L.W. 410, *Dist.* (*Spencer and Devadoss, JJ.*). PARAMSIVA THEVAR *v.* PULUK RUPPA THEVAR.
77 I.C. 631=18 M.L.W. 780=1924 M.W.N. 27=33 M.L.T. 137=47 Mad. 525=A.I.R. 1924 Mad. 137=45 M.L.J. 829.

———*Sale without notice under O. 21, R. 22 may be nullity but without notice to legal representative of J—D dying just before actual sale is not a nullity—*(*Case-law discussed.*)

If any order is passed by an executing Court against a party without notice being given to him of the application which gave rise to the proceedings the party behind whose back such proceedings are taken, will not be bound by the order. Further, if process is issued without the notice, which O. 21, R. 22 prescribes in cases where the judgment-debtor is dead or the decree is more than one year old, the want of notice might constitute a material irregularity entitling a person whose interests have been affected to apply either under O. 21, R. 90 or by suit to have any sale of property that has been held upon the decree-holder's application set aside. But if the decree-holder has done all that the law requires him to do and if the judgment-debtor or one of the several judgment-debtors, where there are more than one, happens to die during the course of the execution of the sale warrants or it may be while the auctioneer is actually holding the auction, the sale is not invalidated by the accident of the owner's death before the sale is completed: 22 M. 119 ; 26 M. L. J. 267 and 41 M.L.J. 547; 6 Mad. 180 ; 15 M. 399, *Dist.*

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A decree once passed does not become barred or incapable of being executed by reason of the death of a judgment-debtor, nor do execution proceedings abate owing to the failure of the decree-holder to bring the legal representatives of a judgment-debtor on the record O. 21 R. 22 is the only provision which deals with legal representatives of parties to decrees and that only applies to the commencement of execution proceedings. The legal representatives of judgment-debtors who die during the course of processes of Court being executed are able to watch public sales without being personally served with notice. When the law only prescribes the issue of notice to them at the commencement of execution proceedings, they cannot claim as a matter of right to have fresh notice, if their representation of the deceased's estate commences during the progress of the carrying out of the processes of the Court, nor are they justified in treating such processes as invalid for want of jurisdiction on the part of the Court and its officers. A.I.R. 1922 Mad. 307, *Diss.* and 25 Bom. 337 (P C.), *Foll.* (*Spencer and Krishnan, JJ.*). DORAISWAMI *v.* CHIDAMBARAM PILLAI. **75 I.C 46=47 Mad. 63=18 M.L.W. 577=1923 M.W N. 817=33 M.L.T. 25=A.I.R. 1924 Mad. 130=45 M.L.J. 413.**

———*Irregularity in attachment does not nullify sale.*

When sale has been duly held, without material irregularity or fraud, it cannot be considered a nullity merely by reason of flaw in the attachment or even the entire absence of an attachment. Similarly an attachment which was duly made in all except some minor detail of which the judgment-debtor had no knowledge at all, must be considered a valid attachment for all purposes. Even if the order of attachment was not subsequently posted in the Collector's office, that will not in any way invalidate or affect the attachment. (*Hallifax, A.J.C.*). JODHAN *v.* KAPIL NATH. **69 I.C. 563=A.I.R. 1923 Nag. 78.**

———*Failure to attach.*

The failure to attach the property before sale does not render the sale null and void. It may amount to material irregularity but is not sufficient unless substantial injury is caused thereby, to vitiate the sale. A Court has jurisdiction to sell without attachment under S. 51 of the Civil Procedure Code. (*Dawson-Miller, C.J. and Mullick, J.*). WAZIR NARAIN SINGH *v.* BHIKARI RAM. **68 I. C. 363=3 P L.T. 765=1922 P.H.C.C. 321=2 Pat. 207=A.I.R. 1923 Pat. 45**

———*Sale day fixed by District Judge—Temporary injunction by Subordinate Judge—Refusal by District Judge to stay sale—Sale is invalid and High Court will restore* status quo ante.

Where the District Judge fixed a certain date for the sale of the property alleged to belong to the judgment-debtor, and the claimant of the property instituted in the Court of the Subordinate Judge a suit for declaring the property to be his own in which he obtained an *ad interim* injunction restraining the decree-holder from selling the property but the District Judge refused to stay the sale,

Held, although the District Judge was not personally bound by the order of injunction, yet in the exercise of his inherent powers he should have directed that the sale should not take place, the decree-holder having been restrained by injunction from proceeding with the sale. The District Judge should not have assisted a party to commit a contempt of the Court once the injunction is granted

EXECUTION SALE—What passes under.

the High Court is bound to see that the order of the Court is carried out (*Dawson-Miller, C. J. and Mullick, J.*). MAHARAJ BAHADUR SINGH *v.* A. H. FORBES. **70 I.C. 394=1922 P.H C.C. 225=3 P. L. T. 645=1 Pat. 662=A.I.R. 1922 Pat. 382.**

———*Final decree in the absence of deceased mortgagor—Jurisdiction of person to sell property of person not on record—Sale is a nullity.*

In a mortgage suit against a major defendant and a minor defendant represented by the major defendant, the major defendant died before the final decree and his legal representatives were not brought on the record nor a fresh guardian appointed to represent the minor. The plaintiff applied for and obtained a decree absolute and brought the property to sale. The minor, on attaining majority, brought the present suit for a declaration that the decree absolute and the proceedings were void,

Held, that as the defendant was not properly represented on the record, the present plaintiff was entitled to the declaration he sought.

A Court has no jurisdiction to sell the property of persons who are not parties to proceedings before it, or properly represented on the record. As to such persons a decree or sale purporting to be made under it would be a nullity and might be disregarded without any proceedings to set it aside. (*N. R. Chatterjee and Panton, JJ.*). RUHINI NANDAN GHOSE *v.* RAJENDRA NATH GHOSE. **61 I.C. 291 (Cal.).**

—What passes under.

———*Moveable property wrongly sold—True owner can recover from purchaser.*

In a sale of moveable property under a decree of Court all that is sold is the right, title and interest of the judgment-debtor; and the real owner, if not the judgment-debtor can bring a suit to recover the moveable property or its value from the auction-purchaser in the same manner as he would be entitled to recover from the judgment-debtor: 9 W. R. 118, *Foll.* (*Brown, J.*). MAUNG PA *v.* ABDUL GANI. **97 I.C. 1029=4 Rang. 202=A.I.R. 1926 Rang. 214.**

———*Mortgage-decree—Sale-purchaser acquires interests of both mortgagor and mortgagee—Alienee of property, subsequent to mortgage sued on not made a party to suit—Decree does not bind him—Purchaser cannot get* khas *possession as against such alienee but he can sue for sale of the property.*

At a sale in execution of a mortgage-decree, the interests of both the mortgagor and the mortgagee pass to purchasers: 22 Bom. 945, *Rel. on.*

Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they have not been made parties: 18 Cal. 164 (P.C.), *Rel. on.* The subsequent transferee has to be afforded an opportunity to redeem. He is not, however, entitled to anything more by reason of the fact that he had not been impleaded. This omission can neither improve his possession nor the reverse: 26 All. 464, *Rel. on.*

The purchaser at a mortgage sale has no right to sue for *khas* possession of the property as against a transferee of the equity of redemption who was not a party to the suit on the mortgage but his only remedy is to bring a suit against such transferee for sale: 6 Cal. 317, *Foll.* (*Rutledge, C.J. and Maung Ba, J.*). MA KIN KYAW *v.* R. C. DAY. **97 I. C. 243=4 Rang. 96=A.I.R. 1926 Rang. 183.**

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———*Sale.*

The expression "all moneys due from tenants in respect of arrears of rent" where proprietary rights are purchased in execution includes also any rent decree obtained against the tenants prior to the sale. 25 C.W.N. 863, *Foll. (Suhrawardy and Cuming, JJ.).* JATINDRA NARAIN BHADURI *v.* CHANDRA NATH PRAMANIK.

87 I.C. 742=A.I.R. 1925 Cal. 1247.

———*Subject to equities.*

A purchaser at a sale in execution of a decree purchases the property subject to all the equities of the judgment-debtor and he cannot take up the position of a *bona fide* purchaser for value without notice. (*Newbould and Ghose, JJ.*). J. C. GALSTAUN *v.* SONATAN PAL. **78 I.C. 668= A.I.R. 1925 Cal. 485.**

———*Subject to all equities.*

The purchaser at an auction sale in execution of a decree of a Civil Court purchases the property subject to all the equities affecting the judgment-debtor. (*Jwala Prasad and Kulwant Sahay, JJ.*). NAGENDRA NATH *v.* SAMBHU NATH.

88 I.C. 219=3 Pat. 947=6 P.L.T. 769= A. I. R. 1925 Pat. 106.

———*Mortgage-decree.*

The interest of a purchaser at a sale held in execution of a mortgage decree is certainly more than merely the interest of the judgment-debtor. (*Ayling and Venkatasubba Rao, JJ.*). SUNDARAM IYAR *v.* THIYAGARAJA PILLAI. **99 I. C. 831= A. I. R. 1923 Mad 160=50 M. L. J. 183.**

———For determining what passes to a purchaser in an execution sale the test is what the Court intends to sell and what the purchaser understands that he bought. The question of what the Court could, or should, have sold does not arise: 10 Mad. 241 (P. C.); 27 Mad. 131, *Foll.* (*Baker, Offg. J. C.*). SAKHARAM *v.* GITABAI.

75 I. C. 823=A. I. R. 1923 Nag. 333.

———*Mortgage-decree—Lease by mortgagor not binding.*

Where a lease is granted by the mortgagor after the date of the mortgage, it is not binding on any person who may acquire any rights in the properties in enforcement of the mortgage. An auction-purchaser in execution of a mortgage decree gets the right, title and interest of the mortgagor as on the date of the mortgage and any lease subsequent to the date of mortgage is not binding on him. (*Kanhaiya Lal, J. C.*). MT. BIBI SAIDUNNESSA *v.* FAIYAZ HASAN. **69 I. C. 97=9 O. L. J. 319= A. I. R. 1923 Oudh 1.**

———*Mortgagee—Auction-purchaser.*

There is no difference between a person who purchases, by private treaty and a person who acquires by a sale under a mortgage decree property from the mortgagor. The mortgagee, auction-purchaser stands in no better position against a stranger than the mortgagor himself. (*Dawson Miller, C. J. and Jwala Prasad, J.*). BASANTA KUMARI DASI *v.* BALMAKUND MARWARI. **72 I.C. 912= 1923 P. H. C. C. 1=2 Pat. 277=1 P. L. R. 338= A.I.R. 1923 Pat. 371.**

———*D. Register and* Khatian *not reconcilable—Sale certificate should be looked into.*

Where the D. Register could not be reconciled with the *Khatian* and *Khewat* and where the words "Pach Gunda Minjumle das gunda Pokhta" were used in execution proceedings.

Held, that the only guide to the solution of the doubt as to what actually passed under the sale, is to look into the inventory of the properties attached to the application for execution, the sale certificate and the writ for delivery of possession. (*Coutts and Adami, JJ.*). RASIK BEHARI PRASAD CHAUDHARI *v.* HIRDENARAIN CHOUDHURI.

A.I.R. 1923 Pat. 30.

EXECUTOR —Accounts.

———The general rule applicable to sales in execution of decrees is that no man can transfer to another a better title than he himself possesses. (*Dawson-Miller, C.J. and Coutts, J.*). KALI DAYAL *v.* UMESH PRASAD. **65 I.C. 266= 1922 P. H. C. C. 33=1 Pat. 174= 3 P.L.T. 506=A. I. R. 1922 Pat. 63.**

———Where a *waqf* is created of the value of certain immovable property but before anything is done, the property is sold in execution of a decree against the trustee, the purchaser gets a good title to the property. (*Mears, C.J. and Banerji, JJ.*). MUHAMMAD ISMAIL *v.* MUHAMMAD ISHAQ.

62 I.C. 904=43 All. 508=19 A.L.J. 452= A.I.R. 1921 All. 224.

———*Decree for rent by Revenue Court—Sale in execution—Defendant subsequently held in another proceeding entitled to hold rent-free—Sale passes no title.*

There is a very great distinction between sales in execution of Civil Court decrees and sales by the revenue Courts for arrears of assessment. If it were found that as a matter of fact the defendant in the revenue proceedings was entitled to hold his lands free of assessment, any sale which took place on the footing that he was bound to pay assessment would be invalid and that the purchaser in such a sale would not acquire a good title even against the judgment-debtor except by adverse possession: 25 Cal 833, *Foll.*; 29 Bom. 435, *Dist.* (*Macleod, C.J. and Heaton, J.*). MAHADAN NARAYAN *v.* SADASHIV KESHAV. **59 I.C.118= 45 Bom. 45=A.I.R. 1921 Bom. 257.**

—Miscellaneous.

———*Successive purchasers—Priority.*

An auction-purchaser who during the pendency of a maintenance suit by a Hindu widow of an item of property over which a charge was claimed in the plaint and was granted by the decree purchased in execution of a simple money decree binding on the joint family is not entitled to priority over another auction-purchaser of such property in proceedings taken to execute the maintenance decree. (*Wallace and Ananthakrishna Ayyar, JJ.*). SEETHARAMANUJA CHARYULU *v.* VENKATASUBBAMMA. **1930 M.W.N. 625=32 L.W. 416= A.I.R. 1930 Mad. 824=59 M.L.J. 485.**

———*Stranger—Property of, sold in execution and put in the possession of decree-holder.*

Where in execution of a decree the property of a person unconnected with the suit is brought to sale and he is ousted and possession given to the auction-purchaser such person is entitled to be replaced in the position in which he was when ousted. The mere fact that the auction-purchaser's remedy has, in the meantime, become barred by time makes no difference. (*Tudball and Sulaiman, JJ.*). RAM CHARAN SAHU *v.* GOGA.

60 I.C. 120 (All.).

EXECUTOR.

See also (1) ADMINISTRATOR.
(2) PROB. & ADMN. ACT.

—Accounts.

———*Suit for—No relief sought against one executor—Other executors not taking objection cannot raise objection at later stage.*

In a suit for accounts against executors the plaintiff did not seek any relief against one of them

EXECUTOR—Accounts.

on the ground that the executor had taken no part in the management, though he made him a party. The other executors too did not raise the objection in the written statement or at the time of the framing of the issues or during argument that he was a necessary party to any order to account that might be passed. An order for rendering accounts was made against the others.

Held, that although *prima facie* all the surviving executors should be made parties to a suit for accounts and the order for accounts ought *prima facie* to be made against them all yet in the circumstance of the case the other executor could not be allowed at a late stage to insist on the executor omitted being joined in the order. (*Rankin, C. J. and B. B. Ghose, J.*). KANTI CHANDRA TARAFDAR *v.* RADHA RAMAN SARKAR.

34 C.W.N. 275=A.I.R. 1930 Cal. 461.

———*Option to implead representatives of executors who have died.*

In a suit for accounts against executors of a will it is optional on the part of the plaintiff to implead the representatives of the executors who have died. (*Rankin, C.J. and B. B. Ghose, J.*). KANTI CHANDRA TARAFDAR *v.* RADHA RAMAN SARKAR.

34 C.W.N. 275=A.I.R. 1930 Cal. 461.

—Assets.

———*What is.*

Property acquired with assets, that come into the hands of the executor at the time of the death of the testator, is as much assets of the testator as that which was in his possession at the time of his death. *Abbott* v. *Parfitt*, 6 Q. B. 346, *Ref.* (*Jack and Mitter, JJ.*). RAJENDRA NARAYAN BASU *v.* DEBENDRA NATH MUKHOPADHYA.

123 I.C. 241=50 C.L.J. 70=A.I.R. 1930 Cal. 55.

—De son tort.

———The mere taking away of a portion of the property of a deceased man does not make the person who takes away a portion of the property while there is a legal representative present, an executor *de son tort*. (*Sanderson, C. J. and Chakravarti, J.*). SATYA RANJAN *v.* SARAT CHANDRA.

96 I.C. 695=30 C.W.N. 565=A.I.R. 1926 Cal. 825.

———Where a person has been permitted by the executor to obtain possession of part of the assets of the testator he will not be executor *de son tort* to the original testator or of the executor, even if he retained those assets after the executor's death when there is no personal representative of either. (*Odgers, J.*). GOPALA CHETTY *v.* NARAYANASWAMI CHETTY.

95 I.C. 33=23 M.L.W 528=A.I.R. 1926 Mad. 681.

———*Necessary party.*

An executor by implication having taken upon himself the duties of an executor in connection with the estate of the deceased continues liable to be sued in the character of executor, and is a proper and necessary party to any proceedings in which the estate of the deceased is sought to be affected. If he is not made a party, the estate is not bound by any decree passed in that suit (*Scott-Smith and Forde, JJ.*). KESAR SINGH *v.* INDER SINGH.

76 I.C. 172=6 L.L.J. 454=A.I.R. 1924 Lah. 543.

—Discharge.

———*Becomes* functus officio *on complete administration.*

Quaere—When an express power of sale is given to an executor to be exercised by him when he thought it necessary, does it cease to operate when the executor on a complete administration of the

EXECUTOR—Powers.

estate ceased to be an executor. (*Mulla, J.*). DE SOUZA *v.* K. R. DAPHTARY.

87 I.C. 230=25 Bom. L.R. 610=A.I.R. 1924 Bom. 252.

—Exhibition of bad temper—No disqualification.

———A mere exhibition of bad temper and levelling foolish charges against the man whom the testator had appointed ought not to be allowed to prevent the nominee from becoming the executor in the ordinary way. (*Rankin, C. J. and C. C. Ghose, J.*). BAIDYANATH SEIN *v.* RAJENDRANATH SEIN.

52 C.L.J. 66.

—Powers.

———When an executor deals with a property of the estate, it must be presumed that he was acting in that capacity, notwithstanding that this fact does not appear on the face of the document. The person advancing money under the document need not enquire as to its application. *In re Ven & Furze's Contract*, (1894) 2 Ch. 101 and *Colyor* v. *Finch*, (1854) 5 H.L.C. 905, *Appl.* (*Venkatasubba Rao, J.*). NARAYANASWAMI *v.* RAMASWAMI.

109 I. C. 47=28 M. L. W. 372=A. I. R. 1928 Mad. 817=54 M.L.J. 677.

———*Will giving power to borrow—They can hypothecate if necessary.*

Where by the will the executors were given powers to borrow for the purpose of management and cultivation of the property,

Held, that it was the testator's intention that they should, if they found it necessary or expedient, be entitled to hypothecate the property in order to raise money for those purposes as if they were absolute owners. (*Dawson Miller, C.J. and Mallick, J.*). E. M. TOOMEY *v.* BHUPENDRA NATH.

111 I. C. 57=7 Pat. 520=A.I.R. 1928 Pat. 304.

———*Executor holds property with right of testator—Property vests in residuary legatee only after administration is complete.*

An executor as such is the owner of the properties of the testator and holds these properties in the right of the testator and not in the right of the beneficiaries. The result is that in all the cases coming within the Hindu Wills Act or the Probate Act the executor or the administrator as such is the legal representative of the deceased and statutory owner of property except such as would otherwise have passed by survivorship to some other person. The residuary legatee does not become proprietor until after the administration has been completed and his interest thus ascertained. This interest is subject to the payment of debts and legacies and the discharge of other trusts contained in the will. No doubt he is beneficially interested in the estate subject to these payments and the discharge of these trusts; but he is not proprietor except when a residue has been ascertained, which on completion of administration is made over to him by the executor. Halsbury's "Laws of England", Vol. 14, p. 217, *Ref.* (*Das and Ross, JJ.*). HON'BLE MAHARAJA BAHADUR KESHO PRASAD SINGH *v.* MADHO PRASAD SINGH.

83 I.C. 812=3 Pat. 880=5 P.L.T. 513=A.I.R. 1924 Pat. 721.

———*Promissory note—Note does not bind estate except in case of necessity.*

It appears to be settled law that, upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally, and cannot be sued as an executor so as to get execution against the assets of the testator. 7 Ch. 123, *Foll.*; 24 Cal. 77, *Dist.*

EXECUTOR — Renunciation whether can be retracted.

An exception to the above rule is recognised in case there is a necessity to borrow money for the purpose of the estate. (*Daniels, A.J.C.*). B. ANANT RAM *v.* NATIONAL BANK OF UPPER INDIA, LTD.
66 I. C. 116=9 O. L.J. 94= A.I.R. 1922 Oudh 20.

—Renunciation whether can be retracted.

———An executor is not necessarily concluded by a renunciation once declared and he can retract his renunciation at any time before a grant of administration has passed the seal. (*Mukerji and Guha, JJ.*). NIGENDRA CHANDRA SEN *v.* MOHENDRAHARI NAG. **34 C.W.N. 939.**

—Right to be indemnified.

———*Executor purchasing testator's putni with testator's assets in execution of money decree—Rent falling in arrears—Zamindar bringing suit for rent—Zamindar is entitled to rent and if executor is discharged, testator's property is liable for it.*

A putni was sold in execution of money decree against a putnidar testator. The executor appointed by the testator putnidar under the will, purchased it with assets that came into his hands on the death of the testator. The proprietor of the zamindari under which the putni in question was held brought a suit for recovery of arrears of rent due to default in payment of the same for years 1328 and 1329 B.S. The proprietors had already purchased the putni at a sale held under Regn. 8 of 1819, for arrears of rent for 1330 B.S. So he could not execute the rent decree by sale of putni and was therefore compelled to execute it against the assets. During the period for which the rent was claimed the estate was under the management of executorship but the executor was discharged before the institution of the suit. It was contended that the heirs of the testator were not liable for rent as the rent for which the suit was instituted accrued due during the period when the estate was under the management of the executor and as the putni was already sold the executor was personally liable. It was not shown that the putni did not bring any income during the period when it was in possession of executor,

Held, (i) that the executor was entitled to be indemnified out of the testator's estate against the liabilities which he had properly incurred and (ii) that the proprietor with whom the executor had contracted to pay rent stood in the shoe of executor and would have the same indemnity as the executor had against the testator's estate and could realise his dues out of the assets of the testator. *Raybold* v. *Turner*, 1 Ch. 199 and *Dowse* v. *Gorton*, (1891) A.C. 190, *Ref.* (*Jack and Mitter, JJ.*). RAJENDRA NARAYAN BASU *v.* DEBENDRA NATH MUKHOPADHYA. **123 I.C. 241=50 C.L.J. 70= A. I. R. 1930 Cal. 55.**

—Title.

———*Probate does not create title but from death title vests in executor.*

Every executor derives his title from the will and not from the probate. The probate is indeed the only proper evidence of the executor's appointment but notwithstanding this it is clear that the executor represents the estate of the testator from the time of his death. 14 C.W.N. 256, *Diss.* (*Lindsay and Sulaiman, JJ.*). MEGHRAJ *v.* KRISHNA CHANDRA BHATTACHARJI. **78 I.C. 243= 46 All. 286=22 A.L.J. 193= 5 L.R.A. Civ. 193=A.I.R. 1924 All. 365.**

EXECUTRIX.

See EXECUTOR.

EXPLOSIVES ACT (1884), S. 7—Rules under—R. 35 (1914)—Onus.

EX PARTE.

See (1) CIV. PRO. CODE, S. 9, R. 13.
(2) JUDICIAL PROCEEDINGS.

EX PARTE CASES.

See (1) CIV. PRO. CODE, O. 9.
(2) PRACTICE.

EX PARTE DECREE.

See (1) CIV. PRO. CODE, O. 9.
(2) PRACTICE.

EX PARTE JUDGMENT.

See (1) CIV. PRO. CODE, O. 9.
(2) PRACTICE.

EX PARTE ORDER ABSOLUTE.

See CIV. PRO. CODE, O. 34.

EX PARTE PROCEEDINGS.

See CIV. PRO. CODE, O. 9.

EXPECTANCY.

See T. P. ACT, S. 6.

EXPENSES OF WITNESSES.

See CIV. PRO. CODE.

EXPERT.

See EVIDENCE ACT, SS. 45, 50.

EXPERT EVIDENCE.

See EVIDENCE ACT, S. 45.

EXPERT OPINION.

See EVIDENCE ACT, S. 45.

EXPLOSIVES ACT (4 of 1884).

—S. 5—Rules under—R. 138—Liability.

———*Servant of licensed master manufacturing gunpowder in master's house without latter's knowledge or consent—Master is liable for servant's act.*

The accused held a license under the Indian Explosives Act to manufacture gunpowder. One of the conditions of the license was that the explosive shall be manufactured in a tent or lightly constructed building exclusively appropriated for the purpose and separated from any dwelling house. The accused constructed a building outside the village, which complied with this condition, and employed a woman who used to work exclusively in this building. One day the woman with her assistant went with ingredients for manufacturing gunpowder to the house of the accused in the village, and performed part of the process of manufacture there with pestles having iron rings without the knowledge of their master and while he was engaged elsewhere. During the process of manufacture there was explosion and the woman was killed and her assistant was injured,

Held, (Per *Fawcett and Crump, JJ.* contra *Shah, J.*)—that the act of the woman, though unauthorized, was one within the scope of her employment and the accused, her master, would be liable for her wrongful act. (*Case law Discussed.*) (*Crump, J. On difference between Shah, and Fawcett, JJ.*). EMPEROR *v.* MAHADEVAPPA HANMANTAPPA.
100 I. C. 972=51 Bom. 352=29 Bom. L.R. 153= 28 Cr. L. J. 364=7 A.I. Cr. R. 489= A. I. R. 1927 Bom. 209.

—S. 7—Rules under—R. 35 (1914)—Onus.

———Where a person is accused of having taken delivery of consignments described as "fire works" in contravention of R. 35, the burden of proving that these were explosives such as are covered by the Explosives Rules is upon the prosecution and the mere fact that the accused took possession of and signed for a consignment which was described as fireworks does not amount to an admission by him that these were explosives such as are within

EXPLOSIVES ACT (1884), S. 7—Rules under—Rr. 35 and 47.

the purview of these rules. (*Beasley, C. J. and Pandalai, J.*). POLAKI CHIDAMBARAM *v.* EMPEROR. **1930 Cr. C. 762=3 M. Cr. C. 59=1930 M.W.N. 73=A.I.R. 1930 Mad. 678.**

—Rules under—Rr. 35 and 47.

———*Toy fireworks—Onus.*

Held that the Rules under the Explosives Act do not apply to the manufacture, possession, etc., toy fireworks, and that no offence was committed by reason of such acts.

Held also that the burden of proving that certain articles were explosives is clearly on the prosecution and that the mere fact that the accused took possession of and signed for a consignment which was described as fireworks does not amount to an admission by him that they were explosives such as are within the purview of the rules. (*Beasley, C. J. and Krishna Pandalai, J.*). CHIDAMBARAM *v.* EMPEROR. **1930 M. W. N. 73.**

EXPLOSIVE SUBSTANCES ACT (6 of 1908).

—S. 3—"Maliciously."

———*Word used in legal sense.*

"Malice" in the legal acceptance of the word is not confined to personal spite against individuals but consists in a conscious violation of the law to the prejudice of another. In its legal sense it means a wrongful act done intentionally without just cause or excuse. It is in the legal sense that the word "maliciously" is used in S. 3. *Bromage* v. *Prosser*, 4 B. and C. 247, *Rel. on.* (*Fforde and Addison, JJ.*). BHAGAT SINGH *v.* EMPEROR. **121 I. C. 726=31 P.L.R. 73=31 Cr. L. J. 290=A. I. R. 1930 Lah. 266.**

—Ss. 4 and 7—Consent.

———*Committal consent not obtained—Proceedings not void.*

The failure to obtain necessary consent of Government as required by S. 7 does not invalidate the commitment proceedings conducted by a Magistrate for an offence under S. 4 and exclusively triable by the Sessions Court as the committal proceedings are only an "inquiry" as defined in Cl. (*k*) of S. 4 of the Criminal P. C. (*Fawcett and Madgavkar, JJ.*) EMPEROR *v.* KALLAPPA DUNDAPPA. **99 I. C. 37=50 Bom. 695=28 Bom. L.R. 1290=28 Cr. L. J. 5=7 A. I. Cr. R. 161=A. I. R. 1927 Bom. 21.**

—S. 4—Maliciously.

———*A person not knowing existence of explosives cannot be said to possess it maliciously.*

Not only does the term "possession" imply knowledge, but the expression "maliciously" as used in S. 4, connotes intention. But neither knowledge, nor intention as to the use to be made of an object, can be imputed to a person who is not conscious of its existence. (*Shadi Lal, C.J. and Agha Haidar J.*). DULA SINGH *v.* EMPEROR. **109 I.C. 209=9 Lah. 531=10 A.I. Cr. R. 235=29 Cr. L.J. 481=10 L.L.J. 408=29 P.L.R. 629=A.I.R. 1928 Lah. 272.**

—S. 4—Possession.

———*Presumption of, with head of the family—When arises.*

Where the portion of a house in which an article is found is not in the exclusive possession of any one member of the joint family, but is used by, or accessible to, all the members of the family there is no presumption that the article is in the possession or control of any person other than the housemaster or the head of the family. But it is open to the prosecution to prove that the possession was

EXTRADITION ACT (1903)—Foreign state.

with some other member of the family, and that member would then be liable to account for it: 15 All. 129, *Foll.* (*Shadi Lal, C.J. and Agha Haidar, J.*). DULA SINGH *v.* EMPEROR. **109 I.C. 209=10 A.I. Cr. R. 235=29 Cr. L J. 481=9 Lah. 531=10 L.L.J. 408=29 P.L.R. 629=A.I.R. 1928 Lah. 272.**

—S. 5—Offence under.

———*Temporarily residing in the house is no offence.*

Per *Suhrawardy, J.*—Temporary residence in a house containing explosive articles, even with the knowledge of their existence there, is not possession within the meaning of S. 5, Explosives Act. Conspiracy to possess connotes some act of possession or attempted possession. (*Buckland, Suhrawardy and Cammiade, JJ.*). HARI NARAYAN CHANDRA *v.* EMPEROR. **106 I.C. 545=46 C.L.J. 368=29 Cr. L.J. 49=9 A I. Cr. R. 228=A. I. R. 1928 Cal. 27.**

EXPRESS MALICE.

See (1) MALICIOUS PROSECUTION.
(2) TORT.

EXPRESS TRUST.

See (1) TRUST.
(2) TRUSTS ACT.

EX-PROPRIETARY HOLDING.

See (1) LANDLORD AND TENANT.
(2) OCCUPANCY HOLDING.

EX-PROPRIETARY TENANCY.

See AGRA TENANCY ACT.

EX-PROPRIETOR.

See AGRA TENANCY ACT.

EXPUNGING FROM RECORD.

See (1) CIV. PRO. CODE, S. 151.
(2) PRACTICE.

EXTENSION OF TIME.

See CIV. PRO. CODE, Ss. 148, 151 AND O. 34.

EXTINGUISHMENT OF CHARGES.

See (1) B. T. ACT, Ss. 159-163.
(2) T. P. ACT, S. 101.

EXTINGUISHMENT OF RIGHT.

See (1) LIMITATION ACT, S. 28.
(2) MERGER.
(3) T. P. ACT, S. 101.

EXTORTION.

See PENAL CODE, Ss. 383-389.

EXTRADITION ACT (15 of 1903).

—Construction.

———Extradition Act and Criminal Procedure Code both being penal enactments their terms must be strictly construed in favour of accused persons wherever such construction can be reasonably justified. (*Mirza and Baker, JJ.*). BAI AISHA, *In re.* **117 I.C. 321=53 Bom. 149=31 Bom. L.R. 62=30 Cr. L.J. 772=A.I.R. 1929 Bom. 81.**

—Foreign state.

———*Pondicherry—Treaties between Great Britain and France,* 1815 *and* 1876—*Surrender of British Indian subject for theft committed in Pondicherry—Summary order for surrender—Validity—Indian Extradition Act, Chap. II—Applicability.*

The East Indian possessions of France are not a "Foreign State" and Chap. II of the Indian Extradition Act of 1903 do not apply to those possessions. Extradition in such cases is governed by the treaty of 1815 between Great Britain and France. Article (ix) of the treaty of 1815 remains unaffected by Art. (xvi) of the treaty of 1876 and a British Indian subject may on requisition by the Governor of Pondicherry for instance be surrendered for the offence of theft committed therein without any preliminary procedure being adopted. The treaty of 1815 having provided that the surrender

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should be on demand, a more elaborate procedure cannot be superimposed by the unilateral act of one of the high contracting parties. Nor is it open to a Muuicipal Court to say that the accused should be surrendered with a certain amount of procedure: 47 C. 37, *Foll.*; 48 C. 328, *Expl.* (*Wallace and Jackson, JJ.*). MUTHU REDDI *v.* EMPEROR.
1930 M.W.N. 381.

———*Chandernagore is a Foreign State.*

Chandernagore is a Foreign State as defined by the Extradition Act, 1903. (*Buckland, J.*). CELESTE CULLINGTON, *In re.* **63 I C. 819=48 Cal 328=22 Cr. L. J. 691=A.I.R. 1921 Cal. 273.**

—S. 7—Revision.

———*Order of District or Chief Presidency Magistrate executing warrant under S. 7 can be revised.*

Execution by the District Magistrate (or the Chief Presidency Magistrate) in British India of a warrant under S. 7 of Extradition Act is not an executive act. The Magistrate has judicially to consider the matter and decide whether the warrant can be executed according to law and the order of the Magistrate is subject to the revisional powers of the High Court. The order can also be interfered with under S. 561-A. On proper proceedings being taken High Court can also interfere under S. 491 : 42 Cal. 793, *held too widely stated*; 7 Bom. L.R. 463; 41 Cal. 400 and A.I.R. 1922 Pat. 442, *Rel. on.* (*Mirza and Baker, JJ.*). BAI AISHA, *In re.*
117 I.C. 321=53 Bom. 149=31 Bom. L.R. 62=30 Cr. L.J. 772= A.I.R. 1929 Bom. 81.

—S. 7—Warrant.

———*Magistrate need not enquire as to its legality.*

Section 7 lays down that the Magistrate to whom the warrant is addressed shall act in pursuance thereof and does not require him to take evidence ; hence it is no part of his duty to ascertain whether the warrant issued under S. 7 was a legal warrant; 3 P. R. (Cr.) 1909, *Rel. on.* (*Martineau, J.*). HANS RAJ *v.* CROWN. **95 I C. 275=7 Lah. 159=27 P.L.R. 319=27 Cr.L.J. 755=A.I.R. 1926 Lah. 411.**

———A warrant of extradition signed by the Assistant British Envoy of Nepal Court is not valid where the officer is not empowered as a Political Agent within S. 7. (*Adami and Bucknill, JJ.*). SADHAK GIR *v*, EMPEROR. **81 I. C. 175=25 Cr.L. J. 687=A. I. R. 1925 Pat. 112.**

———*Absconding from jail in Nepal State—Extradition warrant sent by British Envoy at Nepal to District Magistrate in British India is without jurisdiction and cannot be acted upon by Magistrate—High Court can interfere with order of Magistrate.*

Absconding from jail is not one of the offences mentioned in first Schedule. Therefore S. 7 has no application at all to a warrant issued by the British Envoy at the Court of Nepal for the arrest of a person who has absconded from a jail in Nepal and has come into Br. India. Such a warrant is without jurisdiction. Section 10 of the Act could only apply, if the warrant is wholly illegal and without jurisdiction. Therefore the arrest is without any authority.

Section 15 of the Act empowers the Government of India and the Local Government to stay any proceedings taken under Chapter III of the Act and to direct any warrant to be cancelled and the person arrested to be discharged. But that does not necessarily oust the jurisdiction of High Court to interfere in a case where the action under the Act has not been taken under a valid warrant. This section ousts the jurisdiction of High Court to inquire into the propriety of the warrant but leaves

EXTRADITION ACT (1903), S. 18—Extradition.

open the question of High Court's power to interfere with a Magistrate's action, if it was proved that such action was consequent upon a warrant issued by a Political Agent which was plainly illegal. The procedure for requisitioning the surrender of any person accused of having committed any offence not necessarily an extradition crime is laid down in S. 9 of the Act but the requisition of such a case has to be made "to the Government of India or to any Local Government". Where no such requisition is made the warrant addressed to the Dt. Magistrate cannot possibly be supported under S. 9. (41 C. 400 ; 18 C. W. N. 869; 14 Cr. L. J. 673). If the treaty between British and Nepal Governments prohibits extradition for offences not specified therein, such prohibition overrides the provisions of the schedule by virtue of S. 18, but there is no such prohibition in the Treaty and therefore S. 9 does not in any way derogate from the provision of the Treaty. The Act practically enhances the power of the Nepal Government to requisition the authorities in the British territories to arrest and deliver fugitive offenders of their territory : 39 C. 164; 7 Bom. L. R. 463, *Foll.* (*Jwala Prasad and Ross, JJ.*). JAIPAL BHAGAT *v.* EMPEROR. **66 I.C.517=1 Pat. 57=3 P.L.T. 786=23 Cr. L.J. 293=A.I.R. 1922 Pat. 442.**

—S. 8—Bail.

———On an arrest of a person in Berar by or at the instance of Nizam's police once the warrant from the Nizam's state authority has been received the Magistrate has no power to admit to bail even under the Extradition Act except under Ss. 8 and 8 (*a*) and therefore unless the Nizam's authority directs bail to be taken, the Magistrate can only do so if he reports the case to the Local Government: 43 Bom. 310 at 320, *Ref.* (*Baker, Offg. J. C.*). DADDIPRASAD *v.* DISTRICT MAGISTRATE, YEOTMAL. **77 I.C. 234=25 Cr. L. J. 346=A.I.R. 1924 Nag. 313.**

—S. 10—Bail.

———Magistrate has power to grant bail to an accused who has been arrested in pursuance of S. 54 (7) of the Criminal P. C. whom, he has been asked to retain in custody, by the Dt. Magistrate of a Native State.

Per *Fawcett, J.*—As S. 57 (7) does not apply to arrests in Bombay, when the accused is arrested without warrant in Bombay, he must be deemed to have been arrested under S. 33 (g). But even in such a case under S. 23 of the Extradition Act, the Magistrate has power to grant bail. (*Marten and Fawcett, JJ.*). SHRIRAM SHAMBHUDAYAL, *In re.* **87 I.C. 100=26 Cr. L J. 948=26 Bom. L.R. 984=A.I.R. 1925 Bom. 104.**

—S. 18—Extradition.

———*Scope of.*

There is no derogation of the rights of the parties to the treaty by allowing one Government with the consent of the other to obtain extradition of a criminal who has committed an offence not mentioned in the treaty. A Government or a State is entitled if it so wishes, to hand over persons subject to the law of another State at the request of that State. In such a case there is no derogation to the Sovereign rights of either power. All that S. 18 provides is that the Act shall not work against the will of either party so as unduly to impose any liability on such party. It does not prevent their co-operation in a friendly action according to the comity of nations. (*Kennedy, J. C. and Raymond, A.J.C.*). JAMNA *v.* EMPEROR. **91 I.C. 69=20 S.L.R. 128=27 Cr.L.J. 37=A.I.R. 1926 Sind 126.**

EXTRADITION ACT (1903), S. 23—Bail.

—S. 23—Bail.

———*Power to grant.*

Magistrate has power to grant bail to an accused who has been arrested in pursuance of S. 54 (7) of the Cr. P.C., whom he has been asked to retain in custody, by the Dt. Magistrate of a Native State.

Per *Fawcett, J.*—As S. 54 (7) does not apply to arrests in Bombay, when the accused is arrested without warrant in Bombay, he must be deemed to have been arrested under S. 33 (*g*). But even in such a case, under S. 23 of the Extradition Act, the Magistrate has power to grant bail. (*Marten and Fawcett, JJ.*). SHRIRAM SHAMBHUDAYAL, *In re*, **87 I.C. 100=26 Bom. L R. 984=26 Cr. L.J. 948=A.I.R. 1925 Bom. 104.**

EXTRADITION TREATY (1867).

—Surrender of accused.

———*Surrender of accused is to be made on requisition being sent through Commissioner of Berar.*

When an accused person is arrested in Berar by or at the instance of Nizam's Police he is kept by the Berar Police till a requisition is received by the District Magistrate for his surrender. This requisition is sent by the Nizam's authority the Talukdar to the District Magistrate through the Commissioner of Berar, together with the evidence of criminality. The District Magistrate on receiving the requisition from the Commissioner surrenders the accused person. On no account may he comply with a requisition made direct to him by the Nizam's authorities. No time limit is laid down and there is no necessity of a warrant from the Political Agent. (*Baker, Offg. J.C.*). DADDI PRASAD *v.* DISTRICT MAGISTRATE, YEOTMAL.
77 I.C. 234=25 Cr.L.J. 346=A.I.R. 1924 Nag. 313.

EXTRAORDINARY ORIGINAL CIVIL JURISDICTION OF HIGH COURT.

See RESPECTIVE HIGH COURT RULES.

EXTRA TERRITORIALITY.

See JURISDICTION.

EXTRA TERRITORIAL JURISDICTION.

See (1) CR. P. CODE, S. 188.
(2) PENAL CODE, SS. 2, 3 AND 4.

EXTRINSIC EVIDENCE.

See EVIDENCE ACT, S. 92, ETC.

FABRICATED DOCUMENT.

See PENAL CODE.

FABRICATING FALSE EVIDENCE.

See PENAL CODE, SS. 193 AND 114.

FACT, FINDING OF.

See CIV. PRO. CODE, S. 100.

FACTOR.

See CONTRACT ACT, SS. 171 AND 182.

FACTORIES ACT (12 of 1911).

—Construction.

———*Position both of employee and employers should be looked to.*

Factory Acts should be properly enforced for the protection of workmen but on the other hand one must also bear in mind that the employer's position has to be considered too. It may be that without any negligence on their part defects will exist in their factories but if they are to be proceeded against in a Criminal Court for alleged negligence, then it would seem only fair that the matter should be clearly brought home to them. (*Marten and Fawcett, JJ.*). NARAYAN ANANT *v.* EMPEROR. **85 I.C. 226=26 Bom.L.R. 1245=26 Cr.L.J. 482=A.I.R. 1925 Bom. 143.**

FACTORIES ACT (1911), S. 2—Occupier.

—S. 2—"Employed."

———Persons employed merely for selling the manufactured articles do not come within the definition of "employed," even though they happen to occupy a room at the factory for the sake of convenience. (*Addison and Skemp, JJ.*). PRAG NARAIN *v.* CROWN. **109 I.C. 599=8 Lah. 666=29 P.L.R. 234=29 Cr. L.J. 583=A.I.R. 1928 Lah. 78.**

—S. 2—Interruption.

———Interruption must be taken in connexion with each individual employed and not confined to the general cessation of work and it is more reasonable to interpret the section as meaning actual work and not merely residence in the factory for a certain number of hours. (*Dalal, J.*). KAMLAPAT *v.* EMPEROR. **11 L.R.A. Cr. 42=1930 A.L.J. 459=A. I. R. 1930 All. 214.**

—S. 2—Factory.

———*Gurhal Ghar is a factory.*

A Gurhal Ghar is a factory within the meaning of S. 2 (3) (*a*), Factories Act, even though the engine shed is a separate building and less than twenty persons are employed therein but over twenty persons are employed in the Gurhal Ghar inclusive of those employed on the crushers and those employed in the boiling shed, and these latter must be said to be employed both "on the premises and within the precincts of the Gurhal Ghar." A.I.R. 1927 Mad. 345, *Rel. on.* (*Mirza and Broomfield, JJ.*). GANPAT DATTU *v.* EMPEROR. **32 Bom. L.R. 329=A. I. R. 1930 Bom. 162.**

———Mechanical power used only in aid of manufacturing process—Persons simultaneously employed in premises exceeding twenty—It is a factory. (*Mirza and Broomfield, JJ.*). GANPAT DATTU *v.* EMPEROR. **32 Bom. L. R. 329=A.I.R. 1930 Bom. 162.**

———Railway workshops are factories within the meaning of the Act. (*Johnstone, J.*). INDAR SINGH *v.* SECY. OF STATE. **119 I. C. 722=A.I.R. 1929 Lah. 573.**

———*Meaning of.*

By a factory is meant premises where anything is done towards the making or finishing of an article up to the stage when it is ready to be sold or is in a suitable condition to be put on the market. (*Addison and Skemp, JJ.*). PRAG NARAIN *v.* CROWN. **109 I.C. 599=8 Lah. 666=29 P.L.R. 234=29 Cr. L.J. 583=A. I. R. 1928 Lah. 78.**

———*Premises or precincts within which mechanical power is used for manufacture are factory.*

A factory includes everything, mechine rooms, sheds, godowns, yards. If within these premises or precincts mechanical power is used in aid of any process for altering for transport or sale of any article, than these premises or precincts are a factory.

The drying yard used for drying ground-nuts, where machinery for decorticating the ground-nuts was working was held to be a part of factory although there was no connexion with machinery or any work incidental to the manufacturing process: 101 L. T. 571, *Dist.* (*Jackson, J.*). V. RAMANATHAM *v.* KING EMPEROR. **100 I.C. 235=50 Mad. 834=25 M.L.W. 176=38 M.L.T. 78=28 Cr. L. J. 267=7 A. I. Cr. R. 448=A.I.R. 1927 Mad. 345=52 M. L.J. 207.**

—S. 2—Occupier.

———The definition of 'occupier' in the Factories Act is not an exhaustive definition and there is

FACTORIES ACT (1911), S. 18—Procedure.

nothing in it which in any way limits the normal meaning of the word 'occupier' as indicating a person who is in actual possession and control of a factory. (*Fawcett and Madgavkar, JJ.*). GAMADIA *v.* EMPEROR. **91 I.C. 949=50 Bom. 34=27 Bom. L. R. 1405=27 Cr. L. J. 165=A.I.R. 1926 Bom. 57.**

—S. 18—Procedure.

———*' Service of notice.'*

The numerous provisions in the Procedure Code for service of notices or orders are intended to make it certain that a particular process or an order of the Court is brought to the specific notice of the individual affected A mere knowledge that proceedings may be instituted or something of that sort is not sufficient to take the place of the imperative directions in the Code as to service on the actual individual. The words in S. 18 (2) "serve on the manager an order in writing" mean that such an order as is referred to in Form O should be served definitely on the manager of the factory: and that it should specify exactly what measures the manager is to take in order to remove the danger. But a mere note of a visit is not such an order as is contemplated therein. (*Marten and Fawcett, JJ.*). NARAYAN ANANT *v.* EMPEROR. **85 I.C. 226=26 Bom. L. R. 1245=26 Cr. L. J. 482=A. I. R. 1925 Bom. 143.**

—S. 20—Partition.

———The provisions of S. 20 are not fulfilled if there is a door made in a partition between the two portions of the room and that door is shown to be open at a particular time, or even although it is shut, yet it is not locked or other effective means taken to prevent its being opened by a woman or child wishing to get into the press room. (*Fawcett and Madgavkar, JJ.*). GAMADIA *v.* EMPEROR. **91 I. C. 949=50 Bom. 34=27 Bom. L. R. 1405=27 Cr. L. J. 165=A. I. R. 1926 Bom. 57.**

—S. 23—Children.

———Even in the case of a child of fourteen there is need for a certificate under S. 23, Cl. (a). (*Mirza and Patkar, JJ.*). EMPEROR *v.* GOKULDAS HARIDAS. **117 I.C. 447=31 Bom L. R. 544=30 Cr. L. J. 793=A.I.R. 1929 Bom. 272.**

———Where children were employed for purposes of sorting ground-nuts in a yard close to a room where machinery for decortication of ground-nuts was used,

Held, that the children were employed in a factory. (*Jackson, J.*). V. RAMANATHAM *v.* KING EMPEROR. **100 I. C. 235=50 Mad 834=25 M.L.W. 176=38 M.L.T. 78=28 Cr. L.J. 267=7 A.I. Cr. R. 448=A.I.R. 1927 Mad. 345=52 M.L.J. 207.**

—S. 24—Employment of women.

———*General prohibition—Legality.*

All that the law authorises the Inspector to do in the case of a ginning factory is to express his opinion and not to issue orders. The Inspector has no right to issue a general prohibition against the employment of women at night without going into the question whether the staff is sufficient. (*Rafique and Stuart, JJ.*). COCALAS *v.* EMPEROR. **61 I.C. 225=19 A.L.J. 503=22 Cr.L.J. 369=A. I. R. 1921 All. 229.**

—S. 26—Offence under.

———Where men work during a time which is admittedly outside the time fixed for employment of each person employed in the factory, the owner of the factory is guilty under S. 26. (*Dalal, J.*). KAMLAPAT *v.* EMPEROR. **11 L.R.A.Cr. 42=1930 A.L.J. 459=A.I.R. 1930 All. 214.**

FACTORIES ACT (1911), S. 42—Scope.

—S. 27—Employment of women.

———Ginning factory—Employment of women at night—Inspector's opinion not obtained—Employment is technically an offence—Smallest fine should be imposed. (*Rafique and Stuart, JJ.*). COCALAS *v.* EMPEROR. **61 I.C. 225=19 A. L. J. 503=22 Cr.L.J. 369=A.I.R. 1921 All. 229.**

—S. 28—Working system.

———*Cancellation of approval—Appeal — Prosecution pending appeal—Desirability of.*

Where an Inspector of Factories approves a system of working a particular factory, he has power under S. 21 of General Clauses Act to cancel the approval. If an appeal is pending from the order of cancellation it is not desirable to institute a criminal prosecution in respect of the factory having been worked in contravention during the pendency of the appeal. (*Abdul Raoof, J.*). MADAN MOHAN LAL *v.* EMPEROR. **59 I.C. 857=22 Cr. L. J. 153 (Lah.).**

—S. 34—Liability.

———*Liability of manager and occupier.*

The duty to inform the authority under the Factories Act under S. 34 is laid on the manager. It is therefore primarily the manager who is to be supposed to have contravened this provision of the Act, but both the occupier and manager are made responsible jointly and severally for this contravention under S. 41-J. (*Tek Chand, J.*). WAZIR CHAND *v.* EMPEROR. **A.I.R. 1930 Lah. 658.**

—S. 34—' Person.'

———The word " person " includes the plural and consequently where as a result of a single accident more persons than one are injured the accident cannot be split up into as many persons injured and notice contemplated is single notice of the accident which the manager is required to submit to the authorities and therefore contravention of this rule is one offence which cannot in its turn be split up into as many offences as the number of casualties. (*Tek Chand, J.*). WAZIR CHAND *v.* EMPEROR. **A. I. R. 1930 Lah. 668.**

—S. 41—Fine.

———*Amount.*

As S. 41 is a penal section, it ought to be construed strictly. The occupier and manager both or either of them can be required to pay a fine which may extend to Rs. 200, but between the two they cannot be required to pay any sum exceeding Rs. 200 for each offence. (*Shah and Crump, JJ.*). VRIJBALLUBDAS JEKISONDAS *v.* EMPEROR. **43 Bom. 220=A.I.R. 1921 Bom. 322.**

—S. 41—Liability.

———If more than one person is unlawfully employed the manager and agent are liable for as many offences as there are persons so employed. (*Shah and Crump, JJ.*). VRIJBALLUBDAS JEKISONDAS *v.* EMPEROR. **43 Bom. 220=A.I.R. 1921 Bom. 322.**

—S. 42—Scope.

———The structure of S. 42, Factories Act, indicates that one proceeding is split up into two proceedings and while the manager or occupier is accused of having committed an offence under the Act, he is also a complainant on his complaint against the other person or persons he has brought in. In the proceeding in which the manager or the occupier is the complainant he is liable to be cross-examined by the other person or persons who has or have been brought before the Court on his complaint. This must mean that the manager or occupier *qua* complainant must give evidence

FACTORIES ACT (1911)—S. 42—Scope.

himself. There is no substance in the objection that the manager or occupier who initially is charged with an offence against the Act cannot go into the witness-box and give evidence himself, because he goes into the witness-box not as an accused in the case originally started against him, but in his own right as a complainant on his complaint against the other person or persons whom he has brought in. It is not a material irregularity to dispose of the two matters by one judgment or to record the evidence in the two matters together. (*C. C. Ghose and Gregory, JJ.*). SUPT. & REMEMBRANCER OF LEGAL AFFAIRS *v.* MURRAY. **117 I.C. 673= 30 Cr. L.J. 818=56 Cal. 400= 32 C. W. N. 922= A.I.R. 1928 Cal. 557.**

FACTUM VALET.

See HINDU LAW—(1) ADOPTION.
(2) MARRIAGE.

FAIR COMMENT.

See PENAL CODE, Ss. 499 AND 500.
TORT—DEFAMATION.

FAKIR.

See MAHOMEDAN LAW.

FALSE ALLEGATION.

See PENAL CODE, S. 193.

———Charge.

See PENAL CODE, Ss. 182, 211.

———Complaint.

See (1) CRIM. PRO. CODE,
(2) CRIMINAL TRIAL.
(3) PENAL CODE.

———Document.

See PENAL CODE, Ss. 464, 467.

———Entry.

See PENAL CODE, S. 477.

———Evidence.

See PENAL CODE, Ss. 191—200.

———Information.

See PENAL CODE, Ss. 182—211.

———Measure.

See PENAL CODE, S. 267.

———Personation.

See PENAL CODE, Ss. 205, 416, 419.

———Receipt.

See PENAL CODE, Ss. 463 AND 471.

———Statement.

See PENAL CODE, Ss. 191—200.

———Weight.

See PENAL CODE, S. 267.

FALSE IMPRISONMENT.

See TORT.

FAMILY ARRANGEMENT.

Arbitration.
By Limited owner.
Consideration.
Construction of.
Effect.
Essentials and Test.
Marriage Settlements.
Parties.
Setting aside.
What are family arrangements.
Writing stamp and registration.
Miscellaneous.

—Arbitration.

———*Award in favour of person not party to reference—Binding nature of.*

The co-heirs of a Mahomedan referred the division of the properties to arbitration. One of the co-heirs requested that some of the properties falling to his share must be awarded to his minor son who was not a party to the submission and the properties were likewise awarded to him:

FAMILY ARRANGEMENT—Consideration.

Held, that a family arrangement was the result and that the benefit of the award could be claimed by the minor though he himself was no party to the submission to the arbitration, and that the minor acquired title to the properties. (*Devadoss, J.*). DADA SAHIB *v.* GAJRAJ SINGH.
85 I.C. 258=20 M.L.W. 854= A.I.R. 1925 Mad. 204=47 M.L.J. 928.

———*Award—Enforceability as family arrangement.*

Where one party to the award led another to believe to his prejudice that he is going to abide by the award he is estopped from contesting it. The fact that he signed the award does not however by itself render it more binding on him: 6 C. P. L. R. 95, *Foll.* It has always been the policy of Courts of equity to uphold family settlements, even when they are not in legal form: 43 All. 1 and 42 Cal. 801, *Foll.* (*Baker, Offg. J. C.*). CHOWDHURI MANOHARLAL *v.* MT. AMANO.
77 I.C. 41=A.I.R. 1924 Nag. 14.

———*Award and family arrangement—Validity—Principles underlying.*

The principles under which the validity of an arbitration should be judged are more rigid than those which apply when a family agreement is under consideration. There is ample authority indicating that in some instances in which, although as an arbitration proceeding the result of an award cannot be supported, it is still capable of support on the ground, that the award represented what is in effect the outcome of a family compromise. Even assuming that much greater latitude may be extended to the support of a family arrangement than is the case in maintaining an award under an arbitration, nevertheless, where a reversionary interest is in fact affected by a family arrangement, such a compromise cannot be supported. Much more so when the reversionary interest is that of a minor. *Case-law discussed.* (*Bucknill and Ross, JJ.*). RAM BAHADUR SEN v. MAHANTH GANESH BHAGAT. **73 I.C. 542=2 Pat. 554= 5 P.L.T. 255= A. I. R. 1924 Pat. 49.**

—By limited owner.

———The circumstance that a party to a settlement was a limited owner at the time would not make it any the less binding if the other requisites of validity of the settlement are present. (*Mukerji and Bose, JJ.*). KHANTA MOYEE DEBI *v.* HRIDAYANANDA BHATTACHARJEE.
118 I.C. 566=48 C.L.J. 489= A.I.R. 1929 Cal. 149.

———Hindu Law—Limited owner making family arrangement—Reversioner obtaining possession of portion of estate—Reversioner is estopped from claiming as such afterwards. (*Lindsay, J. C.*). JAGESHAR *v.* BHUSHAN. **24 O. C. 5= A.I.R. 1921 Oudh 134.**

—Consideration.

———Converting an expectancy into certainty and avoiding chance of litigation in future is good consideration for family arrangement. (*Mukerji and Bennet, JJ.*). POKHAR SINGH *v.* MT. DULARI KUNWAR. **A. I. R. 1930 All. 687.**

———A family arrangement may be executed to avoid future disputes even if they have not already arisen. (*Ashworth, J.*). RAMESHWAR RAI *v.* SHEOPAL RAI. **117 I.C. 822 (All.)**

———*Claims adjudged and disputes settled is sufficient consideration for upholding the family settlement.*

FAMILY ARRANGEMENT—Consideration.

———It is a wrong principle of law to test the validity of the agreement by having recourse to the expedient of finding out whether the claims of the parties to the agreement were good. The true test is whether the parties had laid any claim against each other and whether those claims had been settled by virtue of the agreement termed the "family settlement." If a settlement was arrived at, the strength or validity of the claims of the parties has nothing to do with the validity of the family settlement. The fact that the claims of the parties had been adjudged and that the disputes between them had been settled would amount to a sufficient consideration for the upholding of the family settlement: A. I. R. 1927 Oudh 572, *Appr.* and *Foll.* (*Misra and Nanavutty, JJ.*). SITAL SINGH *v.* GAJINDRA BAHADUR SINGH.
116 I.C. 59=4 Luck. 57=5 O.W.N. 1022=
A. I. R. 1929 Oudh 373.

———*Active contest is not necessary.*

Although at the time when a family settlement is made there was no active contest, still the mere fact that at that time the parties agreed among themselves that they would not dispute each other's claims in respect of certain property is sufficient to establish the fact that a valid and binding family settlement took place between them: A.I.R. 1927 Oudh 572, *Expl.* (*Wazir Hasan, Ag. C.J. and Pullan, J.*). BALBHADDAR SINGH *v.* SHAMSHER SINGH. **115 I.C. 197=6 O.W.N. 109=**
A. I. R. 1929 Oudh 305.

———*Avoiding possible or anticipated dispute is sufficient consideration.*

In order to have a valid family settlement it is not necessary that there must be a dispute in existence at the time when such settlement is arrived at. It may be that the members of the family may anticipate disputes likely to arise thereafter and if in order to prevent the arising of such disputes and to secure peace and happiness in the family they arrive at a settlement among themselves, the settlement arrived at must be deemed to be valid: 22 O.C. 300, *Foll.* (*Misra and Srivastava, JJ.*). AMEER HASAN *v.* MD. EJAZ HUSAIN. **117 I.C. 456=6 O.W.N. 51=**
A. I. R. 1929 Oudh 134.

———The family arrangement or settlement is ordinarily resorted to in the interests of the whole family when recourse to it is essential to protect the family property from the extravagance of a particular member of the family, or to make a suitable provision for a female member of the family: 6 All. 560 (P.C.), *Ref.* (*Kolhatkar, A.J.C.*). MAHADEO *v.* GANESHRAM. **113 I.C. 373=**
A. I. R. 1928 Nag. 308.

———*Pending litigation or prospects thereof are not necessary.*

It is not necessary that there should be a pending litigation or a prospective litigation in order that an arrangement may be considered a good family arrangement. The principle underlying the family arrangement extends not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but to cases in which arrangements are made between them for the preservation of its property: *Williams* v. *Williams*, (1867) 2 Ch. A. 294, *Foll.* (*Devadoss, J.*). SADASIVAM PILLAI *v.* SHANMUGAM PILLAI. **98 I.C. 268=25 M.L.W. 119=**
A.I.R. 1927 Mad. 126.

———Bona fide *claim.*

If there is a *bona fide* claim by a member of the family to the property in dispute, although it might turn out in the end that there was no substance in it, an arrangement come to by all the members of the family to settle that claim is a valid arrangement and will be binding upon all the parties concerned: A.I.R. 1921 Pat. 260; A.I.R. 1924 Pat. 736 and 33 All. 356 (P. C.), *Foll.* (*Ross and Kulwant Sahay, JJ*). GAJADHAR PRASAD *v.* LACHUMAN LAL SAHU. **103 I.C. 354=**
8 P.L.T. 759=A.I.R. 1927 Pat. 339.

FAMILY ARRANGEMENT—Construction of.

———A family arrangement requires some consideration and under the guise of a family arrangement a party cannot enter into a transaction which he is not under the law competent to do and which may be beyond his disposing power.

Where a Hindu widow gave away part of her husband's estate to the presumptive reversioner,

Held, that in the circumstances the gift could not be supported as a family arrangement. (*Suhrawardy and Cuming, JJ.*). INDRA NARAIN MANNA *v.* SARBASOVA DASI. **87 I.C. 930=41 C.L.J. 341=**
A.I.R. 1925 Cal. 743.

———*Compromise of disputed claims.*

Wherever doubts and disputes have arisen with regard to the rights of the different members of the same family, and fair compromises have been entered into to preserve the harmony and affection, or to save the honour of the family, those compromises will be sustained by the Court, although, perhaps, resting upon grounds which would not have been considered satisfactory if the transaction had occurred between strangers. But it must be established that the right compromised could at least have formed the subject-matter of a claim though a doubtful claim. (*Das and Adami, JJ.*). BHAGWATI KOER *v* JAGDAM SAHAY.
62 I.C. 933=2 P.L.T. 471=6 P.L.J. 604=
A.I.R. 1921 Pat. 260.

—Construction of.

———*Deed must be construed as a whole.*

Deeds of family settlement are of a nature peculiarly their own and the rule of interpretation which would be applicable to pure deeds of transfer cannot be permitted to be applied in the case of such deeds. The deed of family settlement must be read as a whole and the intention of the parties must be gathered from the various provisions contained therein and such intention should be respected. (*Stuart, C.J. and Gokaran Nath Misra, J.*). AHMAD AZIM *v.* SHAFI JAN. **97 I.C. 897=**
2 Luck. 335=3 O.W.N. Sup. 102=
A.I.R. 1926 Oudh 561.

———In the case of family settlements, conditions may be inserted therein, which would not be valid in the case of ordinary deeds, under the ordinary law, but such conditions in the deed would be valid and enforceable, when forming a part of such family settlement: (*Case law cited.*)

Under a family settlement a talukdar granted some villages to his brothers in lieu of maintenance and in the deed of settlement it was stated that the villages given to each of the brothers were to be given to them in perpetuity for ever, generation after generation with proprietary powers. The words used in the vernacular being "*waste dawam wa hamesha ka naslan bad naslan batnan wa batnan bad batnan ba akhtilar malikana*". It was further laid down that if no male issue was born to a Guzaradar then the female issue would be allowed maintenance, and the widow of Guzaradar was to remain in possession of the entire property, without power of alienation during her lifetime, and after her death the property was to be divided among the surviving brothers,

FAMILY ARRANGEMENT—Effect.

Held, that the words "*naslan bad naslan*" and "*batnan bad batnan*" indicated an idea not to make a guzara resumable after the death of the particular grantee but to make it heritable and heritable only by the lineal male descendants, and such male lineal descendants would be covered by the expressions " *naslan* " (progeny) and " *batnan* " (womb).

The estate conferred upon each of the brothers was an estate in its inception of an absolute character, but heritable only by the male lineal descendants of the grantee and by his widow for her lifetime in case there was no such descendant, and descendible to his surviving brothers after the death of the widow. (*Stuart, C.J. and Gokaran Nath Misra, J.*). AHMAD AZIM *v.* SHAFI JAN.

97 I.C. 897=2 Luck. 335=3 O.W.N. Sup. 102= A.I.R. 1926 Oudh 561.

—Effect.

———Malabar Law—Karar by the manager assented to by other members—Karar is binding on the manager and comes to end on his death : 5 L. W. 511 and 32 M. L. J. 323, *Foll.* (*Wallace, J.*). ACHIPRE *v.* ACHIPRE. **105 I.C. 101= 1927 M W.N. 553=A.I.R. 1927 Mad. 887.**

——The essence of a family arrangement lies in an adjustment of conflicting claim *bona fide* made and recognized on both sides with the laudable object of putting an end to a controversy. If it were permissible to raise and to obtain a trial of the issue as to title in a subsequent litigation and obtain a finding thereon and then to determine in favour of the validity of the arrangement if it falls in line with the finding no compromises will hold good in the end : A.I.R. 1927 Oudh 97, *Foll.* (*Stuart, C.J. and Wazir Hasan, J.*). MAHABIR *v.* DWARIKA. **103 I. C. 757=4 O W. N. 663= A.I.R. 1927 Oudh 572.**

———Compromise in settlement of claim of doubtful nature is binding on parties. (*Sulaiman and Boys, JJ.*). MOTI SHAH *v.* GHANDHARP SINGH. **96 I. C. 595=48 All. 637=24 A.L.J. 873= A. I. R. 1926 All. 715.**

———Settlement of doubtful rights is binding on all parties—*Spes successionis* cannot be dealt with—Contingent right may be dealt with by turning it into vested right by means of surrender: 42 Mad. 523, *Foll.* (*Stapleton* v. *Stapleton*, 21 L. J. Ch. 434). (*Phillips and Ramesam, JJ.*). RAMA AIYAR *v.* NARAYANASAMI AIYAR. **96 I.C. 483=23 M.L.W. 496=1926 M.W.N. 958= A.I.R 1926 Mad. 609=51 M.L.J. 313.**

———A family arrangement is binding as much on the parties thereto as on their sons and descendants. (*Lindsay and Kanhaiya Lal, JJ.*). BUDH SAGAR *v.* BISHUN SAHAI. **86 I.C. 554= 47 All. 327=23 A.L.J 141= A.I R. 1925 All. 366.**

———A settlement of controversy between two persons may amount to a transfer from one to the other. But where the compromise is based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is, there is no such transfer: 3 Agra H.C. Rep. 82; L.R.I.A. 157 (P.C.) and 33 All. 356 (P.C.), *Foll.*

Where settlement creates no title by transfer in favour of any one of the parties to it, but the interest which the persons obtain under the terms of the settlement is in virtue of the recognition of the antecedent claim of each by the other or others, and where one of the parties has founded his claim on his right to succeed by inheritance under an alleged rule of custom, his land is " inherited " within the meaning of Oudh Civil Digest, para 179 (a). (*Wazir Hasan and Simpson, A.J.Cs.*). AMEER MIRZA BEG *v.* UDIT PERSHAD. **90 I.C. 779=2 O.W.N. 816= A I.R. 1925 Oudh 709.**

FAMILY ARRANGEMENT—Essentials and test.

———Where the several conditions of the deed of settlement constitute elements of consideration moving from one party towards another and thereby resulting in the entire settlement, and where the compromise intends to, and does as a matter of fact, settle the disputes amongst the several members of the family, it must be held that every one of the parties to the compromise is bound to fulfil the obligations which he undertakes to do in regard to any other party to the same settlement. They are not only bound to do so, but that they cannot be permitted to do otherwise: 40 All. 487 (P.C.), *Ref.* (*Wazir Hasan, A.J.C.*). AMIR ALI *v.* IQBAL ALI. **61 I.C. 312=24 O.C. 22= 8 O.L.J. 287=A.I.R. 1921 Oudh 112.**

—Essentials and test.

———For a family arrangement to be good it is not necessary that there should be a family dispute which has to be settled or composed. A family arrangement to be good need not necessarily be a " Compromise of doubtful rights." *Williams* v. *Williams*, (1867) 2 Ch. 294, *Foll.* (*Mukerji and Bennet, JJ.*). POKHAR SINGH *v.* MT. DULARI KUNWAR. **125 I.C. 1=1930 A.L.J. 688= A.I.R. 1930 All. 687.**

———*Existence of dispute* in praesenti *is not necessary but doubtful claim is essential.*

The existence of a doubtful claim is essential for a family settlement but the existence of a dispute or controversy *in praesenti* is not, and a family settlement may be supported on the ground of maintaining peace and goodwill amongst the members or the family, for the preservation of the family honour or of the family property and for the avoidance of disputes and litigation in future. (*Sen and Niamatullah, JJ.*). RAGHUBIR *v.* NARAIN. **A.I.R. 1930 All 498.**

———A family arrangement entered into to avoid the occurrence of disputes in future and not of actually existing disputes is valid. (*Ashworth, J.*). RAMESHWAR RAI *v.* SHEOPAL RAI. **117 I.C. 822 All.**

———For a compromise to be binding it is necessary that the parties should have been parties to the compromise or should claim under or through such parties or should have acted on it or derived some benefit under it. Further the parties to the compromise should *bona fide* consider that there is a question to be decided between them, for no compromise would be good if it ultimately turned out that there was no doubt upon the point which was made the subject of the compromise, and again it must be an honest settlement of an existing dispute which must not be manifestly *ultra vires* of the parties to settle : 2 M.I.A. 181 (P.C.); 13 M.I.A. 497 (P.C.); 7 M.I.A. 311 (P.C.); 14 M.I.A. 24 (P.C.); 20 Cal. 373 (P.C.); 26 Cal. 81 (P.C.) and 33 All. 356 (P.C.), *Ref.* (*Mukerji and Bose, J.*). KHANTAMOYEE DEBI *v.* HRIDAYANANDA BHATTACHARJEE. **118 I.C. 566=48 C.L.J. 489= A.I.R. 1929 Cal. 149.**

———It is the object and purpose of a transaction which determines whether it has the character of a family arrangement or settlement. That character is not determined by the mere fact of its being consented to by the other members of the family. (*Kolhatkar, A.J.C.*). MAHADEO *v.* GANESHRAM. **113 I.C. 373=A. I. R. 1928 Nag. 308.**

FAMILY ARRANGEMENT—Essentials and test.

———Where a family arrangement had been fairly entered into without concealment or imposition on either side, with no suppression of what is true or suggestion of what is false, although the parties might have greatly misunderstood the situation and mistaken their rights, it will be upheld: 10 C.L.J. 503. *Foll.* (*Devadoss, J.*). SADASIVAM PILLAI *v.* SHANMUGAM PILLAI. **98 I.C. 268= 25 M.L.W. 119=A.I.R. 1927 Mad. 126.**

———In considering the question as to whether a deed of family arrangement is a valid deed, one has to consider the benefit to the family as a whole and not to the individual members thereof. (*Ross and Kulwant Sahay, JJ.*). GAJADHAR PRASAD *v.* LACHHUMAN LAL SAHU. **103 I.C. 354= 8 P.L.T. 759=A.I.R. 1927 Pat. 339.**

———The test of a family arrangement is that it constitutes the recognition of a pre-existing title and not that the parties derive any title from each other. There might be a withdrawal of any gratuitous admission, unless there is some obligation not to withdraw it and a mere consent to the entry of the name of another in the revenue papers does not create any such obligation: 1 O.L.J. 81, *Ref.* (*Raza, J.*). MT. PHULJHARI *v.* HAR PRASAD. **93 I.C. 378=1 Luck. 318=3 O.W.N. 181= 13 O.L.J. 548=A.I.R. 1926 Oudh 338.**

———A family arrangement cannot be effected by mere conduct, apart from any explicit agreement. A *bona fide* dispute is also essential. (*Wazir Hasan and Ashworth, A.J.Cs*). AMJAD KHAN *v.* ASHRAF KHAN. **87 I.C. 445=2 O.W.N. 83= 28 O.C. 265=A.I.R. 1925 Oudh 568.**

———A family arrangement to be operative must be without fraud. It would not be supported if founded in mistake of either party to which the opposite party was accessory or if either party has been misled by the concealment of material things; for the essence of the matter is mutual communication of all relevant circumstances. (*Mookerjee and Buckland, JJ.*). SATISH CHANDRA GHOSE *v.* KALIDASI DASI. **68 I.C. 577=26 C.W.N. 177= 34 C.L.J. 529=A.I.R. 1922 Cal. 203.**

—Marriage settlement.

———*A* executed a marriage settlement in view of the marriage of his son *B* under which *B*'s wife *C* took a life-interest after *B*'s death. Subsequently *C* obtained a divorce from *B*. After *B*'s death the question arose whether *C* still took life-interest under the settlement.

Held, that *C*'s rights under the settlement were not forfeited by the dissolution of the marriage: *Flitzgerald* v. *Chapman*, (1875) 1 Ch.D. 563, *Rel. on*; 20 Bom. 718, *Dist.* (*Baker, J*). AIMAI HORMUSJI WADIA *v.* JAMSHEDJEE JEEJEEBHOY, BART. **A.I.R 1930 Bom. 481.**

———*Child's portion—Vesting of—Presumption.*

Unless there is anything to the contrary, the presumption in marriage settlements is that a child's portion vests at marriage in the case of a daughter and at majority in the case of a son unless there is anything to the contrary. (*Twomey, C.J. and Young, J.*). COHEN ESTHER *v.* E. I. COHEN. **59 I.C. 806=10 L.B.R. 196=13 Bur. L.T. 78.**

—Parties.

———*Minors—Binding nature of.*

Even in the case of a Mahomedan family if the family arrangement is a fair and equitable one it should not be rejected simply on the ground that the minors were not represented by a properly constituted guardian of theirs at the time when the arrangement was arrived at. If the interests of the minor children are fully safeguarded and if all

FAMILY ARRANGEMENT—Setting aside.

the adult members of the family accept the arrangement it should be held binding on the minors: 33 All. 256 (P.C.); 3 Agra H.C.R. 82 and A.I.R. 1922 P.C. 356, *Appl.* (*Misra and Srivastava, JJ.*). AMEER HASAN *v.* MD. EJAZ HUSAIN. **117 I.C. 456= 6 O.W.N. 51=A.I.R. 1929 Oudh 134.**

———*All members need not join for arrangement to be valid.*

It is not necessary that in order to make a valid and binding family arrangement all the members of the family must be parties to it. If some members of the family settle their disputes by arriving at a settlement among themselves there is no reason why that settlement should not be considered to partake of the nature of family arrangement. (*Gokaran Nath Misra, J.*). TEJ BAHADUR KHAN *v.* NAKKOKHAN. **99 I.C. 472= 3 O.W.N 993=A.I.R. 1927 Oudh 97.**

———*Father can enter on behalf of minor sons.*

The father, as the natural guardian of his minor sons, is fully competent to enter into a family arrangement on their behalf and in considering whether there was sufficient consideration for the agreement the Court will not be disposed to scan with much nicety the amonnt of the consideration. *William* v. *Williams*, (1867) 2 Ch. 294, *Rel. on*. (*Ross and Kulwant Sahay, JJ.*). GAJADHAR PRASAD *v.* LACHHUMAN LAL SAHU. **103 I.C. 354= 8 P.L.T. 759=A.I.R. 1927 Pat. 339.**

———A family arrangement is one arrived at by members of the same family. The mere fact that an agreement is entered into by persons who are relations of each other does not make such an agreement a family settlement so as to be binding on persons who are not even parties thereto. (*Mears, C.J. and Sulaiman, J.*). MITTER SAIN *v.* DATA RAM. **90 I.C. 1000=24 A.L.J. 185= A.I.R. 1926 All. 194.**

———*Parties must belong to same family.*

Per *Lindsay, J.*—Family arrangements are arrangements arrived at by members of the same family in settlement of doubtful claims, cases in which, there being uncertainty as to the rights of the various claimants, the dispute is composed by a settlement based upon the acknowledgment of pre-existing title in the parties concerned. There must be a dispute, the parties must belong to the same family, and the property which constitutes the subject-matter of the dispute must be the property of the family to which the parties belong. An arrangement made by a Hindu widow with the person whom she is going to adopt, before the adoption, is not a family arrangement. (*Lindsay and Mukerjee, JJ.*). MITAR SAIN *v.* DATA RAM. **87 I.C. 724=A.I.R. 1926 All. 7.**

—Setting aside.

———A family arrangement stands on a different footing from an ordinary contract. A settlement of doubtful claims or rather what the parties believed to be doubtful claims, without the worry and expense of litigation might itself be sufficient consideration for such an arrangement. The fact that there is no other consideration to support the arrangement or that it transfers the property to a person without any right, is not a sufficient ground for setting it aside: 8 Cal. 138, *Rel. on.* (*Bhide, J.*). MT. ICHHNUN *v.* BANWARI LAL. **114 I.C. 711= A.I.R. 1929 Lah. 16.**

———Where agreement of family arrangement was recorded in the *wajib-ul-arz* prepared at the time of the settlement and its terms were acted upon since then, it is not open to the parties to raise any question regarding the validity of the agreement:

FAMILY ARRANGEMENT—Setting aside.

A.I.R. 1924 P.C. 27 ; A.I.R. 1916 P. C. 9 ; A.I.R. 1927 Oudh 162 and A.I.R. 1927 Oudh 570, *Foll.* (*Misra and Nanavutty, JJ.*). SITAL SINGH *v.* GIJINDRA BAHADUR. **116 I. C. 59= 4 Luck. 57=5 O.W.N. 1022= A.I.R. 1929 Oudh 373.**

———*Grounds for.*

An agreement as to division of the family property can be set aside where the heir gives up property to which he had undoubted rights without consideration or where he was ignorant or without professional assistance, even though there was no evidence of fraud or undue influence : A.I.R. 1924 Pat. 49, *Foll.* (*Brown and Chari, JJ.*). TAFUZZAL AHMAD *v.* MAUNG SHWE KYI.

A. I. R. 1929 Rang. 335.

———Where a compromise is no longer to be regarded as a merely executory agreement, but is accepted and worked on by parties, such a family compromise should not on grounds of equity and good conscience be disturbed unless there are strong and valid reasons for doing so. (*Findlay, J.C.*). MT. ANJIRA BAI *v.* ANNAPURNA BAI.

109 I. C. 624=11 N. L. J. 133= A. I. R. 1928 Nag. 254.

———*Strong evidence is necessary to set it aside.*

When a family arrangement is brought about in the interests of the members of a family, it would require very strong grounds to set it aside at the instance of any one of the parties to the arrangement. (*Devadoss and Waller, JJ.*). SUBBARAJU *v.* NARAYANARAJU. **97 I. C. 232=24 M. L. W. 716= A. I. R. 1926 Mad. 1093=51 M.L.J. 366.**

—What are family arrangements.

———Where several members of a family arrive at a settlement each one relinquishing his claim in respect of the property not falling to his share and recognizing the rights of the others as they had previously asserted it to the portions allotted to them respectively, the transaction should be looked upon as a family arrangement and not as a transfer from one member to the other member : 33 All. 356 (P.C.) ; A.I.R. 1922 P. C. 356 ; 17 O. C. 108 and A. I. R. 1923 Oudh 307, *Foll.* (*Misra and Srivastava, JJ.*). AMEER HASAN *v.* MD. EJAZ HUSAIN. **117 I.C. 456=6 O. W. N. 51= A. I. R. 1929 Oudh 134.**

———*Declaration of family arrangement of disrupted family.*

A declaration of family arrangement purporting to give shares in the plaintiff's ancestral property to the members of the different branches of the disrupted joint family was executed by the father of the plaintiff. Under law there could not be any re-union and the act was done not to settle any dispute but simply out of charity and compassion. The plaintiffs were not the parties to the declaration nor was it to their advantage. The declaration was never intended to be enforced, was not acted upon and the plaintiffs were all along in possession of the property,

Held, that the declaration could not affect the plaintiffs. (*Adami and Fazl Ali, JJ.*). LAKSHMIDHAR JAGATI *v.* KRISHNA CHANDRA JAGATI.

A.I.R. 1929 Pat. 548.

———Where disputes arose on the death of a Hindu and his widow and daughter on one side and his nephew on the other side settled the disputes by an agreement according to the terms of an oral will left by the deceased, taking for themselves particular shares of his estate,

Held, that the agreement is a *bona fide* family arrangement and is binding on the parties. (*Coutts Trotter, C. J. and Ramesam, J.*). A. P. R. K. R. V. VELLAM CHETTI *v.* VENUGOPAL CHETTI. **97 I.C. 570=24 M.L.W. 842= A.I.R. 1927 Mad. 185.**

FAMILY ARRANGEMENT — What are family arrangements.

———On death of widow all members of last male holder's family agreeing to their names being recorded in revenue records irrespective of different degrees of relationship—Family arrangement is complete. 35 All. 502 ; 37 All. 105 ; 17 O.C. 108 ; 19 O. C. 75 and 22 O. C. 300, *Foll.* (*Gokaran Nath Misra, J.*). TEJ BAHADUR KHAN *v.* NAKKO KHAN. **99 I.C. 472=3 O.W.N. 993= A. I. R. 1927 Oudh 97.**

———According to the terms of a compromise in a suit effected between the parties plaintiff was to adopt the son of one of the defendants within two months from the date of compromise and if he did so he was to enjoy the entire property which fell to his father's share but on failure to take the boy in adoption he was to retain only one half of the property. The plaintiff failed to take the boy in adoption and consequently was dispossessed of half the properties in execution of the compromise decree. In a suit for the recovery of those properties on the ground that the compromise is not binding on him,

Held, that the compromise was a *bona fide* family settlement and not opposed to public policy and that the clause in the compromise that the plaintiff should retain one-half of the properties and give back the other half on failure to adopt the boy was not a penal clause. (*Devadoss and Waller, JJ.*). SUBBARAJU *v.* INDUKURI NARAYANARAJU. **97 I.C. 232=24 M.L.W. 716= A.I.R. 1926 Mad. 1093=51 M.L.J. 366.**

———*Bona fide* settlement of dispute—Holder of an estate dying leaving two widows and a son, bequeathing whole estate to the son—One widow challenging the validity of the marriage of the other widow and the legitimacy of the son—Agreement allowing increased maintenance to contesting widow for her withdrawing the allegation is a *bona fide* settlement. 33 All. 356 (P.C.), *Foll.* (*Stuart, C. J. and Raza, J.*). SHYAMA KUMAR SINGH *v.* THAKURAIN DULAR KUNWAR. **98 I.C. 81=3 O.W.N. 805.**

———If there is a dispute and if all the members of the family come to an arrangement it will not be open to any of the parties to go behind such an arrangement, but where a father and sons amicably arranged that the father should settle all the properties upon the sons reserving to himself little or nothing, it cannot be said that the essentials of a family arrangement are present which would preclude any of the parties from claiming by inheritance to any other of the parties to such an arrangement. In order to make out a valid family settlement by which a person could relinquish his right to property not only *in praesenti* but also *in futuro*, there must be in the first place consideration for such relinquishment : in the second place there must be words which would convey such an expression of intention on the part of any of the parties to the document. So long as the arrangement is merely a one sided arrangement or where there is no dispute to be settled, a mere settlement of property by one upon another cannot be considered to be a family arrangement under which it can be said that certain rights which would accrue in future have been given up. (*Spencer and Devadoss, JJ.*). ABDUL RAHIMAN *v.* UTHUMANSA ROWTHER. **85 I. C. 945= A. I. R. 1925 Mad. 997.**

FAMILY ARRANGEMENT—What are family arrangements.

———Where by the agreement one brother agrees to forego his right under S. 22 as the brother to succeed to his brother's share, if he left a widow, it is subsequently not open to him, or to any one claiming through him to go behind that agreement in order to claim a right which has been surrendered. A family settlement is binding on the parties thereto because the objection of settlement is the reconciliation of existing differences and the avoidance of future dispute. (*Kanhaiya Lal, J. C. and Lyle, Offg. A.J.C.*). MUHAMMAD YAQUB KHAN *v.* MUHAMMAD SAHIB ALI KHAN. **67 I.C. 556= 9 O.L.J. 160=25 O.C. 21=A.I.R. 1922 Oudh 87.**

—Writing, stamp and registration.

———Where the transaction is intended to operate as a transfer, the formalities enjoined by the Stamp, Registration and Transfer of Property Acts have to be complied with. The imperative requirements of these statutes cannot be evaded or displaced by the parties choosing to describe the document embodying the transaction as a family settlement when, in truth and substance, it is either a transfer of property or a deed of partition. (*Sen and Niamatullah, JJ.*). RAGHUBIR *v.* NARAIN **A. I. R. 1930 All. 498.**

———There is no provision of law requiring that a partition of family settlement must be reduced to writing and the writing registered, though of course, when they are reduced to writing, the point of registration may arise.

Where by family arrangement it was settled that *A*, father of *B*, was to pay the family debts and *B* was to pay nothing, and Rs. 1,000 from the joint property were to be paid to *B* as his share and a house was to fall to the share of *A*:

Held, that the alleged arrangement amounted to family settlement and not to a release of his share by *B*. It was not therefore necessary to get the settlement reduced into writing and get the writing registered. Oral evidence on the point of the alleged settlement was therefore admissible. (*Shingne, J.*). RANGU NYAHALCHAND SHET VANI *v.* LAKSHMAN MARTAND KULKARNI. **A.I.R. 1930 Bom. 438.**

———Family settlement need not be embodied in formal registered document: A. I. R. 1927 Oudh 97, *Rel. on*; 35 All. 502 and 22 O. C. 300, *Ref.* (*Wazir Hasan, Ag. C.J. and Pullan, J.*). BALBHADDAR SINGH *v.* SHAMSHER SINGH. **115 I.C. 197= 6 O.W.N. 109=A.I R. 1929 Oudh 305.**

———A family settlement is based on the assumption that there is an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is. So a deed of family settlement is not a transfer within the meaning of S. 10, T. P. Act but is a recognition of conflicting claims. (*Raza and Pullan, JJ.*). HANUMAN SAHU *v.* ABBAS BANDI BIBI. **120 I. C. 387= 6 O.W.N. 169=4 Luck. 452= A.I.R. 1929 Oudh 193.**

———A family arrangement dealing with immovable property of the value of Rs. 100 and *upwards*, can be effected by an oral contract: 1 I. A. 157 (P. C.): 33 All. 356 (P. C.); and A. I. R. 1914 P. C. 44, *Rel. on.* (*Sulaiman, Ag. C.J. and Mukerji and Boys, JJ.*). RAMGOPAL *v.* TULSHI RAM. **116 I.C. 861=51 All. 79=26 A.L.J. 952= A.I.R. 1928 All. 641.**

———*Oral arrangement followed by a petition in Court.*

If an oral family arrangement is followed immediately or after an interval (shorter or longer) by a petition in Court containing a reference to the arrangement (either a mere reference to the fact of their having been an arrangement, or a partial or complete setting out of the terms, with or without a declaration of an acceptance of and intention to be bound by those terms), the question whether the reference was merely for the purpose of informing the Court or was dictated by a desire to make formal record of the arrangement to be evidence by the document, will have to be determined on the facts of each case. In the former case registration is unnecessary. But in the latter case, if the value of the property involved is Rs. 100 or upwards' absence of registration makes the document inadmissible in evidence and is fatal to proof of the arrangement indicated in the document. (*Sulaiman, Ag. C. J. Mukerji and Boys, JJ.*). RAMGOPAL *v.* TULSHI RAM. **116 I.C. 861=51 All. 79= 26 A.L.J. 952=A.I.R. 1928 All. 641 (F. B.).**

———*Arrangement reduced to writing with intention to form document of title but not registered—Doctrine of part performance will not cure absence of registration.*

Where there is no legally binding oral family arrangement, or the arrangement though reduced to writing with the intention that the document should be the document of title, cannot be proved for want of registration, and where no question of estoppel arises, the mere facts that mutation has taken place and that possession has been taken cannot, by virtue of what is known as the doctrine of part performance, remedy the absence of registration: 31 All. 73 (P.C.), *Rel. on.* (*Sulaiman, Ag C.J. Mukerji and Boys, JJ.*) RAMGOPAL *v.* TULSHI RAM., **116 I.C. 861=51 All. 79= 26 A.L.J. 952=A.I.R. 1928 All. 641 (F.B.).**

———Court of equity will uphold a family arrangement provided that it has been acted upon, even where legal forms such as registration have not been strictly complied with: 43 All. 1; 42 Cal. 801 (P.C.), *Ref.* (*Baker, Offg. J. C.*). BAKARAM *v.* NARAYAN. **78 I. C. 58=A. I. R. 1924 Nag. 373.**

———An arrangement amounting to a mutual relinquishment and admission of claim by all the parties cannot come within any of the classes of transfer with which the Transfer of Property Act deals for purposes of registration. (*Hallifax, A.J.C.*). JAINAKSI *v.* GULAM MOHIUDDIN. **69 I. C. 545=A.I.R. 1923 Nag. 55.**

—Miscellaneous.

———A family arrangement must be proved as well as pleaded, and it cannot be presumed in the absence of any evidence: A. I. R. 1928 All. 65, *Ref.* (*Staples, A. J. C.*). MAHASINGA *v.* MANSINGA. **118 I. C. 55= A.I.R. 1929 Nag. 83.**

———*Condition not valid in ordinary deeds may be inserted.*

A family settlement cannot create an estate which is contrary to law but in the case of family settlements conditions may be inserted therein which would not be valid in the case of ordinary deeds under the ordinary law, but such conditions in the deed would be valid and enforceable when forming a part of such family settlements: A. I. R. 1926 Oudh 561, *Foll.* (*Raza and Pullan, JJ.*). HANUMAN SAHU *v.* ABBAS BANDI BIBI. **120 I.C. 387= 6 O.W.N. 169=4 Luck. 452=A.I.R. 1929 Oudh 193.**

FAMILY SETTLEMENT.

See FAMILY ARRANGEMENT.

FATAL ACCIDENTS ACT (13 of 1855).

—Applicability.

———The principle embodied in the Indian Fatal Accidents Act may be applied to cases arising in

FATAL ACCIDENTS ACT (1855)—Applicability.

FATAL ACCIDENTS ACT (1855)—Basis of compensation.

Berar, though the Act has not been applied. (*Kotwal and Macnair, A.J.Cs.*) RAKMABAI *v.* DHANRAJ. **64 I.C. 311= A.I.R. 1921 Nag. 102.**

—Basis of compensation.

———Compensation awarded under the Act is compensation for the loss of the actual pecuniary benefit which the beneficiaries might reasonably have expected to enjoy, had the man not been killed. (*Kemp, J.*). CAITANO DE MELLO *v.* MERIDIAN ELECTRICAL ENGINEERING CO. **102 I.C. 400=29 Bom.L.R. 402= A. I. R. 1927 Bom. 357.**

—Costs.

———In a case under the Fatal Accidents Act, costs as between attorney and client would be allowed. (*Page, J.*). NAIN BALA SEN *v.* AUCKLAND JUTE CO., LTD. **89 I.C. 679= 52 Cal. 602= A.I.R. 1925 Cal. 893.**

—Licensee and licensor.

———Licensor not disclosing to licensee hidden risk in the use of subject of license—Loss caused to licensee—Licensor is liable for damages under the Indian Fatal Accidents Act. (*Marten, C.J. and Kemp, J.*). LAKHMICHAND *v.* RATANBAI. **101 I.C. 210=51 Bom. 274=29 Bom.L.R. 78= A.I.R. 1927 Bom. 115.**

—Measure of damages.

———Measure of damages is the financial loss sustained by the death—One year's wages is not a proper measure. (*Schwabe, C.J. and Wallace, J.*). S. I. INDUSTRIALS, LTD. *v.* ALAMELU. **72 I.C. 632=1923 M.W.N. 344=17 M.L.W. 495= A.I.R. 1923 Mad. 565=45 M.L.J. 53.**

—S. 1—Amount.

———*Length of life and value to plaintiffs determine the estimate.*

The amount awarded must not be equivalent for the loss but some reasonable sum. In awarding damages for prospective loss of income or other earnings, the Courts ought not to give the plaintiff such a sum as, if invested, would produce the full amount of income which he would probably have earned but ought to take into account the accidents of life and other matters and to give the plaintiff what they consider under all the circumstances a fair compensation for his loss. The proper way of finding out the financial loss to the plaintiff is to form some estimate of what the value of the continued life of the deceased would have been to the plaintiff and how long it was probable that it would continue: A. I. R. 1923 Mad. 565, *Appr.* (*Prideaux, A.J.C.*). SECY. OF STATE *v.* BHARIBAHU. **96 I.C. 403=9 N.L.J. 76= A. I. R. 1926 Nag. 271.**

—S. 1—Appeal.

———Appellate Court should not set aside award of lower Court unless it is capricious or unreasonable—Awarding amount is difficult and judicial officers may differ widely regarding the appropriate amounts but they should exercise proper discretion. (*Kanhaiya Lal and Ashworth, JJ.*). G.I.P. RY. CO. *v.* MT. NANNHI BAI. **96 I.C. 278= A.I.R. 1926 All. 702.**

—S. 1—Distribution.

———Damages awarded can be distributed between some of the parties. (*Richardson and Suhrawardy. JJ.*). SYED SADAQ REZA *v.* KHOSHMOHINI DASI. **71 I.C. 346= A.I.R. 1922 Cal. 317.**

—S. 1—Facts to be considered.

———In a suit for damages any fine realised from the defendant and paid to the plaintiff in the criminal case against the defendant, should be taken into consideration. (*Mukerji and Ashworth, JJ.*). NATHU RAM *v.* MT. CHAND KUAR. **106 I.C. 165= A.I.R. 1927 All. 684.**

FATAL ACCIDENTS ACT (1855), S. 2—Remote loss.

———Suit for damages—Deceased a cultivator only—Probable duration of the capacity of deceased to supply labour must be considered. *Rowley* v. *L. and N. W. Railway*, 42 L.J. Ex. 153, *Foll.* (*Mukerji and Ashworth, JJ.*). NATHU RAM *v.* MT. CHAND KUAR. **106 I. C. 165= A.I.R. 1927 All. 684.**

———No rule exists as to how many years' income is to be allowed as compensation—Possibility of earner's death, his age and earning capacity are to be considered. (*Harrison and Dalip Singh, JJ.*). DHAN SINGH *v.* MT. GANESH BAI. **101 I.C. 642= A.I.R. 1927 Lah. 417.**

———*Value of life depends on the earning capacity of the deceased—High Court need not interfere if the amount awarded is sufficient protection.*

It is difficult to lay down any general rule regulating the award of damages in cases under the Act. In each case the circumstances may differ, and these circumstances must necessarily regulate the amount to which a party might be entitled, or measure the loss which that party has suffered by the death of the person concerned.

Where a person loses his life as a result of an accident, the value of his life does not depend on the number of his dependants but on his earning capacity. The larger the number of dependants in a family, the greater is the value of the life of the person supporting them; but the loss which they suffer by his death can be measured by his earning capacity, of which the family was enjoying the benefit, and the care, attention and support which were to be reasonably expected from him had he been alive: A.I.R. 1922 Cal. 317, *Foll.*

When the dependants are sufficiently protected by the amount awarded to them, High Court need not interfere. (*Kanhaiya Lal and Ashworth, JJ.*). G. I. P. RY. Co. *v.* MT. JANKI BAI. **96 I.C. 681=A.I.R. 1926 All. 703.**

———The widow and son of the deceased can recover damages for the loss of the contribution made by the deceased towards the joint income of the family. Legal liability alone is not the test of injury in respect of which damages may be recovered under the Act, but the reasonable expectation of pecuniary advantage by the relatives remaining alive may be taken into account and damages given in respect of that expectation, if it be disappointed. and the probable pecuniary loss thereby occasioned (112 P.R. 1913, *Ref.*) and the fact that the deceased provoked the quarrel in the course of which he was killed does not disentitle his relatives from recovering damages. (*Abdul Rzoof and Abdul Qadir, JJ.*). PIARA RAM *v.* BEHARI RAM. **69 I.C. 354= A.I.R. 1924 Lah. 269.**

—S. 1—Sentimental considerations.

———*Relevancy of.*

In a suit for damages under the Act no sentimental considerations are relevant. The plaintiff cannot get higher damages because the deceased was brutally murdered by the defendant than if the death had been due merely to an error of judgment. (*Mukerji and Ashworth, JJ.*). NATHU RAM *v.* MT CHAND KUAR. **106 I.C. 165= A. I. R. 1927 All. 684.**

—S. 2—Remote loss.

———Where a passenger had some currency notes about him at the time of the accident,

FATAL ACCIDENTS ACT (1855), S. 2—Scope.

Held, that the loss of such notes cannot be the cause of action against the railway as the loss of the notes was only a remote and not an immediate result of the accident.

Every cause leads to an infinite sequence of effects, but the author of the initial cause cannot be made responsible for all the effects in the series. He is liable only for those which immediately flow out of his wrongful act. *Sharp* v. *Powell*, (1872) 7 C.P. 253, *Expl.* (*Shadi Lal, C.J. and Le Rossignol, J.*). SECRETARY OF STATE *v.* GOKAL CHAND.

96 I.C. 1026=6 Lah. 451=26 P.L.R. 623=A.I.R. 1925 Lah. 636.

—S. 2—Scope.

———The statute by enacting the rule allowing the legal representatives to include in their suit a claim for the loss to the estate does not create any fresh liability but merely recognizes what already existed under the common law and prescribes only the procedure for enforcing it. (*Shadi Lal, C.J. and Le Rossignol, J.*). SECRETARY OF STATE *v.* GOKAL CHAND.

90 I.C. 1026=6 Lah. 451=26 P.L.R. 623=A.I.R. 1925 Lah. 636.

FAZENDARI.

See LAND TENURE FAZENDARI.

FEEDING THE GRANT BY ESTOPPEL.

See T. P. ACT, S. 43.

FERRY.

—Acquisition of right.

———The right to a ferry franchise between two villages cannot be acquired by mere prescription but there must be facts proved from which, if there is no direct grant from the Government, it can be implied that such grant was actually made. (*Macleod, C. J. and Coyajee, J.*). SHAMA DURGAJI BHOI *v.* GANGADHAR NARAYAN MUZUMDAR.

67 I. C. 419=24 Bom. L.R. 445=46 Bom. 952=A .I. R. 1922 Bom. 245.

FICTITIOUS TITLE.

See T. P. ACT, S. 53.

FIDUCIARY RELATIONSHIP.

See (1) EVIDENCE ACT, S. 111.
(2) TRUSTS ACT, SS. 88, 94.
(3) CONTRACT ACT, S. 16.

FINAL ORDER.

See C. P. CODE, SS. 2 (2), 11, 104, 109.

FINANCE ACT (13 of 1925).

—S. 7—Calculation of super-tax.

———*Unregistered firm converted into a limited company on* 1st *April*, 1925—*Rate of super-tax.*

The Western India Turf Club was converted into a Limited Company by being registered under Companies Act as a Company limited by guarantee. For the financial year 1925-26 it was called upon to put in a return of income for the previous year, namely, 1924-25. It accordingly put in its return of income showing the income earned by the Club as an unregistered firm during the previous year 1924-1925, when the Company was not in existence. For the purposes of assessment, the Income-tax Officer determined the total income to be Rs. 15,03,522 under S. 23 (1) of the Act, and calculated super-tax thereon at Rs. 4,59,153 by applying to it the scale rates applicable to an unregistered firm,

Held, that the Company is liable to be assessed at the rate of one anna in the rupee for super-tax in respect of the excess over Rs. 50,000 of total income of the Turf Club for the previous year: A.I.R. 1925 All. 535, *Expl.* and *Dist.* (*Macleod, C. J. and Coyajee, J.*). THE WESTERN INDIA TURF CLUB, *In re*.

98 I.C. 226=50 Bom. 648=28 Bom. L. R. 1236=A.I.R. 1926 Bom. 539.

———(5 of 1927).

—S. 5—Demand drafts.

———Demand drafts are bills of exchange and are exempt from stamp duty, *English and Indian Case-law discussed.* (*Rankin, C. J., Suhrawardy, B. B. Ghose, Mukerji and Cammiade, JJ.*). *In the matter of* STAMP ACT.

115 I.C. 177=56 Cal. 233=32 C.W.N. 1015=A.I.R.1928 Cal. 566 (S.B.).

FINDING OF FACT.

See C. P. CODE, S. 100.

FINE.

See PENAL CODE, SS. 63—70.

FINGER IMPRESSION.

See (1) CRIMINAL TRIAL.
(2) EVIDENCE ACT, S. 45.

FIRE INSURANCE.

See INSURANCE.

FIRM.

See (1) C. P. CODE, O. 21, RR. 49, 50 & O. 30.
(2) CONTRACT ACT, SS. 239—266.
(3) CORPORATION.
(4) COMPANY.

FIRST INFORMATION.

See CR. P. CODE, SS. 154—160.

FISHERY.

—Adverse possession.

———An exclusive right of fishery is not a mere profit *a prendre* but is an interest in immovable property which can be acquired by twelve years' adverse possession as against the lawful owner. Such an interest is transferable and heritable. (*Sundaram Chetty, J.*). SECRETARY OF STATE *v.* THE DISTRICT BOARD OF TANJORE.

31 L.W. 508=1930 M.W.N. 328=A.I.R. 1930 Mad. 679.

———The right of the public to fish in the sea is common and is not the subject of property and members of the public exercising the common right to fish in the sea are bound to exercise that right in a fair and reasonable manner and not so as to impede others from doing the same: 2 Bom. 19, *Foll.*

A person, therefore, although exclusively and continually using a portion of the sea over 28 years cannot claim it as the basis of the legal right to exclude any others and to confine the use of that portion of the sea for fishing for himself: 2 Bom. 19 and 39 Cal. 53, *Rel. on.* (*Madgavkar, J.*). RAOJI VASUDEO GIRAP *v.* TUKARAM VISHNU KURLA.

117 I.C. 335=31 Bom. L.R. 329=A.I.R. 1929 Bom. 226.

———If the right claimed is a mere right to fish not excluding the lawful owner, it would appear to be an easement within the description of the word in the Limitation Act and can be acquired by 20 years' uninterrupted enjoyment. If it is an exclusive right of fishery it is an interest in immovable property and can be acquired by 12 years' adverse possession involving an ouster of the rightful owner. Such a right contains all the essential elements of property and even if it may properly be described as a profit *a prendre*, it has also the distinctive features of an interest in immovable property. Even if S. 26 of the Act should be applicable, this would not bar the operation of Art. 144 and S. 28 if the right came under both descriptions: 2 P. L. J. 283, *Foll.*; 5 Cal. 945; 12 Bom. 221; 18 Cal. 80, *Ref.* (*Dawson-Miller, C. J. and Mullick, J.*). HENRY HILL AND CO. *v.* SHEO RAJ BAI.

67 I.C. 954=1 Pat. 674=3 P.L.T. 477=1 Pat. L. R. 34=A. I. R. 1923 Pat. 58.

FISHERY—Essentials for establishing right.

—Essentials for establishing right.

———It is not absolutely essential to prove an express grant after a considerable lapse of time and the plaintiffs can establish their right by proof of an uninterrupted user of fishery prior to their dispossession. The evidence, however, must be clear and unambiguous showing the plaintiff's exercise of the right of fishery over the particular spot in river particularly when the bed of the part of the river in question belonged to the owner of the adjoining village : 42 Cal. 489 (P.C.), *Foll.* (*Dawson-Miller, C. J. and Jwala Prasad, J.*). KEDAR NATH GOENKA *v.* AMRIT MANDAL.

88 I.C. 676=1925 P.H.C.C. 170=A. I. R. 1925 Pat. 568.

—Extent of right.

———*Jalkar—Part of river bed free from water during part of the year—Right to fishery over that part is not lost.*

The grantee of a fishery right in a river is entitled to fish in all waters comprised within the bank of the river and the circumstances that a particular sheet of water may during part of the year be disconnected from the flowing stream or permanent current, does not affect the rights of the grantee : a jalkar so situated in the river-bed is essentially part of the river and the fish contained therein may properly be deemed fish of the river: 18 C.L.J. 399 and 42 Cal. 489 (P. C.), *Foll.* (*Newbould and Graham, JJ.*). SECRETARY OF STATE *v.* NEMAI CHAND MUKHERJEE. **91 I.C. 752 (Cal.).**

—Jalkar.

———*Meaning of.*

The term Jalkar is ambiguous. It may mean a grant of a right of fishery or it may mean the grant of a sheet of water together with the sub-soil. The question whether what was intended to be granted in a particular case was restricted to a right of fishery or included a grant of sheet of water together with the sub-soil must depend upon the construction of the original grant if available or must be determined with regard to the subsequent history of the property. (*Mookerjee and Chotzner, JJ.*). PRANKISHORE TARAFDAR *v.* SURODA PROSAD PAKRASHI. **72 I.C 55=37 C. L.J. 580=A.I.R. 1923 Cal. 358.**

—Lease of.

———Grant of lease for fishing creates an interest in immovable property: 14 N. L. R. 35, *Ref.* (*Findlay, J. C.*). MANYA *v.* SITARAM.

100 I.C. 438=23 N.L.R. 16=A.I.R. 1927 Nag. 147.

—Navigable rivers.

———*Right of fishing in—Extent of.*

It was in the power of the Government in right of the Crown as successor to the East India Company to grant such exclusive right of fishing in a navigable water. Since about 1860 the policy of making such grants has been greatly doubted. But such grants were not uncommon in Bengal in earlier times and if proved, they are perfectly legal. Mere grants of rights to tolls are not rights of exclusive fishery. A mere mention in the Revenue documents, that certain classes of revenue are not being interfered with, is not to be construed as granting exclusive right in navigable waters if other adequate and sufficient meaning can be found for them. *Prima facie* public navigable rivers are *publici juris* and everybody has a right in India to fish in any navigable water—whether tidal or not. Per *Ghosh, J.*—"I entertain considerable doubt whether after the abolition of Sayer any Zemindar has got any right to levy tolls or taxes with regard

FISHERY—Right to soil.

to the right of fishing by fishermen in a public navigable river". (*Rankin and B. B. Ghose, JJ.*). MIDNAPORE ZAMINDARY CO., LTD. *v.* TRAILOKYA NATH HALDAR. **81 I.C. 501=51 Cal. 110=40 C. L. J. 238=A.I.R. 1924 Cal. 562.**

—Occupancy right.

———No right of occupancy can be acquired in respect of a right called jalkar or fishery : 23 W.R. 432; 4 Cal. 767; 4 Cal. 961, *Ref.* (*Fazl Ali and Chatterji, JJ.*). JAIGOBIND SINGH *v.* BHAWANI SINGH. **9 Pat. 401=A. I. R. 1930 Pat. 382.**

—Passing of rights.

———The settlement of land carries with it the right to fish when there is water upon it unless and until the landlord shows that the fishing right was reserved to him. *Jones* v. *Davies,* (1902) 86 L. T. 477, *Rel. on.* (*Fazl Ali and Chatterji, JJ.*). JAIGOBIND SINGH *v.* BHAWANI SINGH.

9 Pat. 401=A.I.R. 1930 Pat. 382.

—Permanent right.

———In order that there should be a permanent right of fishing it is necessary that there should be a grant or that it should be possible to hold that a grant was implied. Mere recording in the Government chitta that certain persons have been given settlement of fishing rights does not prove that there was a permanent grant, nor does it lead to the presumption of a lost grant. It should be shown that it was at least the practice of Government to give permanent leases of fishing rights. (*Cammiade and S. K. Ghose, JJ.*). JADABENDRA NANDAN DAS *v.* BEHARI MULA. **118 I.C. 888=56 Cal. 444=A.I.R. 1929 Cal. 464.**

—Transfer of right.

———*Quebec Law—Right of fishing can be separately transferred.*

The right to fishing accompanied with a right of way for the enjoyment of the former right is more than usufructuary in the older and stricter meaning. It is right to a separate subject or incident of property. There is no inherent reason for refusing to treat a fishing right as a self-contained and separable subject. In the seigniorial cases they were treated as self-contained and separable. In the law of Scotland, where the fee cannot be split up they are regarded as proper subjects for a separable title to property in fee. The definition of Art. 405 of the Quebec Code presents this analogy that it places no difficulty in the way of regarding the right of fishing as an item among others comprised in the subject-matter. There is no reason why, consistently with the language of Arts. 405, 406 and 408 of the Quebec Code there should not be ownership of a fishing right as a mode of enjoying and disposing of separable and physical subject for possession. The title to take the fish is a title to take a product of the river and Art. 408 recognizes as possible in law the union with it as an accessory of the right to use bed of the river or the banks when naturally or artificially stipulated for as part of that which is joined to the fishing right. (*Viscount Haldane.*) MATAMAJAW SALMON CLUB *v.* DUCHAINE (SINCE DECEASED.) **A.I.R. 1921 P. C. 200 (P.C.).**

—Right to soil.

———*Right to soil* prima facie *is in Government.*

Prima facie the soil in the bed or the sea in a port would be vested in the Government in right of the Crown. (*Marten, J.*). LAKSHMAN GOWROJI *v.* RAMJI ANTONE. **23 Bom. L.R. 939=A.I.R. 1921 Bom. 93.**

FISHERY—Several Fishery.

—Several Fishery.

———*Lost grant.*

There are serious legal difficulties in accepting a contention that a right of several fishery had its origin in a lost grant by the Government to a certain unincorporated community who granted it to the men of certain localities, who lastly granted it to the parties in question. (*Marten, J.*). LAKSHMAN GOWROJI *v.* RAMJI ANTONE.

23 Bom. 939 = A.I.R. 1921 Bom. 93.

—Shifting river.

———*Rights in.*

In Bengal it is settled that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the upstream and the downstream limits of his grant, whether the Government own the soil subjacent to such waters as being the long established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment: A. I. R. 1914 P. C. 48, *Appl.*

But there is no authority for the proposition that the grantee would not only enjoy the right of fishery in the bed of the tidal navigable river as granted, but would also retain the right of fishery on the land of another over which the river flowed for a short interval but ceased to do so, if there is a sheet of water on defendants' land which is connected with the river. (*B. B. Ghose and G. N. Roy, JJ.*). INDU BHUSHAN BOSE *v.* SARAJULALA DEBI.

104 I.C. 494 = 46 C.L.J. 93 = A.I.R. 1927 Cal. 741.

—Stake fishing.

———*Rights of the public.*

Where stake fishing is an ordinary method of public fishing, acts which could be relied under English law to establish a several fishery may be attributed to the person's exercise of a public right. There would seem no reason why a man who has once planted his stakes and kept them in repair should ever be turned out during his life, nor why if, from illness or old age, he wanted to retire, he should not be able to substitute a relative or a friend in his place with or without payment before any other member of the public could intervene. Once it is granted that the public right of fishing in navigable waters on any coast may be exercised by stake fishing, it almost follows that *quasi* permanent rights may be obtained in particular spots. For there is no one entitled to eject the stakeholder, and in practice it would be difficult, if not impossible, to prevent him from transferring his rights to his relatives or friends. So where stake fishing is general, caution is necessary before one accepts the view that each Dar owner has a prescriptive right to a sheet of water and to affix his stakes in the sub-soil although he has no claim to the soil itself. Where it is not established that the acts in question are necessarily inconsistent with a public right of stake fishing, no prescriptive right to an exclusive right or several fishery can be held to be made out.

The stake fisherman may fix his stake as the sailor does his anchor or mooring buoy. Neither claims the soil for each is exercising a public right. The stake like the mooring buoy may belong to and be used by a particular man or a shipping Company. But all this does not involve an exclusive right to any particular waters. It is only because all persons having the like right, namely, the general public cannot all fish or anchor in the same spot that by a natural process different persons go to different spots and that in course of time a particular spot may be identified with a particular person.

FOREIGNERS ACT (1864), S. 2—Effect of transfer of territory.

The right of a member of the public who is entitled to fish in the sea by means of stakes would not pass by grant or descent. The right of the public to fish in the sea does not come within the description of property of any kind. On the other hand, the stake fisherman will be entitled to be protected from improper interference with his public right of fishing. The law is capable of compelling parties to exercise their common rights fairly towards each other, and not in a spirit of malice or rapacity. But though the right to fish may be public, the right to the stake is private and is a subject of property. If, therefore, the stakes were let out with covenants for repair, surrender and non-removal and possibly also with a covenant for compensation if by negligence the existing right to fish therefrom was lost, it would be questionable whether such an agreement could be successully attacked. (*Case-law fully discussed*). (*Marten, J.*). LAKSHMAN GOWROJI *v.* RAMJI ANTONE.

23 Bom. L.R. 939 = A.I.R. 1921 Bom. 93.

———The tenant of a several fishery must give up the fishing stakes on the termination of the tenancy, and he cannot claim to retain them on the ground that he has repaired them from time to time or even renewed them. *Prima facie* the boundaries mentioned would include every fixture within their limits at the creation of the tenancy. (*Marten, J.*). LAKSHMAN GOWROJI *v.* RAMJI ANTONE.

23 Bom. L.R. 939 = A.I.R. 1921 Bom. 93.

FIXTURES.

See T. P. ACT, Ss. 3 AND 108.

FLOATING CHARGE.

See COMPANIES ACT, S. 109.

FOOD, ADULTERATION OF.

See MUNICIPAL ACTS.

FORBEARANCE TO SUE.

See CONTRACT ACT, Ss. 2 AND 28.

FORECLOSURE.

See C. P. CODE, O. 34, Rr. 2 AND 3.

FOREIGN COURT.

See (1) C. P. CODE, S. 13.
(2) EVIDENCE ACT, Ss. 40 AND 43.

FOREIGNERS ACT (3 of 1864).

—S. 2—Effect of transfer of territory.

———*Cession of territory by Britain to another state —British subject ceases to be such on cession.*

A relinquishment of the Government of a territory is not only a relinquishment of the right to soil or territory, but also of the rights over the inhabitants of the country. The distinction between a right of election of which sovereign he will become the subject and the method by which a man can leave a newly ceded territory and remain within the allegiance of his former sovereign, seems somewhat fine: but the distinction is one between a mere assertion of elected allegiance and actual conduct clearly showing such an election. It is not enough for an inhabitant to assert, when the question arises, that he has elected to remain within the allegiance of his former sovereign; there must be conduct on his part, such as leaving the ceded territory and going to reside permanently in his former sovereign's dominions to indicate his previous election. Any inhabitant of the ceded or separated territory has not the right to remain an inhabitant of it, and at the same

FOREIGNERS ACT (1864), Ss. 3 & 3 (a)—Procedure.

time to retain the allegiance and nationality of the State which ceded or permitted the separation. The common law of England embodying the above rules is the law for the time being in force in British India within the meaning of the proviso to S. 1: 18 Cal. 620 (P. C.) and 42 Mad. 589 (P.C.), *Foll.*

The applicant was born in Ramdupati which was in British territory. In that village he had some lands and owned a house in which his family resided permanently. He, however, came to Bombay for purposes of trade. Ramdupati was subsequently ceded to the Maharaja of Benares by the British Government. The applicant continued to live in Bombay for trade before as well as after the cession,

Held, that the applicant was a "foreigner" by virtue of the proviso to S. 2 of Act III of 1915, amending the Foreigners Act, 1864. (*Fawcett and Madgaonkar, JJ.*). EMPEROR *v.* JAGARDEO RAMSUMER TIWARI. **90 I.C. 310=49 Bom. 804=87 Bom. L.R. 1043=26 Cr. L.J. 1526=A.I.R. 1925 Bom. 489.**

—Ss. 3 & 3 (a)—Procedure.

———Government must issue orders about detention or release or removal without delay—Commissioner of Police cannot do any such thing without such orders. (*Marten and Fawcett, JJ.*). JAGERDEO RAMSUMER TEWARE, *In re*. **85 I. C. 138=49 Bom. 222=26 Bom. L.R. 1252=26 Cr. L.J. 458. A.I.R. 1925 Bom. 139.**

FOREIGN JUDGMENT.

See CIVIL P. C., S. 13.

FOREIGN JURISDICTION ACT (1890, 53 & 54 Vict., Ch. 37).

—Protected state.

———*Jurisdiction of Crown in.*

The Foreign Jurisdiction Act appears to make the jurisdiction, acquired by the Crown in a protected country, indistinguishable in legal effect from what might be acquired by conquest. It is a statute that appears to be concerned with definition and secondary consequences rather than with new principles. *Rex* v. *Earl of Crowe*, (1910) 2 K. B. 576, *Rel. on.* SABHUZA II *v.* MILLER. **99 I.C. 265=30 C. W. N. 961=A.I.R. 1926 P. C. 131 (P. C.).**

—S. 1—Interpretation.

———"Foreign country" means any country or place outside of Her Majesty's dominions, and the expression "jurisdiction" includes power. Consequently there can be no doubt at all that the King-in-Council has power in respect of foreign territory within the definition of that clause, either to legislate himself by Order in Council or to make provision for legislation by delegating that legislative authority to such a person or body as he may denote in the Order in-Council. (*Lord Atkin.*) DATTATRAYA KRISHNA RAO KANE *v.* SECY. OF STATE. **A. I. R. 1930 P. C. 267 (P.C.).**

—S. 12—Interpretation.

———"*Act of Parliament*" *and* "*orders and regulations.*"

The Act of Parliament and the orders and regulations referred to thereunder are Acts, orders and regulations so far only as they apply to His Majesty's subjects in the territory in question and have no relation to a case where the legislation does not purport to affect His Majesty's subjects at all but has relation to persons who are not subjects of His Majesty, but subjects of His Highness the Nizam of Hyderabad. (*Lord Atkin*). DATTATRAYA KRISHNA RAO KANE *v.* SECY. OF STATE. **A.I.R. 1930 P.C. 267 (P. C.).**

FOREST ACT (1878), Ss. 29 and 32 (c)—Clearing.

FOREST ACT (7 of 1878).

—Berar grazing rules.

———There is nothing in the grazing rules for Berar given in appendix 15 of the C.P. Forest Manual, which imposes any criminal liability on a licensee for grazing, for the acts of his servant. (*Baker, J.C.*). FAKIRA SAMBHAJEE KUNTU *v.* EMPEROR. **87 I.C. 918=26 Cr.L.J. 1030=A.I.R. 1926 Nag. 73.**

—Presumption.

———If a person is found with a gun and ammunition in a Reserved Forest it may be presumed until the contrary is shown that hunting was being engaged in. (*Curgenven, J.*). SAMUEL *v.* EMPEROR. **1929 M.W.N. 808.**

—S. 3—Permanently settled estate.

———Where the land is part of a permanently-settled estate, it is private property and not Government property within the meaning of the Forest Act and therefore cannot legally be subject of reservation under Chapter II of that Act. (*Woodroffe and Suhrawardy, JJ.*). SECRETARY OF STATE *v.* ABDUL RAHAMAN. **76 I.C. 494=A. I. R. 1923 Cal. 377.**

—Ss. 6, 7 and 9—Interpretation.

———Sections 6, 7 and 9 equally refer to land which is of the description mentioned in S. 3, that is, proceedings taken in respect of such land. (*Woodroffe and Suhrawardy, JJ.*). SECRETARY OF STATE *v.* ABDUL RAHAMAN. **76 I.C. 494=A.I.R. 1923 Cal. 377.**

—S. 25 (d)—Essentials for conviction.

———The owner of cattle found grazing in a Government Forest Reserve cannot be convicted under S. 25 (*d*). Forest Act (7 of 1878) in the absence of evidence that he pastured the cattle or permitted them by some overt act or negligent omission to trespass in the reserve. (*Baker, J.C.*). FAKIRA SAMBHAJI KUNBI *v.* EMPEROR. **87 I.C. 918=26 Cr. L. J. 1030=A.I.R. 1926 Nag. 73.**

—S. 29—Breaking and clearing.

———Where "breaking" only is forbidden by the notification an offence is not committed where there has been only "clearing." (*Boys and Kendall, JJ.*). UMMED SINGH *v.* EMPEROR. **99 I.C. 407=49 All. 291=8 L. R. A. Cr. 27=25 A. L. J. 148=28 Cr. L. J. 151=7 A.I.Cr.R. 200= A. I. R. 1927 All. 121.**

—S. 29—Fixing of date.

———Notification under S. 29 (*a*) fixing no date is bad—Conviction for cutting trees reserved by such notification is illegal under S. 32. (*Rankin and Duval, JJ.*). MOSLEM SIKDAR *v.* EMPEROR. **102 I. C. 498=54 Cal. 296=28 Cr.L.J. 562=A. I. R. 1927 Cal. 516.**

—S. 29—Reversion.

———"Protected forests" were declared to be reserve forests and then they were declared to have ceased to be reserve forests,

Held, the later notification did not turn the forests into village forests or into land to which the Forest Act did not apply at all; but the effect of it was to revert them to their former position of protected forests. (*Stuart, J.*). KAMLA PATI *v.* EMPEROR. **81 I.C. 711=46 All. 128=25 Cr.L.J. 999=A.I.R. 1924 All. 539.**

—Ss. 29 and 32 (c)—Clearing.

———Where 'breaking' of ground only is forbidden by a notification issued under the Forest Act, no

FOREST ACT (1878), S. 39 (b)—Liability to duty.

offence is committed when there has been only 'clearing'. A. I. R. 1927 All 121, *Foll.* (*Iqbal Ahmad, J.*). THEP SINGH *v.* EMPEROR.
102 I. C. 559=8 A. I. Cr. R. 111=8 L. R. A. Cr. 112=28 Cr.L.J. 591=A.I.R. 1927 All. 767.

—S. 39 (b)—Liability to duty.

———The ordinary interpretation of Cl. (b) would be that the duty is to be levied from the person who actually brought the timber from some place outside British India to the place, whereon its importation the duty becomes leviable, and thus it would be straining Cl. (b) to hold that timber, of which a person obtains possession and which has been originally brought from a place beyond the frontier of British India, is liable in the hands of that person to duty, though he has taken no part in the bringing of that timber from the place beyond the frontier. What the clause only contemplates is the levy of duty from a person, who has actually brought timber from a foreign place to the place where the duty is leviable; and if in fact, a person has not brought it from such foreign place and has not participated in a conspiracy to so bring it, the timber is not liable in his hands to a levy of duty: 17 Bom. L. R. 72, *Foll.* (*Fawcett and Patkar, JJ.*). EMPEROR *v.* KADARBHAI USUFALLI.
103 I. C. 593=51 Bom. 896=28 Cr. L. J. 705=8 A. I. Cr. R. 346=29 Bom. L. R. 987=A.I.R. 1927 Bom. 483.

—S. 41—Confiscation.

———Confiscation made in order to test the wrong interpretation of the words "timber" and "forest produce" in S. 41 put by the High Court though vexatious was held necessary. (*Harrison, J.*). LAL BADSHAH *v.* EMPEROR. **106 I.C. 790=29 Cr. L. J. 198= A.I.R. 1928 Lah. 80.**

—S. 41—Interpretation.

———"*Timber*" *and* "*forest produce.*"

The words "timber" and "forest produce" in S. 41 are used in the widest sense as given in the definitions to be found in S. 2 and not in the narrow and restricted sense especially introduced to define and limit the powers described in Ch. 7. (*Harrison, J.*). LAL BADSHAH *v.* EMPEROR. **106 I. C. 790=29 Cr. L. J. 198=A.I.R. 1928 Lah. 80.**

———"*Timber and other forest produce.*"

The phrase "timber and other forest produce" in S. 41 refers to timber and other forest produce as defined in S. 39, *viz.*, timber or other forest produce which is produced in British India and in respect of which the Government has any right or which is brought from any place beyond the frontier of British India. (*Harrison, J.*). LAL BADSHAH *v.* KING EMPEROR. **76 I. C. 104=23 Cr. L. J. 104=A. I. R. 1923 Lah. 225.**

—S. 41—(Bom. Rules) 3 and 4—Liability of forester.

———Forester is not liable for consenting to removal of produce to a place other than the one to which pass relates so long as the quantity and description of the produce are not exceeded. (*Shah, Ag. C. J. and Kincaid, J.*). KING EMPEROR *v.* PANDU VITHU. **84 I.C. 250=26 Bom. L. R. 971=26 Cr. L. J. 250=A.I.R. 1924 Bom. 489.**

—S. 41 (Bom. Govt.), Rr. 3 and 4—Removal of wood.

———Removal of wood to place other than that to which passes related is an offence. (*Shah, Ag. C. J. and Kincaid, J.*). KING EMPEROR *v.* PANDU VITHU. **84 I.C. 250=26 Bom. L. R. 971=26 Cr.L.J. 250=A.I.R. 1924 Bom. 489.**

FOREST ACT (1927), S. 59—Interpretation.

—S. 59—Appeal.

———Under S. 59 even a third person who was not a party to the proceedings in the Original Court and whose claim for relief from confiscation was not adjudicated upon is entitled to prefer an appeal. The phrase, "any person claiming to be interested in the property so seized" in S. 59 cannot be construed as limited to the case contemplated by S. 57. And, the words 'so seized' refer to the seizure under S. 52. (*Pearson and Jack, JJ.*). MEHAR SARDAR *v.* EMPEROR. **34 C.W.N. 956=52 C. L. J. 171=1930 Cr. C. 908=A.I.R. 1930 Cal. 577.**

—Ss. 63 and 29—Scope.

———Under S. 63 a Forest Officer cannot arrest, without warrant, persons committing an offence under S. 29 and his custody is not a lawful custody under S. 63 within the meaning of S. 225, Penal Code. (*Rankin and Duval, JJ.*). MOSLEM SEKDAR *v.* EMPEROR. **102 I. C. 498=54 Cal. 296=28 Cr. L. J. 562=A.I.R. 1927 Cal. 516.**

—S. 75 (d)—Withdrawal of tender.

———Rule under S. 75 (d) prohibiting withdrawal of tenders before acceptance is not *ultra vires*. (*Macleod. C. J., Crump and Coyajee, JJ.*). SECRETARY OF STATE *v.* BHASKAR KRISHNAJI.
89 I.C. 498=49 Bom. 759=27 Bom. L.R. 973=A.I.R. 1925 Bom. 485 (F.B.).

—S. 84—Applicability.

———Section 84 does not apply generally to the consequences of a breach on the part of the contractor but only to a particular penalty provided for a breach of the condition as to the contractor performing any duty or act or abstaining from a particular act. (*Shah, Ag. C. J. and Kincaid, J.*). BHAGWANDAS RANGILDAS *v.* SECRETARY OF STATE. **86 I.C. 87=27 Bom. L.R. 66=49 Bom. 194=A.I.R. 1925 Bom. 227.**

———(16 of 1927).

—S. 26—Burden of proof.

———Where the charge against the accused is that he has made an encroachment on Government forest land, the *onus* is on the prosecution to establish that the land forms part of the Government forest: 19 Mad. 165, *Ref.* (*Findlay, J. C.*). NAGO WAIN *v.* EMPEROR. **124 I. C. 622=1929 Cr. C. 53=A.I.R. 1929 Nag. 190.**

—S. 26 (d)—Conviction under.

———Cattle grazing in the Government forest—Owner not authorizing directly nor indirectly such grazing—He cannot be convicted: 11 N. L. R. 76, *Ref.* (*Subhedar, A. J. C.*). EMPEROR *v.* SARTOKI. **120 I.C. 414=1930 Cr. C. 152=31 Cr. L.J. 109=A. I. R. 1930 Nag. 64.**

———Where it is clear from evidence that the accused has been cultivating land alleged to be part of a Government forest for at least seven years and the probabilities are that his father had done the same before him he cannot be held to have cleared or broken up the land for cultivation or any other purpose and his conviction under S. 26 (h) cannot be sustained. (*Findlay, J. C.*). NAGO WANI *v.* EMPEROR. **124 I.C. 622=1929 Cr. C. 53=A.I.R. 1929 Nag. 190.**

—S. 59—Interpretation.

———*Words "any person claiming to be interested in the property" in S. 59—"So seized".*

The first canon of construction of a statute is that you must take the language as it stands and if it is clear, give effect to it. There is no possible ground for saying that the phrase "any person claiming to be interested in the property so seized" occurring in S. 59 could be construed as limited to

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the case contemplated by S. 57 when no mention is made of any such limitation, the language of the section is perfectly clear and unrestricted in its terms and must be given effect to accordingly. Apart from that, the words "so seized" logically and grammatically refer to the seizure under S. 52, which includes seizure of tools, boats, etc. (*Pearson and Jack, JJ.*). MEHER SARDAR *v.* EMPEROR.
A.I.R. 1930 Cal. 577.

FORFEITURE.

See (1) ACT OF STATE.
(2) CONTRACT ACT, S. 74.
(3) CROWN.
(4) LANDLORD AND TENANT.
(5) PENAL CODE.
(6) T. P. ACT, S. 111.

—Of Property—*See* PENAL CODE, S. 62.

FORCED ENDORSEMENT.

See PENAL CODE, S. 465, ETC.

FORGED NOTES.

See PENAL CODE, S. 489-B.

FORGERY.

See (1) CR. P. CODE, SS. 195 and 476.
(2) PENAL CODE, SS. 463 and 471.

FOREST OFFICER.

See FOREST ACT.

FORMA PAUPERIS.

See CIV. PRO. CODE, O. 33.

FORM AND CONTENTS OF JUDGMENT.

See CR. P. CODE, S. 367.

FORWARD CONTRACTS.

See CONTRACT ACT, SS. 73, 83—92, ETC.

FOSTERAGE.

See MAHOMEDAN LAW.

FRAME OF SUIT.

See CIV. PRO. CODE.

FRAMING AND SETTING ISSUES.

See CIV. PRO. CODE.

FRANCHISE.

See MUNICIPAL ACTS.

FRAUD.

See also (1) C. P. CODE, SS. 11, 13 AND 47 AND O. 6, R. 4; O. 21, R. 90, ETC.
(2) CONTRACT ACT, SS. 17, 19, ETC.
(3) DECREE, SETTING ASIDE.
(4) PRACTICE—FRAUD.

——Party to Fraud—Relief.

See T. P. ACT, S. 53.

——Who may plead.

See (1) CONTRACT ACT, SS. 19, 23.
(2) EVIDENCE ACT, S. 115.
(3) T. P. ACT, S. 53.

—Benami transaction.

——Where in a suit for declaration that a certain alienation is invalid the plaintiff is merely a figure head and the real plaintiff is the alienor himself who has caused the suit to be instituted for undoing his own act, no declaratory decree should be passed: A.I.R. 1925 Lah. 24, *Foll.* (*Findlay, J.C.*). GANGABAI *v.* HANSDAS. **103 I.C. 905=10 N.L.J. 64=A.I.R. 1927 Nag. 213.**

—By minor.

——In equity, if an infant be old enough to commit a fraud by inducing others to think that he is of age, he cannot take advantage of it, and, if the Court cannot restore the parties to their original footing, the infant will be bound as if he were an adult. But where the minor has not obtained any property by fraudulent misrepresentation and is merely asking to be put in the position which he occupied before the transaction, this rule will not apply.

FRAUD—Fraudulent decree.

It is a question of some difficulty to determine what constitutes a fraudulent misrepresentation by an infant; but it is well established that, allowing another person to deal with him as if he was an adult or doing acts which only an adult can properly do is not sufficient: *Ex-parte Jones*, (1881) L. R. 18 Ch. D. 109, *Ref.*

The representation must, in order to create the liability, be an express representation.

Where, therefore, a minor simply executes a vakalatnama and files a written statement without making any express representation that he is of age, that of itself does not amount to a fraudulent representation that he is of age.

Again, there may be a false representation which is not fraudulent; for untruth does not of itself import a dishonest mind. Proof of absence of the actual and honest belief is necessary; *Derry* v. *Peck*, 14 A. C. 337, *Ref.* (*Das and Adami, JJ.*). GANGANAND SINGH *v.* RAMESHWAR SINGH.
102 I.C. 449=6 Pat. 388=8 P.L. T. 730=A.I.R. 1927 Pat. 271.

—Effect.

——If fraud has been effectuated, estate should be allowed to remain where it is—Otherwise Court will interfere. (*Robinson, C. J. and Duckworth, J.*). MAUNG PO ZU *v.* MAUNG P. KWA.
65 I. C. 322=11 L. B. R. 89=A.I.R. 1921 L.B. 58.

—Execution sale.

——Civil P. C., S. 47—Old and new Code—No application under S. 47 is maintainable, for recovering land obtained by fraud not concerned with publishing or conducting the sale—A separate suit will lie. 19 Cal. 683 (P.C.), *Diss.* (*Gokul Prasad, J.*). NARAIN SINGH *v.* ZALIM SINGH. **74 I.C. 351=A. I. R. 1923 All. 573.**

—Ex parte decree.

——Court finding in later suit that summons was not served on defendant in former suit—No fraud is established thereby—Civil P. C., S. 11. (*Ross, J.*). HARNARAIAN PANDEY *v.* NAND KESHWAR PANDEY. **71 I. C. 573=1 P.L.R. 127=A.I.R. 1923 Pat. 406.**

—Failure of fraud.

——Where fraud has wholly failed, parties can be remitted to original position. (*Hallifax, A.J.C.*). RAMPRASAD *v.* SETH JASKARAN. **82 I. C. 489=21 N.L.R. 21=A. I. R. 1925 Nag. 73.**

—Fraudulent decree.

——A fraudulent decree pre-supposes that fraud has been practised on the Court or on one of the parties to the suit. (*Cuming and Graham, JJ.*). BISWAMBAR BISWAS *v.* NILAMBAR MURARI.
33 C.W.N. 997=A.I.R. 1930 Cal. 263.

——*Every fraud can't sustain suit to set aside decree got by fraud.*

Many decrees are obtained by the fraud of the successful party which cannot be set aside by filing another suit and when the authorities are examined the difficulty, in laying down any principle to establish a distinction between frauds which if proved will enable the successful party to set aside a decree and those which will not support such a suit, is apparent.

Whenever a plaintiff or defendant obtains a decree by perjury the Court has been misled and not mistaken and the judgment so obtained can be impeached on the ground of fraud.

Where the Court was misled by the insolvent plaintiff who concealed his insolvency, in the suit for debt due prior to insolvency and where it was still open to the Official Assignee to sue him for the debt.

FRAUD—Fraudulent registration.

Held: the decree could be set aside by the debtor. (*Macleod, C.J.*). ANDREW ROZARIO *v.* MAHOMED IBRAHIM SARANG. **33 I.C. 34= 48 Bom. 583=26 Bom. L.R. 695= A.I.R. 1924 Bom. 460.**

—Fraudulent registration.

———Any fraud or misrepresentation by one party alone is ample to render the registration a nullity. (*Findlay, O.J.C.*). MT. SARJA *v.* MT. TULSI. **91 I. C. 1018=A.I.R. 1926 Nag. 93.**

—Omission to raise issue.

———Court cannot go into the question of fraud when no issue has been raised regarding fraud and the defendants were not asked to meet any such case. (*Krishnan and Venkatasubba Rao, JJ.*). KUPPUSWAMI AIYANGAR *v.* BAVASWAMI RAO. **101 I. C. 399=50 Mad. 357= A.I.R. 1927 Mad. 538=38 M.L.T. 197.**

—Partnership.

———*Fraud vitiates any agreement entered into on dissolution of partnership.*

An agreement entered into on a dissolution will be set aside if it can be shown to have been based upon error or to have been tainted by fraud, whether in the shape of positive misrepresentation or of concealment of the truth.

In a suit upon a promissory note it was found that the working partners of a firm prepared and produced accounts before the sleeping partners on the faith of which the latter took upon themselves the partnership business and sent off the working partners promising to pay them under promissory note a sum of money after giving the former some cash and some logs of timber.

Held: that having regard to the fraud practised upon the sleeping partners as shown by the numerous instances of falsification of accounts by the working partners, the settlement was not binding upon the managing partners and that the promissory note was accordingly vitiated: 5 M.I.A. 872 (P.C.) and *Law* v. *Law*, (1905) 1 Ch. 140, *Ref.* (*Ananthakrishna Ayyar, J.*). (VATAKKAM CHIRAYIL PARKUM) KURUNDALIAMMAL *v.* T. P. E. N. KUNHI KANNAN. **123 I. C. 596= A. I. R. 1930 Mad. 141.**

—Party to fraud.

———*Defence of* pari delicto.

Two points have to be proved before a person can successfully plead the defence of *pari delicto*. It must be proved that the transaction was intended to defraud a third person and that the third person was, as a matter of fact, defrauded. The mere admission on the part of the plaintiff that the transaction was intended to defraud was not sufficient for the Court to take judicial notice of the fraud although it is not raised by the pleadings. The defence must be raised at the proper time and where the plaintiffs have no opportunity of leading evidence to meet the second point, *viz.*, that the third person was as a matter of fact defrauded, the defence cannot be allowed: 27 All. 266, *Expl.* and *Dist.* (*Rupchand and Barlee, A.J.Cs.*). MULCHAND HEMRAJ *v.* KHEMCHAND THANMAL. **118 I.C. 202= A. I. R. 1930 Sind 9.**

———Where each party is equally in fault, the law favours him who is actually in possession: A.I.R. 1923 Cal. 90; A.I.R. 1923 All. 504; 25 P.R. 1905; and 21 P.R. 1916, *Foll.*; A.I,R. 1925 Mad. 1016; 18 O. C. 131; 31 Bom. 405; 37 Bom. 217; 32 M.L.J. 484 and A.I.R. 1923 Mad. 711, *Not foll.* (*Addison, J.*). WAZIR CHAND *v.* KARANCHAND. **107 I. C. 110 (Lah.).**

FRAUD—Party to fraud.

———Parties to fraud cannot seek assistance from Court. (*Findlay, Offg. J. C.*). C. P. AUTOMOBILE, LTD. *v.* RAMCHANDRA VISHWANATH. **91 I.C. 1029=A.I.R. 1926 Nag. 259.**

———A plaintiff is precluded from setting up his own fraud in order to support his claim. The case of defendant who is only resisting a claim stands on a different footing: 38 P.R. 1892; 31 B. 405; 18 O.C. 131, *Dist.*; 25 P. R. 1905: 18 B. 372, *Foll.* (*Martineau, J.*). RADHA KISHAN *v.* MOOLCHAND. **76 I.C. 128=A.I.R. 1925 Lah. 27.**

———Benami—Defendant purchasing benami in plaintiff's name and remaining in possession and defrauding a stranger in collusion with plaintiff—Plaintiff suing for possession—Defendant cannot successfully plead benami and fraud: 32 M.L.J. 484 and 31 Bom. 405, *Foll.*; A.I.R. 1923 Cal. 90, *Not foll.* (*Waller, J.*). PACHYAMMAL *v.* DEVANAIAMMAL. **91 I.C. 776=22 M.L.W. 313=A.I.R. 1925 Mad. 1016.**

———Where the fraudulent purpose has been effected the maxim *in pari delicto potior est conditio possidentis* will apply and the Court will help neither party. On the other hand where the purpose of fraud is not carried in execution the mere intention to defrand will not deprive the true owner of the property. 33 Cal. 967, *Foll.* (*Wazir Hasan and Pullan, A.J.Cs.*). BANSI DHAR *v.* AJUDHIA PRASAD. **82 I.C. 333=27 O.C. 175=11 O.L.J. 619= A.I.R. 1925 Oudh 120.**

———Once it is established that the parties are *pari delicto* the Courts will not assist an illegal transaction in any respect, that is, the person who asks the Court to do something will fail. A.I.R. 1923 All. 504, *Foll.*; A.I.R. 1924 All. 80, *Dist.* (*Daniels, J.*). DAYA RAM *v.* THAKURI. **83 I. C. 21= 46 All. 622=22 A.L.J. 506= 5 L.R.A. Cr. 170=A.I.R. 1924 All. 668.**

———*Strifling non-compoundable prosecution—Parties not* in pari delicto.

Money paid on illegal contract cannot be recovered in the absence of fraud, duress or undue influence or oppression, where the payment was obtained by the innocent misrepresentation of the other party. The generality of the rule is, however, subject to some qualification, *e. g.*,, where contracts or transactions are prohibited by law for the sake of protecting one set of men from another set of men, the one from their situation and condition being liable to be oppressed or imposed upon by the other, there the parties are not *in pari delicto*; and it has therefore been held that the person injured after the transaction is finished and completed, may bring his action and defeat the contract. If one person has paid money to another or has executed deeds in favour of another in pursuance of an illegal agreement, *e. g.*, to strifle a non-compoundable criminal prosecution though both parties are *in delicto*, yet they are not *in pari delicto*, and the person who has paid the money or has executed the deeds may recover it back in an action for money paid and received or may apply for the setting aside of the deeds respectively. (*Case-law discussed.*) (*C. C. Ghosh and Panton, JJ.*). RAM KUMAR DAS *v.* NANDA KUMAR SHAHA. **75 I. C. 27= 50 Cal. 639= A. I. R. 1924 Cal. 248.**

———Vendor cannot plead that the transfer in favour of vendee was a benami transaction intended to cheat the creditors or his own vendor by putting his name as benamidar for his own vendor. (*Coutts-Trotter and Ramesam, JJ.*). K. RAMASWAMY NAICKER *v.* ALAMELU AMMAL. **78 I.C. 921=34 M.L.T. 301=1924 M.W.N. 203= A.I.R. 1924 Mad. 604=46 M.L.J. 298.**

FRAUD—Party to fraud.

———*Carried out—Court will refuse relief to applicant.*

Where it was a part of the agreement that the parties should procure an order recognising the transfer, withholding from the Court the fact that it was not intended by them to be operative but real intention was merely to mislead third parties.

Held, it is a discreditable conspiracy to cheat the creditors. In such a case, when the facts come to the notice of the Court, the doctrine of *pari delicto* will be given effect to; and the Court will refuse aid to the party who has participated in the fraud and who asks for relief. 2 Q. B. D. 724 C. A., *Foll.* (*Spencer and Venkatasubba Rao, JJ.*). SHRIRAMA ROW *v.* BAPAYYA.

76 I.C. 845=18 M L.W. 453=
A.I.R. 1924 Mad. 189.

———*He can succeed only if purpose did not get beyond intention.*

Where the owner of property transfers it to another for an illegal purpose and such purpose is carried into execution neither the vendor nor his heirs can succeed in a suit to eject the vendee in possession without proving that the purpose never got beyond the stage of intention. In general where parties are concerned in illegal agreements or other transactions whether they are *mala prohibita* or *mala in se* Courts of equity following the rule of law as to participators in a common crime will not interpose to grant any relief. (*Baker, Offg. J. C.*). MAN SINGH *v.* KARAN SINGH. **78 I. C. 260=**
A. I. R. 1924 Nag. 200.

———*Transferee can retain property only if fraud is carried out.*

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud the contemplated fraud must be actually carried into effect. Then and then alone does the fraudulent grantor or giver loose the right to claim the aid of the law to recover the property he has parted with: 35 I.C. 28, *Foll.* (*Wazir Hasan and Cuming, A. J. Cs.*). RANNAQ ALI *v.* SYED NAZIR HUSSAIN. **78 I. C. 359=11 O.L.J. 92=**
A. I. R. 1924 Oudh 321.

———*Parties* in pari delicto—*Fraud carried out—Court would dismiss claim.*

A defendant can properly plead and rely on facts showing that he and the plaintiff were *in pari delicto* (4 Q.B. 312, 1869, *Ref.*). If the Court finds that parties were acting together with a view to perpetrate fraud and did in fact perpetrate that fraud, and that there is no difference in the decree of the plaintiff and defendant's guilt the duty of the Court is to dismiss the claim. A.I.R. 1923 Cal. 90. (*Mears, C.J. and Banerji, J.*). VILAYAT HUSAIN *v.* MT. MISRAN. **72 I.C. 92=**
45 All. 396=21 A.L.J. 303=4 L.R.A. Civ. 418=
A.I.R. 1923 All. 504.

———Suit for possession—Plaintiff, a party to the fraud, cannot allege fraud but defendant can show transaction to be fraudulent. (*Robinson, C. J. and Heald, J.*). MAUNG TIN *v.* MA MYA MJIUT.

65 I.C. 459=11 L.B.R. 83=A.I.R. 1921 L.B. 63.

—Proof of.

———When a plaintiff impeaches a transaction on the ground of fraud, the facts which constitute the alleged fraud must be distinctly, specifically and accurately stated. A charge of fraud must be substantially proved as laid, and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. 11 B. 620; 20 C. W. N. 638, *Foll.* (*Percival, J. C. and Rupchand Bilaram, A.J.C.*). ABDUL NABI KARIMDINO *v.* MAZHARALI NUR MAHOMED. **125 I.C. 33.**

———*Fraud—Collusion.*

Where the Court had no jurisdiction to pass a decree in terms of a compromise for payment of the amount agreed, where, to avoid possible complication and difficulties arising out of recording a simple compromise in that Court, a form of having a reference to arbitration and award was gone through and where application to a competent Court was made to file the award and have a decree passed in its terms, without letting the Court know of the proceedings in the other Court,

Held, that this conspiracy of silence cannot be described as "collusion" in the sense in which the word is used in connexion with judicial proceedings, *viz.*, a secret agreement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose, or even in the wider sense of a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person or for some improper purpose. (*Fawcett, Ag. C. J. and Murphy, J.*). KONDI RAVJI *v.* CHUNI LAL RUPCHAND. **113 I.C. 229=**
53 Bom. 75=30 Bom. L.R. 1539=
A.I.R. 1929 Bom. 1.

———Fraud is difficult to prove by means of direct evidence. It can usually only be established by the circumstances surrounding the case. (*Findlay, J.C. and Macnair, A.J.C. afterwards Prideaux, A.J.C.*). VYANKATESH *v* ANNASA LAL.

107 I.C. 517=23 N.L.R. 143=11 N.L.J, 49=
A.I.R. 1928 Nag. 1.

———It is not ordinarily possible to prove fraud by direct evidence. So if it is inferred from the conduct of the parties the finding as to fraud is not illegal. (*Baker, J. C.*). SHEORAM *v.* DOMA.

89 I.C. 367=A I. R. 1925 Nag. 460.

———*Evidence of, can be gathered from circumstances only.*

In a case where a forgery or fraud is alleged, it is almost impossible to prove the same by actual direct evidence, and all that the person alleging it can do is to give evidence of the circumstances, from which a reasonable presumption arises that something of the sort has occurred. (*Findlay, O. J. C.*). KESHEO *v.* VITHAL. **89 I. C. 468=**
8 N. L. J. 123=A. I. R. 1925 Nag. 427.

———Fraud and collusion must be proved by facts or inferences from facts as a whole—Suspicions or surmises or conjecture are no substitute but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would escape. (*Lord Atkinson.*) SATISH CHANDRA *v.* SATISH KANTHA. **73 I.C. 391=28 C.W.N. 327=**
39 C.L.J. 165=33 M.L.T. 325=
A. I. R. 1923 P.C. 73=45 M.L.J. 363 (P.C.).

———One *R* executed a sale deed of his share in favour of *S* and the plaintiffs brought the present suit against *S* for pre-emption. After the summonses to the defendants had been issued and served, *P*, a co-sharer in the village executed a deed of gift in favour of *S* in respect of a very small amount of the property in the village enabling thereby to resist, the claim of the plaintiffs on the ground that he (*S*), was already a co-sharer in the village and therefore no suit for pre-emption was maintainable against him.

FRAUD—Revenue sale.

Held that the circumstances that the donor was of a different caste to the donee, that the deed of gift was given after the institution of the suit and the smallness of the property gifted did not justify the presumption of fictitiousness of the deed of gift. If the *plaintiffs wished to challenge the deed of gift they should have said so in their pleadings and given evidence in support of their allegations, fictitiousness and fraud. (Rafique and Piggott, JJ.).* SHIB LAL *v.* BIDHA SINGH.

72 I.C. 140=21 A.L.J. 329=4 L.R.A. Civ. 375=A.I.R. 1923 All. 508.

—Revenue sale.

———If a suit for annulment of a revenue sale is based on a definite allegation of fraud, that of itself is sufficient to entitle the plaintiffs to the relief provided that the plaintiffs prove that fraud has been committed and that the plaintiffs' right of residing in the lands has been adversely affected. (*Suhrawardy and Costello, JJ.*). ANANTA LAL SARKHAL *v.* SOUDAMINI GUHA.

A. I. R. 1930 Cal. 621.

———*Civil Court has jurisdiction to declare sale fraudulent and not binding on plaintiff.*

A Civil Court has jurisdiction to make a declaration that a revenue sale is fraudulent and did not convey plaintiff a interest in the property. The sale has the appearance of a sale for arrears of revenue but is in its essence, a private alienation. A co-owner of land cannot be allowed to use the machinery of the Revenue Sale Law to defraud other co-owner, and if he does so the Civil Courts are competent to declare that the result of his conduct is not to place a fraudulent purchaser in a better position than a buyer at a private sale. (*Pratt, J.*). MA ZA *v.* MA MI. **67 I.C. 636=11 L.B.R. 313=A.I.R. 1923 Rang. 17.**

—Taking advantage of.

———Where the plaintiff succeeded in carrying out the fraud by executing a sale-deed of his property he is precluded from putting forward his own title to the property by taking advantage of his own fraud. 36 C. 551 (P.C.), *Foll.* (*Gokul Prasad, J.*). LACHMAN DEO *v.* MULCHAND. **71 I.C. 441=A.I.R. 1923 All. 411.**

———A person who procured a legal flaw cannot take advantage of it. (*Walsh and Stuart, JJ.*). RAM SUNDAR *v.* MT. KULWANTHI KUNWAR.

66 I.C. 499=44 All. 642= 20 A.L.J. 392=A.I.R. 1922 All. 233.

—What is.

———Any and every act of the defendant which misleads the Court does not afford a cause of action to the plaintiff to found a separate suit for having a decree declared void. Thus if in the previous case the Court was misled into holding that the service of the summons by registered post was good service it would not by itself be sufficient to found a separate action on the ground of the fraud. The only remedy open to a party under such circumstances is to apply to the Court which passed the previous decree to set aside the *ex parte* decree under O. 9, R. 13, C. P. C. (*Rupchand, A. J. C.*). FIRM OF M. GHULLAMALLY & SONS *v.* FIRM OF GAMMETER. **24 S.L.R. 232=A.I.R. 1930 Sind 298.**

———A defendant relying on a rule of evidence which prevents a Court from taking certain evidence can hardly be said to be guilty of a fraud. (*Macleod, C. J. and Crump, J.*). TALAKCHAND BHERAJI *v.* ATMARAM KESHAV. **77 I. C. 342=25 Bom.L.R. 818=A. I. R. 1924 Bom. 58.**

———The mere execution of a deed of relinquishment by an ex-proprietary tenant cannot amount to constructive fraud on behalf of the landlord. (*Gokul Prasad, J.*). BHAGWANT *v.* MARE.

72 I.C. 1024=A.I.R. 1923 All. 113.

FRAUD IN COURT.

See C. P. CODE, S. 73, O. 21, R. 52.

FRAUD ON CREDITORS.

See (1) FRAUDULENT TRANSFERS.
(2) T. P. ACT, S. 53.

FRAUDULENTLY, DEFINITION OF.

See PENAL CODE, S. 25.

FRAUDULENT PREFERENCE.

See (1) PROV. INS. ACT, Ss. 37 AND 54.
(2) PRES. TOWNS INSOLVENCY ACT, S. 56.
(3) T. P. ACT, S. 53.

FRAUDULENT TRANSFER.

See T. P. ACT, S. 53.

FREE CONSENT.

See CONTRACT ACT, S. 16.

FREEDOM OF RELIGION ACT.

See CASTE DISABILITIES REMOVAL ACT.

FREIGHT.

See RAILWAYS ACT.

FRESH EVIDENCE.

See C. P. C., O. 41, R. 27.

FRESH SUIT.

See C. P. C., O. 23, R. 1.

FRUSTRATION.

See CONTRACT ACT, S. 56.

FUGITIVE OFFENDERS ACT (1881, 44 & 45 Vict., Ch. 69).

—S. 33—Interpretation.

———The word "return" in S. 33 is not to be read as implying that the offender is a fugitive from the country to which he is being sent for trial: 103 Law Times 473, *Rel. on.* (*Wild, J. C. and Aston, A.J.C.*). E. C. D. WHEELER *v.* EMPEROR.

112 I.C. 673=29 Cr. L. J. 1089=A.I.R. 1928 Sind 161.

FULL BENCH.

See PRACTICE—HIGH COURT.

FUNERAL EXPENSES.

See (1) HINDU LAW.
(2) MAHOMEDAN LAW.

FURTHER ENQUIRY.

See (1) C. P. C,, O. 41, Rr. 23 AND 25.
(2) CR. P. C., Ss. 203 AND 437.

FUTURE INTEREST.

See T. P. ACT, O. 34.

GADABA OR GUDABA.

See GRANT—INAM.

GAMBLING.

See (1) CONTRACT ACT, Ss. 23, 30 AND 65.
(2) GAMBLING ACTS, IMPERIAL (PUBLIC GAMBLING ACT 3 OF 1867) AND PROVINCIAL.

GAMBLING ACT (III of 1867).

—S. 3—Gambling in Dewali.

———Gambling in Dewali should not be considered to be an offence; but the law will not countenance gambling even at Dewali if it is in contravention of the Gambling Act. Where the only evidence that anything was done in contravention of the Act was that the owner of the house had in front of him a small pot containing a few annas and there was no reason to suppose that the sum represented his profits or that it was what is known as 'nal' and the sums staked were quite trifling,

Held, that it was only a case of Dewali Gambling in a private house and no offence was committed. (*Pullan, J.*). LACHHMAN *v.* EMPEROR. **7 O. W. N. 757=1930 Cr. C. 943=A.I.R. 1930 Oudh 403.**

GAMBLING ACT (1867), S. 5—General warrant —Legality.

—S. 5—General warrant—Legality.

———To issue a warrant to raid houses where gambling goes on at the time of Dewali is highly undesirable as the police are merely encouraged to run in numbers of perfectly innocent persons in order to get a reward. (*Pullan, J.*). LACHHMAN *v.* EMPEROR. **7 O.W.N. 757=1930 Cr. C. 943= A.I.R. 1930 Oudh 403.**

GAMBLING CONTRACT.

See CONTRACT ACT, S. 23.

GAMBLING IN LITIGATION.

See CONTRACT ACT, S. 23.

GAMING.

See (1) CONTRACT ACT, Ss. 30 AND 65.
(2) GAMBLING ACTS, IMPERIAL AND PROVINCIAL.

GANJAM AND VIZAGAPATAM AGENCY RULES.

See AGENCY RULES.

GARNISHEE.

See (1) C. P. CODE, O. 21, Rr. 46, 53, ETC.
(2) HIGH COURT RULES.

GAYAWAL.

See (1) HINDU LAW—RELIGIOUS OFFICE.
(2) T. P. ACT, S. 6.

GAZETTE.

See EVIDENCE ACT, S. 81.

GENERAL CLAUSES ACT (10 of 1897).

—S. 3 (15)—High Court.

———For the purpose of determining the meaning the words "ordinary or extraordinary original civil jurisdiction" in S. 3, Cl. 15, General Clauses Act, all that is excluded is the High Court, acting under Cls. 11 to 18, Letters Patent, and that the High Court exercising any other original jurisdiction would fall within the definition of District Judge.

Hence the High Court is a "District Court" when it does not exercise its ordinary or extraordinary civil jurisdiction conferred by Cls. 11 to 18, Letters Patent: 13 Bom. 520 (P. C.), *Foll.* (*Wallace and Ananthakrishna Ayyar, JJ.*). *In the matter of* G. A. KUPPUSWAMI NAYAGAR. **A. I. R. 1930 Mad. 779.**

—S. 3 (20)—Applicability.

———The definition of the words "in good faith" given in the General Clauses Act of 1897 does not apply to the Transfer of Property Act. (*Mukerji and Ashworth, JJ.*). LACHMI PRASAD *v.* LACHMI NARAIN. **107 I.C. 36=25 A. L. J. 926= A.I.R. 1928 All. 41.**

—S. 3, Cl. 25—Benefit to arise out of land.

———*Whether includes mortgage.*

Held, that a mortgage is not "a benefit to arise out of land" within the meaning of S. 3, Cl. 25 of the General Clauses Act. (*Rankin, C. J. and C. C. Ghose, J.*). IMPERIAL BANK OF INDIA *v.* BENGAL NATIONAL BANK, LTD. **57 Cal. 328=34 C. W. N. 605.**

—S. 3 (25)—Building.

———Building is immovable property. (*Harrison and Dalip Singh, JJ.*). MUNI LAL *v.* KISHORE CHAND. **103 I. C. 742=9 L. L. J. 157= 28 P. L. R. 325=A.I.R. 1927 Lah. 373.**

—Ss. 3 (25) and 34—Mortgage bond.

———Simple mortgage bond is moveable property for the purpose of procedure for attachment. (*Case-law discussed*). 15 All. 134; 26 Bom. 305; 18 P. R. 1909; 37 Mad. 51; 50 I.C. 157, *Foll.* (*Walsh, A.C.J. and Boys, J.*). LAL UMRAO SINGH *v.* LAL SINGH. **80 I.C. 890=5 L.R.A. Civ. 674= 22 A.L.J. 840=46 All. 917= A. I. R. 1924 All. 796.**

GENERAL CLAUSES ACT (1897), S. 3 (39)—Corporation.

—S. 3 (25)—Mortgagee's interest.

———A sale of a mortgagee's interest can only be effected by means of a registered deed of transfer: 10 A.L.J. 167; 29 Cal. 1; 37 Mad. 51, *Foll.*; 13. All. 89; 15 All. 134 and A.I.R. 1924 All. 796, *Expl.* and *Not foll.* (*Sulaiman and Kendall, JJ.*). BANK OF UPPER INDIA, LTD. *v.* FANNY SKINNER. **119 I.C. 241=1929 A.L.J. 279= 51 All. 494=A. I. R. 1929 All. 161.**

—S. 3 (25)—Mortgage with possession.

———A mortgage with possession is an interest in land because the mortgagee has a right to possession and enjoy the benefits arising out of the land until he is redeemed. In such a case, the mortgagee rights therein are immovable property. (*Harrison and Dalip Singh, JJ.*). MUNI LAL *v.* KISHORE CHAND. **103 I.C. 742=9 L. L. J. 157= 28 P. L. R. 325=A. I. R. 1927 Lah. 373.**

—S. 3 (25)—Several fishery.

———A several fishery is an incorporal hereditament and would normally be considered real or immovable property. (*Marten, J.*). LAKSHMAN GOWROJI *v.* RAMJI ANTONE. **23 Bom. L.R. 939= A.I.R. 1921 Bom. 93.**

—S. 3 (31)—Juge d' instruction.

———'Juge d' instruction' is a Magistrate and so statements made in his immediate presence are admissible in evidence. The term 'Magistrate' is not restricted to the Magistrates exercising jurisdiction under Cr. P. C.: 22 Bom. 235, *Rel. on.* (*Waller and Pandalai, JJ.*). PANCHANATHAM PILLAY *v.* EMPEROR. **121 I. C. 157= 29 M.L.W. 645=1929 M.W.N. 383=52 Mad. 529= 2 M. Cr. C. 150=31 Cr.L.J. 223= A.I.R. 1929 Mad. 487=56 M.L.J. 628.**

—S. 3 (34)—Shares in company.

———Shares in a company are goods. But they are peculiar kinds of moveable property, which cannot pass freely from hand to hand. (*Macleod, C.J. and Crump, J.*). VADILAL SARABHAI *v.* MANEKJI PESTONJI BHARUCHA. **82 I.C. 977= 25 Bom. L.R. 414=A.I.R. 1923 Bom. 372.**

—S. 3 (37)—Under Wakf Act.

———There does not appear to be anything in the Mussalman Wakf Act which is repugnant to the definition of an offence contained in the General Clauses Act and in the Criminal Procedure Code and as the Act contains no provision regarding the Court by which offences under S. 10 of the Act should be tried, they can be tried by any Magistrate. (*Percival, J.C. and Aston, A.J.C.*). ALI MAHOMED *v.* EMPEROR. **105 I.C. 666= 22 S.L.R. 141=28 Cr. L.J. 954= 9 A.I. Cr. R. 142=A.I.R. 1928 Sind 43.**

—S. 3 (39)—Applicability.

———*Guardians and Wards Act, S.* 4 (2)—*Person.*

Per *Mukerji, J.*—The word 'person' as used in the definition of 'Guardian' in S. 4, Cl. (2), Guardians and Wards Act, is not to be read in the light of the meaning given to it by S. 3, Cl. (39), General Clauses Act. (*Mukerji and Guha, JJ.*). SM. ASALATA ROY *v.* SOCIETY FOR THE PROTECTION OF CHILDREN OF INDIA. **51 C.L.J. 272= A.I.R. 1930 Cal. 397.**

—S. 3 (39)—Corporation.

———*Cr. P. C., S.* 250—"*Person*" *includes a corporation.*

The expression "person" includes not only a natural person but also a juristic person. Section 3 (39) of the General Clauses Act makes it perfectly clear that the word "person" includes "any company or

GENERAL CLAUSES ACT (1897), S. 3. (39)—Firm.

association or body of individuals whether incorporated or not". (*Shadi Lal, C.J.*). THE MUNICIPAL COMMITTEE OF LAHORE *v.* RATTAN CHAND. **72 I.C. 623=24 Cr. L.J. 463= A.I.R. 1923 Lah. 31.**

—S. 3 (39)—Firm.

———The word 'person' clearly includes a firm as provided by the General Clauses Act, 1897; and when the return is made on behalf of the firm by a partner, it is the firm that is the person who makes the return. (*Coutts-Trotter, C.J. and Krishnan, J.*). COMMR. OF INCOME-TAX, MADRAS *v.* THILAI CHIDAMBARAM NADAN. **90 I.C. 549= 48 Mad. 602=22 M.L.W. 206= A.I.R. 1925 Mad. 1048=49 M.L.J. 124.**

—S. 3 (52)—Mark.

———Mark by a person able to write but who belonged to illiterate caste was held to be a valid signature. A.I.R. 1923 Nag. 182, *Ref.* (*Baker, Offg. J. C.*). GULAM MOHIUDDIN *v.* SHANKER. **78 I.C. 79= A.I.R. 1924 Nag. 159.**

—S. 3 (52)—Signature.

———*Bengal General Clauses Act, S.* 3 (41)—"*Signature*"—*Means writing name with the intention to authenticate the document.*

Speaking generally a signature is the writing or otherwise affixing a person's name or a mark to represent his name, by himself or by his authority with the intention of authenticating a document as being that of or as binding on the person whose name or mark is so written or affixed. The insertion of the name, in any part of the writing, in a manner to authenticate the instrument is sufficient. Although the signature be in the beginning or middle of the instrument, it is binding as if at the foot of it. The question always is, whether the party, not having signed it regularly at the foot, yet meant to be bound by it as it stood, or whether it was left, so unsigned because he refused to complete it; but when it is ascertained that he meant to be bound by it as a complete contract, the signature is, for purposes of execution, effective. The Courts have gone so far as to hold that the name at the head of a telegram was sufficient. Some of the cases even hold that it matters not for what purpose the signature was put, if in fact it authenticates the document. But the primary rule is what where the name occurs in the document, not as authenticating the whole, but only for a particular purpose or only with reference to a part, it is not an effective signature. *Johnson* v. *Dodgson*, 2 M. & W. 653; 46 R. R. 733; *Tourret* v. *Cripts*, 48 L. J. Ch. 567, *Ref. to.* (*Mookerjee and Chotzner, JJ.*). J. & D. EZIEKEIL CO., *In re.* **70 I.C. 794=36 C.L.J. 109=50 Cal. 180= A.I.R. 1923 Cal. 35.**

—S. 3 (59)—Applicability.

———Where the probabilities are not, and the evidence does not show, that the parties usually went by the Gregorian Calendar, provisions of General Clauses Act, S. 3 (59) do not apply. (*Batten, J.C.*). SETH BHOJRAJ *v.* PANDA SHANKERNATH. **71 I.C. 45= A.I.R. 1922 Nag. 265.**

—S. 3 (59)—'Sambat' calendar.

———A year calculated according to the *Sambat* calendar amongst Hindi speaking parties should not be considered to mean a year according to the British calendar. (*Baker, J.C.*). MOTIRAM *v.* SETH LAKHMICHAND. **76 I. C. 44= A.I.R. 1924 Nag. 216.**

—S. 6 —Contingent rights.

———*Repeal of statute does not affect even contingent rights.*

GENERAL CLAUSES ACT (1897), S. 6—Sanction for prosecution.

If an auction-purchaser of properties has, under law a right to re-payment of his purchase-money should he discover that the judgment-debtor had no saleable interest in the property,

Held, that such an alternative contingent right is presumed by S. 6 (*c*) of the Act and is not to be deemed to be taken away by the repeal of the enactment giving such a right. (*Mookerjee and Chotzner, JJ.*). MAKAR ALI *v.* SURFADDIN. **70 I.C. 606= 36 C.L.J. 132=27 C.W.N. 183=50 Cal. 115= A.I.R. 1923 Cal. 85.**

—S. 6—Interpretation.

———The repeal or amendment of an Act does not affect a right already in existence unless a contrary intention is made out expressly or by implication. (*Dawson-Miller, C.J. and Jwala Prasad, J.*). CHAUDHURI GURSARAN DAS *v.* AKHOURI PUMESHWAR CHARAN. **104 I.C. 580=6 Pat. 296= 8 P.L.T. 841= A.I.R. 1927 Pat. 203.**

—S. 6 —Interpretation.

———The word enactment in S. 6 (e) include not only an entire law but any section or provision of a law. (*Daniels, J.*). KASHMIRI LAL *v.* MT. KISHEN DEN. **83 I.C. 650=5 L.R.A. Cr. 99= 26 Cr. L.J. 90= A. I. R. 1924 All. 563.**

—S. 6—Letters Patent.

———*Amendment of applicability.*

In the case of a repeal by an enactment there are clear statutory authorities against retrospectivity of legislation for instance, S. 38, Interpretation Act, 1889, (52 and 53 Vic., c. 63), and S. 6, General Clauses Act, 1897. But these provisions do not cover an amendment to the Bombay High Court's Letters Patent, which is made by His Majesty under the powers conferred by sub-S. (1-A), S. 106, Government of India Act: 3 B.H.C.R. (O.C.J.) 49 and *The Colonial Sugar Refining Company Ltd.* v. *Irving*, (1905) A.C. 369, *Dist.* (*Fawcett and Mirza, JJ.*). BADRUDDIN *v.* SITARAM. **114 I.C. 241= 52 Bom. 753=30 Bom. L.R. 942= A.I.R. 1928 Bom. 371.**

—S. 6—Provincial Acts.

———*Mallik, J.*—When an Act of the Governor-General-in-Council repeals any enactment, then, unless a different intention appears, the repeal shall not affect any rights acquired under the enactment so repealed. This rule also applies to an Act of the Bengal Council. (*Cuming and Mallick, JJ.*). SHIBA KALI KUMAR *v.* CHUNI LAL. **103 I.C. 674=31 C.W.N. 1007= A.I.R. 1927 Cal. 748.**

—S. 6—Repeal of Ss. 92 and 93, T. P. Act.

———*Effect.*

A judicially declared right of redemption is a valuable right. The rights of a mortgagor who has obtained a redemption decree under the T. P. Act, Ss. 92, 93 are not mere matters of procedure and are not taken away by the repeal of those sections by the C. P. Code, 1908. (*Daniels, A. J. C.*). RAM BUP *v.* GHANI AHMAD. **74 I.C. 162= 9 O.L.J. 624= A.I.R. 1923 Oudh 156.**

—S. 6—Sanction for prosecution.

———*Amended Code—Effect of.*

Sanction for prosecution granted before the coming into force of the new Code under which the provision as to the grant and revocation of sanction is abolished, can be revoked even after the coming into force of the new Code, the right to apply for revocation of sanction not being a mere matter of procedure but of substantive right. *Gardner* v. *Lucas*, (1878) 3 A.C. 582; *Attorney-General* v. *Sillem*, 10 H.L. C. 704 and *Colonial Sugar Refining Co.* v. *Irving*, (1905) A.C. 369, *Foll.* (*Coutts-Trotter,*

GENERAL CLAUSES ACT (1897), S. 8 (1)—Succession Act.

C. J., Spencer, Kumaraswami Sastry, Beasley and Srinivasa Aiyangar, JJ.). RAMAKRISHNA AIYAR *v.* SITHAI AMMAL. **91 I.C. 395=27 Cr.L.J. 91=1925 M.W.N. 684=48 Mad. 620=22 M.L.W. 879=A.I.R. 1926 Mad. 911=49 M.L.J. 223 (F.B.).**

—S. 8 (1)—Succession Act.

———Proceedings under the repealed and re-enacted Succession Certificate Act must be taxed in exactly the same way after as before the Act of 1925 for there is no substantial difference involved in the principle of the provisions. (*Marten, C. J. and Baker, J.*). RAJARAJESWARASHRAM *v.* SVARUPANANDTIRTH. **103 I.C. 637=29 Bom. L.R. 1031=A.I.R. 1927 Bom. 499.**

—S. 10—Applicability to decrees.

———Section 10 is based upon the principle that parties who are prevented from doing a thing not by any default of their own but by the Court itself are entitled to do it at the first subsequent opportunity and this principle is a general one and applies to the interpretation of decrees of Court. (*Krishnan, J.*). SANKARAN *v.* RAMAN.

87 I.C. 560=1925 M.W.N. 566=21 M.L.W. 469=A.I.R. 1925 Mad. 743=48 M.L.J. 596.

—S. 10—Cattle Trespass Act.

———*Principle of S. 10 may be applied to Cattle Trespass Act, S. 20.*

Although S. 10, General Clauses Act, only applies to Acts made on or after 14th January, 1897, and does not cover in terms, an Act like Cattle Trespass Act passed in 1871, the principle underlying S. 10, General Clauses Act, should be applied to complaints under Cattle Trespass Act, S. 20. (*Findlay, J. C.*). MAHADEO GANPATI PATIL *v.* NABHA VISWANATH. **113 I.C. 285=30 Cr. L.J. 125=12 A.I. Cr. R. 69=A.I.R. 1929 Nag. 96.**

—S. 10—Closing of Court.

———*Court open during vacation for receiving plaints, etc., is deemed to be open.*

When a Court is adjourned for the vacation but the notification states that the Court will be open on certain days for the reception of plaints, petitions and other papers, the Court cannot be treated as closed on those days when it was open for the above purpose: 5 M. 189 (F.B.), *Foll.*

As a matter of practice, it is well understood that plaints, which are not presented in the Presidency Small Cause Court on the days when the office is open for receiving them during the vacation, become time-barred after the expiration of the period of limitation appropriate to such suits and plaintiffs cannot claim to exclude the whole of the Small Cause Court's vacation. The words "other papers" are very wide and must include applications for re-trial of the suit. (*Spencer and Venkatasubba Rao, JJ.*). THE BRITISH INDIA STEAM NAVIGATION CO. *v.* H. M. SHARAFALLY. **70 I.C. 388=17 M.L.W. 705=46 Mad. 938=A. I. R. 1923 Mad. 435=44 M.L.J. 100.**

—S. 10—Compromise decree.

———As neither S. 5 of the Limitation Act nor S. 10 of the General Clauses Act applies to a compromise decree, a party who was bound to do a particular thing under such decree is not entitled to any extension of time on account of the Courts being closed on that day. On the question of the date, from which the time should be counted,

Held, that it should be counted from the date of decree. (*Daniels, J.C.*). ILAHI RAZA KHAN *v.* MT. TAIBA BEGAM. **66 I.C. 273=9 O.L.J. 53=A.I.R. 1922 Oudh 145.**

GIFT—Conditional gift.

—S. 10—Expiry of time on holiday.

———Limitation Act, S. 4—Time fixed by decree expiring in Holidays—Payment on re-opening day is within time. 7 N.L.R. 176, *Foll.*; 35 B. 75, *Ref*; 36 B. 268, *Not foll.*; 41 All. 47, *Ref.* (*Batten, J.C.*). DHANU SINGH *v.* KESHAOPRASAD. **72 I.C. 388=19 N.L.R. 116=A.I.R. 1923 Nag. 246.**

—S. 26—General and special laws.

———Where the insolvent was entrusted with furniture by the Official Assignee for the purpose of continuing his business and, in breach of the trust, he disposed of it to various persons,

Held, that his conviction under general law was proper, even assuming that the facts proved do amount to an offence under S. 103 (b) (2), Presidency Towns Insolvency Act: 6 M.L.W. 283, *Foll.* (*Waller and Madhavan Nair, JJ.*). WILLIAM PLYTHE PETRETT *v.* EMPEROR. **105 I.C. 448=39 M.L.T. 268=28 Cr.L.J. 928=A.I.R. 1927 Mad. 1018.**

—S. 26—No two punishments.

———Where either of the two offences under two different Acts was constituted by the same acts the offender could not be punished for both. (*Zafar Ali, J.*). (HAKIM) BAHADUR SINGH *v.* THE CROWN. **76 I.C. 689=25 Cr. L.J. 225=A. I. R. 1923 Lah. 342.**

GESTATION.

See (1) T.P. ACT, S. 14.
(2) EVIDENCE ACT, S. 112.

GHATTI TOMULU.

See MAD. EST. LAND ACT, SS. 3 (11), 143, 145.

GHATWALI.

See LAND TENURE—GHATWALI.

GHATWALI LAND REGULATION (BENGAL—29 of 1814).

—Ghatwal can be a mourashi mokararidar.

———A person may be a *mourashi mokararidar* and also a ghatwal. (1918 P.H.C.C. 305 and A.I.R. 1924 P.C. 5, *Ref.*). The distinction between a ghatwali within the regulation and ghatwali which is outside the regulation is that in the former case there is no tenure between the zamindar and the ghatwali who holds direct from the Government while in the latter the tenure exists. In the former case while the lands of the ghatwali are still deemed to be within the zamindari, the zamindar no longer pays the Government revenue for them and has therefore, no claim to the underground rights; his only right connected with these lands is to receive the difference between the rent paid by the ghatwal and the amount of the Government revenue which was assessed on this part of the zamindari; if the Government does not claim the mineral rights there is no one to whom they can belong but the ghatwal. But in the latter case the zamindar still pays the Government revenue on these lands and if the ghatwal claims the minerals he must show some transaction which grants him the minerals either expressly or by necessary implication. (*Das and Ross, JJ.*). SATYA NIRANJAN CHAKRAVARTY *v.* SUSHILA BALA DASI. **90 I.C. 513=4 Pat. 799=A.I.R. 1926 Pat. 103.**

GIFT.

See also (1) DEED—CONSTRUCTION.
(2) HINDU LAW—GIFT.
(3) MAHOMEDAN LAW—GIFT.
(4) T. P. ACT, Ss. 122—128.
(5) TRUSTS ACT, S. 3.

—Conditional gift.

———Condition to pay maintenance allowance to donor by donee not observed by donee—Property

GIFT—Imperfect gift.

gifted can be recovered by donor. (*Sir John Wallis.*) MOHANT RAI *v.* MT. LACHHMINA KUNWAR.
101 I.C. 363=1927 M.W.N. 456=26 M.L.W. 94=31 C.W.N. 1087=39 M.L.T. 155=A.I.R. 1927 P.C. 123. (P.C.).

—Imperfect gift.

———Imperfect gift cannot be given effect to by being treated as a trust. *Milroy* v. *Lord*, (1862) 4 Deg. F.& J. 264 and *Richards* v. *Delbridge*, (1874) L. R. 18 Eq. 11, *Foll*. (*Rankin, J.*). AMARENDRA KRISHNA *v.* MONIMUNJARI DEBI.
66 I.C. 586=48 Cal. 986=A.I.R. 1921 Cal. 148.

—Life-estate.

———It is possible in this country for a person, possessed of estate appertaining solely to himself to grant by deed or will an estate to some other person which will amount substantially to an estate which corresponds in extent to that which is known in English Law as a "Life-estate." I. A. Supp. Vol. 47 (P.C.), *Foll.* (*Das and Bucknill, JJ.*). BRIJKISHORE NARAIN SINGH *v.* HARBANS NARAIN SINGH. **62 I.C. 611=2 P.L.T. 728=A.I.R. 1921 Pat. 397.**

—Subsequent condition.

———Condition subsequent in a gift which is void does not affect validity of gift. (*Page, J.*). LALIT MOHAN SEAL *v.* BROJENDRA NATH SEAL.
96 I.C. 45=53 Cal. 251=A.I.R. 1926 Cal. 561.

—Trust and gift.

———Every step taken towards proof of a gift is in itself *protanto* a negation of a trust, for a trust retains the actual ownership in the trustee, while an endeavour to make a gift is an endeavour to divest the property and pass it away to the donee. (*Viscount Sumner.*) HARIRAM SEROWGEE *v.* MADAN GOPAL BAGLA. **114 I. C. 565=1929 A.L J. 406=49 C.L.J. 335=33 C.W.N. 433=31 Bom. L.R. 710=1929 M.W.N. 422=30 M.L.W. 835=A.I.R. 1929 P.C. 77=57 M.L.J. 581 (P.C.).**

GODAVARI AGENCY RULES.

See AGENCY RULES—GODAVARI.

GOLD COAST COLONY NATIVE ORDINANCE.

—S. 28—Complaint under.

———*Remedies open.*

Where a complaint as to violation of S. 28 is brought against a person in a Native Court, all that he can do is either to put in defence and if judgment is against him appeal against it or apply for transfer. He cannot stop the case by raising a case in another Court and craving by means of declaration to make good what is really the defence in the original action simply by saying that bringing of the case is malicious. (*Viscount Dunedin.*) OSUMANYAWA YAW EWUA *v.* NANA SIR OFORI ATTA. **A. I. R. 1930 P. C. 260 (P.C.).**

GOOD FAITH.

See (1) FENAL CODE, S. 52.
(2) SP. REL. ACT, S. 27.
(3) T. P. ACT, SS. 41, 43, 53.
(4) TRUSTS ACT, S. 96.

GOODS.

See CONTRACT ACT (1872), SS. 76—123.

GOOD WILL.

See (1) CONTRACT ACT, SS. 253—266.
(2) PARTNERSHIP.
(3) TRADE MARK.
(4) TRADE NAME.

GOONDAS ACT.

See BENGAL GOONDAS ACT (1 B. C. OF 1923).

GOVERNMENT OF INDIA ACT (1915), S. 30—Acquisitions.

GOVERNMENT.

See (1) ACT OF STATE.
(2) CROWN.
(3) GOVERNMENT OF INDIA ACT.
(4) GRANT.
(5) SECRETARY OF STATE.

GOVERNMENT OF INDIA ACT (1833, 3 & 4 WILL IV, Ch. 85).

—S. 86—Applicability.

———It may be that for political, economic or other reasons the Government desire to restrict the purchase of immovable property in British India by the Ruling Chiefs but before such a desire can be enforced through the law Courts of this country it must be shown that the circular issued by the Government is one that has the sanction of some law binding on the Courts. Section 86 of an enactment of 1833, 3 and 4 Williams 4, C. 85 and S. 1, Act 4, 1837 passed by the Right Hon'ble the Governor-General-of-India-in-Council on 17th April, 1837 have no application to such cases. (*Fforde and Jai Lal, JJ.*). MAHARAJA OF FARED KOTE *v.* ANANTH RAM. **114 I. C. 62=10 Lah. 447=A.I.R. 1929 Lah. 1.**

GOVERNMENT OF INDIA ACT (1858, 21 & 22 Vict., Ch. 106).

—S. 65—Applicability.

———*Regulation of Civil Procedure is not subject to S.* 65.

The Regulation of Civil Procedure has nothing to do with the obligations formerly vesting in the East India Company as a trading corporation, for it is incidental to the duties of the ruling power, and cannot be said to be subject to the Government of India Act, 1858, S. 65. (*Viscount Sumner.*) BHAG CHAND *v.* SECY. OF STATE. **104 I.C 257=51 Bom. 725=54 I. A. 338=23 A.L.J. 641=29 Bom.L.R. 1227=46 C.L.J.76=1927 M.W.N.561=1 L.C 291=32 C.W.N. 61=26 M.L.W. 809=A.I.R. 1927 P.C. 176=53 M.L.J. 81 (P.C).**

GOVERNMENT OF INDIA ACT (1915, 5 and 6 Geo. V, Ch. 61 as amended by 1916, 6 and 7 Geo. V, Ch. 37, 1919, 9 and 10 Geo. V, Ch. 101, 1924, 14 and 15 Geo. V, Ch. 23 and 1925, 15 and 16 Geo. V, Ch. 83).

—Ss. 29 (5) and 32—Commandeering order.

———A commandeering order is one which no one but Government can make, and being an act of the Sovereign, the Secretary of State evidently cannot be sued in respect of it. (*Cholzner, J.*). KESSORAM PODDAR & CO. *v.* SECY. OF STATE.
107 I.C. 360=54 Cal. 969=A.I.R. 1928 Cal. 74.

—S. 29—Ultra vires contracts.

———When a statute lays down certain mandatory provisions in regard to the framing of contracts between the Secretary of State and a private individual, it is no answer to say that because the provisions were ignored on particular occasions and payments were made on contracts which were not in conformity with the statute that that should be taken as a precedent which will be binding upon the Secretary of State in every case. Contracts to be binding upon the Secretary of State must be made in strict conformity with the provisions laid down in the statute. If they are not so made, they are not valid as against him. (*Cholzner, J.*). KESSORAM PODDAR & CO. *v.* SECY. OF STATE. **107 I. C. 360=54 Cal. 969=A.I.R. 1928 Cal. 74.**

—S. 30—Acquisitions.

———After Collector had taken possession of land acquired under Land Acquisition Act, the owner

GOVERNMENT OF INDIA ACT (1915), S. 30—Scope and nature of.

expressed a desire to gift away the land to Government. The Government thereupon withdrew the further proceedings relating to the compensation and called upon the owner to effect a registered gift deed.

Held, that there can be no withdrawal after possession is taken under an award. To vest the property in the owner, Government must execute a written deed according to Government of India Act, S. 30, and therefore any incumbrance created on the property by the owner after the withdrawal is ineffective against the Government, where no written re-conveyance by Government to the owner has been effected : 17 M.L.J. 557, *Diss. from.*

The owner at the most can acquire the interest of a trustee for the purpose of re-conveying the property to Government and this interest cannot become subject to any mortgage. (*Rutledge, C. J. and Carr, J.*). SECY. OF STATE *v.* CHETTIAR FIRM OF S. R. M. M. R. M. **98 I. C. 323= 4 Rang. 291=A.I.R. 1927 Rang. 14.**

—S. 30—Scope and nature of.

———The provision of law laid down in S. 30 (2) is mandatory and not merely directory and must be strictly complied with in order to constitute a valid contract with the Secretary of State for India. The act of a person who is not authorized by the Governor-General-in-Council, in entering into a contract on behalf of the Secretary of State for India is *ultra vires* and there is no valid contract with the Secretary of State. (*Tek Chand and Agha Haidar, JJ.*). SECY. OF STATE *v.* G. T. SARIN & CO. **120 I.C. 615=A. I. R. 1930 Lah. 364.**

—S. 32—Income-tax.

———Section 67 is not *ultra vires*, as a suit for recovery of income-tax wrongly assessed would have not lain against the East India Company : 40 Cal. 391 (P. C.) and 4 M. I. A. 353, *Ref.* (*Baguley, J.*). R. N. SINGHA *v.* SECY. OF STATE. **109 I.C. 180=5 Rang. 825= A. I. R. 1928 Rang. 70.**

—S. 46—Interpretation.

———*Madras City Municipal Act—Expression—Governor-in-Council—Meaning of.*

The reference to the Governor-in-Council in the Act could not, in consonance with the general intent, be regarded as anything other than a reference to the executive Government. Therefore, the expression Governor-in-Council in the Act should since Government of India Act, 1919, be read as the Governor acting with Ministers as provided in S. 46. (*Srinivasa Iyengar, J.*). T. EKAMBARA NAICKER *v.* MADRAS CORPORATION. **99 I. C. 18=1926 M.W.N. 842= A.I.R. 1927 Mad. 22.**

—S. 46—Order relating to transferred subjects.

———*Nature of*—Certiorari.

The Madras Presidency is governed in relation to transferred subject by the Governor acting with Ministers. Whether their advice is followed or not, the orders passed in relation to transferred subjects are orders of the Governor acting with Ministers and when such orders are sought to be challenged by writs of *certiorari*, the application should be directed against that body and against none else. (*Venkatasubba Rao and Madhavan Nair, JJ.*). VENKATARATNAM *v.* SECY. OF STATE. **32 M.L.W. 475=A.I.R. 1930 Mad. 896.**

—S. 46—Writs of certiorari.

———When orders passed by the Governor acting with Ministers are sought to be challenged by writs of *certiorari*, the writ should be directed against that body and against none else. (*Venkatasubba Rao and Madhavan Nair, JJ.*). VENKATARATNAM *v.* SECY. OF STATE. **32 M.L.W. 475=A.I.R. 1930 Mad. 896.**

GOVERNMENT OF INDIA ACT (1915), S. 65—Scope.

—S. 49—Delegation of powers.

———When certain powers are given by statute to the Governor acting with the Ministers one of two things, must be clearly established, either that the power was, as a matter of fact, exercised only by the Governor with the Ministers or else that the power is notified as having been so exercised as to make it incapable of being called into question. The Government may, in the course of its administration of executive functions, delegate many things to subordinate officers. But no such delegation is proper or possible when the right, more especially in the nature of a discretion, is created and given by statute in a particular manner.

The requirement of R. 5 under the Madras City Municipal Act that the dispensing with shall be by the special order of the Governor with the Ministers must be strictly carried out. It is not power that can be delegated or that can be exorcised under any departmental rules by any persons other than the persons constituted as the proper authority : 42 Mad. 885, *Rel. on.* (*Srinivasa Iyengar, J.*). EKAMBARA NAICKER *v.* COMMR. OF MADRAS CORPORATION. **99 I.C. 18=1926 M.W.N. 842= A.I.R. 1927 Mad. 22.**

—S. 49—Orders issued by Secretary.

———The Government orders issued "by order of the Government, Ministery of Local Self-Government" and signed by the "Secretary to Government," though required by R. 37 to be issued by the Governor-in-Council are valid in view of S. 49 (1), Government of India Act. (*Odgers and Madhavan Nair, JJ.*). MD. RAZA SAHEB *v.* SADASIVA RAO. **92 I. C. 918=49 Mad. 49= 1926 M.W.N. 467=A.I.R. 1926 Mad. 297.**

—S. 61—Re-distribution of territories.

———Re-distribution of territories does not by itself make an Act inapplicable in a place in which it was already in force. (*Mukerji and Bose, JJ.*). SATYA RANJAN ROY *v.* ANNAPURNA DASI. **114 I.C. 666=48 C. L. J. 523= A. I. R. 1929 Cal. 145.**

—S. 65—High Court.

———*Aston, A. J.C.*—Even the exercise of jurisdiction of a High Court under the Charter Act in British India is subject to the general legislative power of the Governor-General-in-Council : 4 Cal. 172, *Ref.* (*Percival, J.C., Aston, Rupchand Bilaram and DeSouza, A.J.Cs.*). EMPEROR *v.* JIAND. **111 I. C. 865=22 S.L.R. 349=29 Cr. L.J. 945= A.I.R. 1928 Sind 149 (F.B.).**

—S. 65—'Person.'

———The expression "person" as used in S. 65, includes any body of persons, corporate or incorporate. (*Mukerji and Niamatullah, JJ.*). RAMPRASAD, *In the matter of.* **1930 A.L.J. 579= A. I. R. 1930 All. 389.**

—S. 65—Scope.

———If a party has a right of action against the East India Company, that right cannot be taken away by any Act of the Indian Legislature after the possessions of the company are vested in the Crown: 40 Cal. 39, *Expl.* (*Macleod, C.J. and Shah, J.*). DAMODUR TUKARAM *v.* SECY. OF STATE. **62 I. C. 673=45 Bom. 1161= 23 Bom. L. R. 492=A. I. R. 1921 Bom. 367.**

GOVERNMENT OF INDIA ACT (1915), S. 72—Emergency.

—S. 72—Emergency.

———*Authority of the Governor-General—Finality of.*

Per *Broadway, J.*—According to S. 72 of the Act it is the Governor-General, and Governor-General alone, who is concerned and the intention of the framers of the Act is to leave it to the Governor-General to decide, as a pure act of administration whether a state of emergency exists which calls for an Ordinance and that his decision on that point is final and not liable to consideration by the Courts although it is open to the Courts to decide whether, in making the Ordinance he has kept his terms within the provisions of the Act: *De Verteuil* v. *Knaggs*, (1918) A.C. 557, *Rel. on.*

Per *Bhide, J.*—The existence of an emergency and the purpose of an Ordinance can be looked into by a Court of law. If, however, there are circumstances which are reasonably capable of being looked upon as giving rise to an "emergency" the Court will not be justified in interfering even if it is inclined to take a different view on the facts, because legislature has invested the Governor-General with a discretion in very wide terms to exercise his powers under S. 72 and hence his decision is entitled to great weight. (*Broadway and Bhide, JJ.*). DES RAI *v.* EMPEROR.

A.I.R. 1930 Lah. 781.

—S. 72—Overriding existing law.

———*Ordinance* 3 *of* 1930—*Validity.*

Although the provisions of the Ordinance have the effect of depriving the accused person of a right to be tried by a Sessions Judge aided by assessors and a right of appeal to the High Court, still as these rights are given by the Criminal Procedure Code which is only an Act of the Indian legislature it can be overridden by the Indian legislature the Governor-General-in-Council and the Governor-General acting by himself. The terms of the Ordinance, therefore, do not vitiate the provisions of the Government of India Act and hence the Ordinance is not *ultra vires.* (*Broadway and Bhide, JJ.*). DES RAI *v.* EMPEROR.

A.I.R. 1930 Lah. 781

—S. 72—Power of High Court.

———*Ordinance, whether* intra vires *or* ultra vires. —*Decision of.*

High Court can examine an Act of the legislature whether enacted by the legislature itself or by the Governor-General-in-Council or by the Governor-General, in order to see whether the said Act or Ordinance has been made and promulgated within the scope of the powers conferred on the legislature, the Governor-General-in-Council and the Governor-General respectively, by the Government of India Act, 1919: A.I.R. 1920 P.C. 23 and 4 Cal. 172 (P.C.), *Rel. on.* (*Broadway and Bhide, JJ.*). DES RAI *v.* EMPEROR. **A.I.R. 1930 Lah. 781.**

—S. 72-D—Rules under—Rule 94—Demand for grant.

———Save and except what is provided for in S. 72-D of the Government of India Act and R. 94 of the Rules and Standing Orders, there cannot be made any demand for grant even if His Excellency the Governor makes a recommendation for appropriation of provincial revenues on occasions not provided for in the said section and the said rule. (*C. C. Ghose, J.*). SHANKER ROY CHOWDHURY *v.* H.E.A. COTTON. **85 I. C. 14=40 C.L.J. 515= A.I.R. 1925 Cal. 373.**

GOVERNMENT OF INDIA ACT (1915), S. 80-A, Cl. (1)—Interpretation.

—S. 72-D, Rules under—R. 15—Finality of President's decision.

———Rule 15 does not exclude the jurisdiction of the High Court. It is a Rule by which the members of the Bengal Legislative Council are bound, and it means nothing more or less than this that when the President has given his decision on a point of his order, his decision is final, so far as the members of the Council are concerned, and that it cannot be questioned by anybody within the Council. The presence of the word "final" in R. 15 does not exclude jurisdiction of the High Court, nor does it conclude the matter. It is a word which is to be found in numerous statutes sometimes it has been held with reference to the context in which it appears that the word 'final' means final for all purposes, and excludes jurisdiction of the Courts; sometimes it has been held notwithstanding the existence of the word 'final' the jurisdiction of the Courts is not excluded. (*C.C. Ghose, J.*). SHANKER ROY CHOWDHURY *v.* H.E.A. COTTON.

85 I.C. 14=40 C.L.J. 515= A.I.R. 1925 Cal. 373.

—S. 72-D (3) (4)—Interpretation.

———In Cl. (3) to S. 72-D, as amended in 1925, the words "payments or emoluments payable to or on account of a person in respect of his office" include the tour expenses and the travelling allowances of the Governor and the Members of his Council and the Inspector-General of Police and therefore these expenses are non-votable items.

Even assuming for the sake of argument that the "tour expenses" and the "travelling allowances" were not exempted from being submitted to the vote of the Council, the question cannot be raised before the High Court by reason of Cl. (4). (*Dawson-Miller, C.J., Jwala Prasad and Bucknill, JJ.*). KRISHNA BULLABH SAHAY *v.* GOVERNOR OF BIHAR & ORISSA. **96 I.C. 791=5 Pat. 595= 7 P.L.T. 695=A.I.R. 1926 Pat. 305 (F.B.).**

—S. 79—Special tribunal.

———*Creation of—Powers of the Local legislature.*

The words "to make laws for the peace and good Government of the territories for the time being constituting that Province" in S. 79 are very wide and include a power to direct that disputes of a particular kind shall be decided in a particular way and before a tribunal specially created for the purpose. (*Lindsay, Kanhaiya Lal and Daniels, JJ.*). ABDUL RAHMAN *v.* ABDUL RAHMAN.

87 I.C. 51=47 All. 513=23 A.L.J. 385= 6 L.R.A. Civ. 191=A.I.R. 1925 All. 380 (F.B.).

—S. 80-A, Cl. (1)—Interpretation.

———*Court of law is not competent to consider the merits of a particular enactment.*

The words "for the peace and good Government" are used because they are words of the widest significance and it is not open to a Court of law to consider with regard to any particular piece of legislation whether in fact it is meritorious in the sense that it will conduce to peace or to good Government. They are words which are intended to give subject to the restrictions of the Act, a legislating power to the body which it invests with that authority. There is nothing in that expression which can be the foundation of any reasonable argument to the effect that the Criminal Law Amendment Act of 1925 was outside the jurisdiction of the local legislature. (*Rankin, C.J. and Mazumdar, J.*). GIRENDRA NATH *v.* BIRENDRA NATH.

102 I.C. 647=54 Cal. 727=31 C.W.N. 593= 8 A. I. Cr. R. 121=A. I. R. 1927 Cal. 496

GOVERNMENT OF INDIA ACT (1915), S. 80-A, Cl. (4)—Interpretation.

—S. 80-A, Cl. (4)—Interpretation.

———"*Affect*"—*Meaning of.*

Clause 4 is doubtless wider than the mere provision that the local legislature shall not have power to repeal an Act of Parliament and the word "affect" may cover any interference with the will of Parliament as expressed in a statute. But what Cl. 4 of S. 80-A refers to and preserves from interference is the effect of an Act of Parliament by its own force as a determination of the will of Parliament with reference to a particular subject-matter. It may well be that it guards against any possibility that a local legislature might attempt to interfere with the operation of Acts of Parliament that do not technically extend to India. But it cannot be construed as meaning that because in 1726 when there was no other law, the Courts in Calcutta adopted the law that prevailed at home subject to many modifications, therefore any part of that law so introduced which originated in statute as distinct from common law cannot be interfered with by the local legislature. (*Rankin, C. J. and Mazumdar, J.*). GIRENDRA NATH *v.* BIRENDRA NATH.
102 I.C. 647=54 Cal. 727=31 C.W.N. 593=8 A.I. Cr. R. 121=A.I.R. 1927 Cal. 496.

—S. 80 (A)—Scope and interpretation of.

———Section 80 (a) cannot be interpreted to mean that no local legislature can, by reason of those words, repeal or alter any enactment of its own. (*Kanhaiya Lal and Lindsay, JJ.*). SARJU PRASAD *v.* BHAGWATI PRASAD.
88 I.C 297=23 A.L.J. 373=6 L. R. A. Civ. 337=A.I.R. 1925 All. 542

—S. 80-A, Cl. (4)—Validity of acts.

———The Bengal Criminal Law Amendment Act of 1925 does not affect Acts of Parliament and is not *ultra vires* of the local Government that passed it. (*Rankin, C. J. and Mazumdar, J.*). GIRENDRA NATH *v.* BIRENDRA NATH.
102 I.C. 647=54 Cal. 727=31 C.W.N. 593=8 A.I. Cr. R. 121=A.I.R. 1927 Cal. 496.

—S. 96-B—Dismissal of officers.

———*Prerogative of the Crown.*

Section 96-B, so far from abrogating the prerogative of the Crown with regard to the dismissal of persons in the Civil Service, reiterates and emphasises the fact that the right of dismissal at pleasure still exists and enacts that that right is only limited in so far as there are definite and special or particular rules or regulations laying down the method by which or the circumstances in which the right is to be exercised: *Denning* v. *Secy. of State*, 37 T. L. R. 138, *Ref.*; A. I. R. 1927 Cal. 311, *Dist.* (*Costello, J.*). BIMALCHARAN *v.* TRUSTEES, INDIAN MUSEUM.
57 Cal. 231=A.I.R. 1930 Cal. 404.

———*Wrongful dismissal—Breach of formalities under R.* 14—*Suit—Maintainability.*

Where a person, who occupied the position of E. A. C. was dismissed from his appointment and he brought a suit against the Secretary of State for India in Council for damages for wrongful dismissal on the ground that the provisions of R. 14 and the Circular G. No. 18 of 28th April, 1926, issued by the Government of Burma, Central Department were not followed, though he cannot rely on the alleged breach of the procedure laid down in Circular G. No. 18; as such order is purely an executive one, he is not precluded from bringing his action and decision of the case will depend on the consideration of the alleged breach of the formalities laid down in R. 14. *Gould* v. *Stewart*, (1896) A. C. 575, *Appl.*; A. I. R. 1927 Cal. 311, *Rel. on.* (*Cunliffe, J.*). J. R. BARONI *v.* SECY. OF STATE.
120 I.C. 695=A.I.R. 1929 Rang. 207.

GOVERNMENT OF INDIA ACT (1915), S. 106 (2)—Revenue.

———*Rules regarding Civil Service, R.* 14—*Strict observance.*

The provisions of R. 14 of the rules regarding Civil Services in India which are manifestly intended for the protection and benefit of the officer, are inconsistent with importing into the contract of service the term that the Crown may put an end to it at pleasure and therefore, before a police officer may be dismissed, the procedure laid down by R. 14 must be followed. *Gould* v. *Stuart*, 1896 A.C. 575, *Foll.* (*Buckland, J.*). SATISCHANDRA DAS *v.* SECY. OF STATE.
101 I.C. 581=54 Cal. 44=A.I. R. 1927 Cal. 311.

—S. 96-B, sub-S. 4—Scope.

———Sub-S. (4) is not sufficiently wide to cover rules regulating General Provident Fund (*Obiter*). (*Kendall, J.*). SECY. OF STATE *v.* HURCHARAN.
117 I.C. 622=1929 A.L.J. 670=51 All. 845=A. I. R. 1929 All. 417.

—S. 106 (1-A)—Letters Patent.

———General Clauses Act (1897), S. 6—Section 6 does not apply to an amendment to Bombay High Court's Letters Patent as it is made not by an enactment but under sub-S. (1-a). S. 106: 3 B.H.C.R. (O.C.J.) 49 and *The Colonial Sugar Refining Company, Ltd.* v. *Irving*, (1905) A. C. 369, *Dist.* (*Fawcett and Mirza, JJ.*). BADRUDDIN ABDUL RAHIM *v.* SITARAM VINAYAK APTEE.
114 I.C. 241=52 Bom. 753=30 Bom. L.R. 942=A.I.R. 1928 Bom. 371.

—Ss. 106 and 107—Making of rules.

———*Sanction of Local Government—Necessity for.*

There is nothing in the Government of India Act or in the Civil Procedure Code, which requires that the rules which the High Court may make for the conduct of its own business or for the regulation of the pleaders appearing before it should have the sanction of the Local Government. (*Devadoss, J.*). *In the matter of* A VAKALATH.
109 I. C. 206=A.I.R. 1928 Mad. 472.

—S. 106 (2)—Revenue.

———*Jurisdiction of High Court.*

In matters affecting the revenue, the original side of the High Court, and that side alone, is debarred from interfering in revenue matters: (35 M. L. J. 33, *Ref.*). Collection of money by sale of smuggled goods is a matter affecting the collection of revenue though it be in the nature of a penalty. (*Coutts-Trotter, C. J. and Beasley, J.*). GOVINDARAJULU NAIDU *v.* SECY. OF STATE.
105 I.C. 576=50 Mad. 449=39 M.L.T. 304=26 M.L.W. 558=A. I. R. 1927 Mad. 689=53 M.L.J. 355.

———High Court can compel Revenue Authority to do its statutory duty. (*Lord Phillimore.*) ALCOCK & CO. *v.* REV. AUTH.
75 I.C. 392=25 Bom. L. R. 920=21 A L.J. 689=50 I.A. 227=1923 M.W.N. 557=47 Bom. 742=33 M.L.T. 267=18 M.L.W. 918=4 L.R P.C. 188=39 C. L. J. 302=28 C.W.N. 762=A.I.R. 1923 P.C. 138=45 M.L.J. 592 (P.C.).

———*Order against Revenue authority under Specific Relief Act, S.* 45, *to make reference to High Court cannot be passed.*

The Government of India Act, S. 106, prohibits an order to be passed against the Chief Revenue Authority under S. 45 of the Specific Relief

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Act requiring the latter to make a reference to the High Court under S. 51 of the Income Tax Act, 1918.

The effect of S. 51 is not to partially repeal S. 106 even to the limited extent of allowing the High Court to exercise Original jurisdiction when there are allegations of bad faith. (*Wallis, C. J. and Oldfield, J.*). CHIEF COMMR. OF INCOME-TAX, MADRAS *v.* ANANTAPUR GOLD MINES, LTD.

64 I. C. 682=44 Mad. 718=14 M.L.W. 108= 1921 M.W.N. 502=A.I.R. 1921 Mad 524= 41 M.L.J. 177.

—Ss. 106 and 107—Validity of rules.

———Section 106 is the general section that deals with the jurisdiction of the High Court and the terms of that section are wide enough to include the special powers mentioned in S. 107. It does not therefore signify whether the power to settle Court-fees is derived from S. 106 or from S. 107: for, in either case the power is ultimately to be traced to S. 106 itself and S. 106 is one of the provisions of the Government of India Act, which the Governor-General-in-Council may repeal or alter. There is nothing to prevent the Indian Legislature from making rules pertaining to Court-fees applicable to the original side and therefore Rr. 10 and 11, O. 33, are not *ultra vires* of the Indian Legislature. (*Venkatasubba Rao, J.*). YELUMALAI *v.* KUPPAMMAL. **109 I.C. 173=27 M.L.W. 760= A. I. R. 1928 Mad. 385=54 M.L.J. 263.**

—S. 106—Writ of certiorari.

———Power to issue writ of *certiorari* falls within original jurisdiction as distinguished from appellate or other jurisdiction—High Courth as no jurisdiction to issue writ of *certiorari* against Governor acting with Minister for Public Health Jurisdiction. (*Venkatasubba Rao and Madhavan Nair, JJ.*). PENUGONDA VENKATARATNAM *v.* SECY. OF STATE. **32 M.L.W. 475= A.I.R. 1930 Mad. 896.**

—S. 107—Abuse of powers.

———If a Magistrate abuses his power under S. 144 the remedy is probably to invoke the power of S. 107, Government of India Act. (*Ramesam, J.*). VEDAPPAN SERVAI *v.* PERIANNAN SERVAI.

113 I.C. 279=28 M.L.W. 506= 1928 M.W.N. 779=52 Mad. 69=1 M.Cr.C. 304= 30 Cr. L. J. 119=12 A.I.Cr.R. 17= A.I.R. 1928 Mad. 1108=55 M.L.J. 621.

—S. 107—Board of Revenue.

———*If Subordinate to the High Court.*

Section 15, Charter Act Replace by S. 107, Government of India Act provides that every Court subject to the appellate jurisdiction of the High Court is subject to its power of superintendence. Reading these two provisions together every Civil Court of the Presidency is subject to the High Court's power of superintendence, in other words, is subordinate to that Court: 9 Cal. 295 (P.C.), *Foll.*

Revenue Courts, although so designated, on account of their more limited jurisdiction, are nevertheless, properly understood, Civil Courts.

The revenue officers having been by the very terms of the Act, constituted Courts, when hearing certain suits or applications, it is a necessary corollary, that the Board, governed as it is by the same rules of procedure, should also be deemed a Court when dealing with the same matters at a later stage.

It is wrong to assume that the Courts mentioned in S. 107 of the Government of India Act (S. 15 Charter Act) as being subject to the High Court's

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appellate jurisdiction, are restricted to such Courts as were in existence, at the time of the passing of the Charter Act or the issue of the Letters Patent. (*Phillips, Odgers and Venkatasubba Rao, JJ.*). RAGHUNADHA PATRO *v.* GOVINDA PATRO.

114 I.C. 161=A.I.R. 1928 Mad. 1032= 55 M.L.J. 798 (F.B.).

—S. 107—Election petitions.

———The High Court has no jurisdiction to interfere with orders passed by Sub Judge or District Judge on petitions presented under the rules for the decision of disputes as to the validity of an election held under Madras District Municipalities' Act, as they are not Courts as defined by C.P.C.: 21 Bom. 279, *Foll.* (*Devadoss, J.*). M. DEIVANAYAGAM PILLAI *v.* P. T. S. DIWAN MOHIDEEN ROWTHER. **70 I.C. 780= 16 M. L. W. 827= 1922 M.W.N. 818= A.I.R. 1923 Mad. 169= 44 M.L.J. 39.**

—S. 107—Errors of law or fact.

———The power of superintendence vested in High Court and embodied in S. 107 of the Government of India Act, was not intended to authorise the Court, in the exercise of the authority so given, to interfere with and set right the orders of a subordinate Court on the ground that such order proceeded on an error of law or an error of fact: 9 All. 104, *Foll.* (*Mears, C.J. and Piggott, J.*). ADYA SARAN *v.* JAGANNATH. **78 I. C. 391=46 All. 323= 22 A.L.J. 235=5 L.R.A. Rev. 49= A.I.R. 1924 All. 561.**

—S. 107—Ex-parte decree.

———Unless a case of denial of the right of fair trial can be made out High Court will not interfere under S. 107 of the Government of India Act. Where the Court determines according to law the question of fact whether sufficient cause has been made out there can be no denial of the right of fair trial. (*Mullick and Ross, JJ.*). JAGDIP SINGH *v.* HARKU SINGH. **89 I.C. 863=A.I.R. 1926 Pat. 37.**

—S. 107—Inadequate decision.

———Decision under S. 73, Village Courts Act, is revisable when it is hopelessly inadequate. (*Mullick and Bucknill, JJ.*). BISHUN MOHAN SAHAY *v.* NARAYAN PRASAD ASTHANA.

74 I.C. 140=A. I. R. 1924 Pat. 434.

—S. 107—Indefinite postponement.

———If the effect of an order of the Trial Court indefinitely postponing the trial of an issue of fact is an almost certain loss of material testimony to plaintiff as well as defendant the High Court will interfere in the exercise of its powers of superintendence though S. 115 of the Code may not apply. (*Mullick and Ross, JJ.*). BHIMNATH *v.* JAGARNATH.

89 I. C. 814=1925 P. H. C. C. 294= 7 P.L.T. 82= A. I. R. 1925 Pat. 674.

—S. 107—Inherent power.

———*Criminal cases.*

It is now well settled that a High Court is competent, in the exercise of the power of superintendence vested in it under S. 107 of the Government of India Act, 1915 (which replaced S. 15 of the Indian High Courts Act, 1861) to set aside proceedings instituted without jurisdiction by a Subordinate Court under S. 145 of the Cr. P. Code; such power of superintendence can be exercised notwithstanding S. 435 (3), Cr. P. Code, which lays down that proceedings under Chapter XII (which comprises Ss. 145-148) are not proceedings within the meaning of that section. The High Court can, when it sets aside the proceedings, proceed to give such consequential directions as

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may be found necessary in the interests of justice in the circumstances of the particular case. Although the Criminal Procedure Code does not contain a provision corresponding to S. 151 of the C. P. Code, yet the inherent power of Courts is in no sense restricted in application to civil cases; it is equally applicable to criminal matters. The power is not capriciously or arbitrarily exercised; it is exercised *ex debito justitiae* to do that real and substantial justice for the administration of which alone Courts exist; but the Court, in the exercise of such inherent power, must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intentions of the Legislature as indicated in statutory provisions. Where in a dispute as to lac between tenants and zamindars it was manifestly impossible to restore the physical condition of things as they existed when the proceedings under S. 145 were instituted and where the title was in dispute and the Court was not in a position to make an assumption as to possession in favour of either party,

Held, that in such circumstances, the best course to adopt was to keep the property in the custody of the Court pending decision by a Civil Court on the question of title: 1 M.L.W. 1032; *Hood Barrs* v. *Heriot*, (1896) A.C. 174 and *Peruvian Guano Co.* v. *Dreyfus Bros.*, (1892) A. C. 166, *Ref.* (*Mookerjee, Ag.C.J., Fletcher, Chatterjee, Richardson and Ghose, JJ.*). PIGOT *v.* ALI MAHOMAD MANDAL.

60 I.C. 325=48 Cal. 522=22 Cr.L.J. 213=A.I.R. 1921 Cal. 30 (S.B.).

—S. 107—Insolvency Judge.

———*If can exercise powers under S.* 107.

The power of superintendence as contemplated by S. 107 is exercised by the High Court as a whole in what is the execution capacity and not by a single Judge exercising insolvency jurisdiction.

Therefore, where the Insolvency Judge of the High Court made the order staying insolvency proceedings in the Court of the District Judge at Hooghly,

Held, that the District Court at Hooghly which is a Court of concurrent jurisdiction with the Insolvency Court of the High Court was not bound by the order of stay. (*Cuming and Mallick, JJ.*). SASOON AND SONS LTD. *v.* GASTO BEHARI DE.

103 I.C. 754=31 C.W.N. 847=A.I.R. 1927 Cal. 629.

—S. 107—Interpretation.

———"*Appellate Jurisdiction.*"

(Per *Robinson, C. J.*)—The expression "Appellate Jurisdiction" in S. 107 does not necessarily imply that there must be some right of appeal. The expression is used merely to indicate the limits of the jurisdiction of the Court so as to cover the largest area over which its jurisdiction extends. (*Robinson, C. J., Heald and Rutledge, JJ.*). K.A.M. MOHIDEEN *v.* BUKSHI RAM.

91 I.C. 627=3 Rang. 410=A.I.R. 1926 Rang. 33 (F.B.).

—S. 107—Mis-use of powers.

———Mis-use of powers under S. 145, Cr.P. Code—Judicial discretion not exercised—High Court can interfere. (*B. B. Ghose and Chotzner, JJ.*). ARAN SARDAR *v.* HARA SUNDER MAZUMDAR.

71 I.C. 225=27 C.W.N. 171=37 C.L.J. 39=24 Cr. L.J. 97=A.I.R. 1923 Cal. 95.

—S. 107—Nature of powers.

———The powers of a High Court under S. 107 are not merely administrative but judicial also, and they may be called in aid when an order is so bad on the face of it as to be in a sense a denial of justice: 1 P.L.T. 467, *Foll.* (*Wort, J.*). MT. MAHARUP KUER *v.* MAHABIR SINGH.

105 I.C. 131=9 P.L.T. 325=A.I.R. 1928 Pat. 111.

—S. 107—Negligence of petitioners.

———The powers of superintendence under Government of India Act, S. 107 are not to be lightly exercised especially where the petitioners were guilty of negligence. (*Mullick and Bucknill, JJ.*). (MT. BIBI) ZAINAB *v.* PARAS NATH.

75 I. C. 430=2 Pat. 800=4 P.L.T. 491=1 P. L.R. 361=A.I.R. 1924 Pat. 37.

—S. 107—Order for taking accounts.

———Suit for accounts of income of property—Interlocutory order—Ultimate decision appealable—Order not to be revised unless directions given for taking accounts are improper. (*Dawson-Miller, C.J. and Mullick, J.*). HARIHAR PRASAD SINGH *v.* KESHO PRASAD SINGH.

3 P. L.T. 638=A.I.R. 1922 Pat. 598.

—S. 107—Orders in executive capacity.

———Suit for possession of house dismissed—Plaintiff subsequently presenting application that defendant having disappeared his movables should be taken into possession by police—Order by Magistrate accordingly—Subsequent application by defendant to set aside previous order dismissed—Both orders held to be passed in executive capacity under Police Act and High Court held to have no jurisdiction to reverse them—Government of India Act, S. 107 held to have no application: 4 P. R. 1908 Cr.; A.I.R. 1927 All. 193; A.I.R. 1926 Bom. 551; 24 Mad. 121; 36 Mad. 72; *Ex parte Bradlaugh*, 3 Q. B. D. 549, *Dist.* (*Jai Lal and Currie, JJ.*). ABDUL SHAKUR *v.* MAHADEV PARSHAD.

A.I.R. 1930 Lah. 539.

—S. 107—Panchayat Court.

———The High Court cannot interfere with the order of a Panchayat Court under Ss. 435 and 439 of the Criminal P. C. But under S. 107 of the Government of India Act the High Court has powers of supervision over all the criminal and Civil Courts in the Presidency, and when a grave error of a Panchaat Court which is not governed by the provisions of the Cr. P. Code appears on the face of the record the powers given by S. 107 of the Government of India Act could be invoked to correct such error.

Where the judgment of a Panchayat Court convicting a person under S. 426 of the Penal Code, does not mention the value of the amount of loss or damage alleged to have been caused, the High Court will set aside the judgment in the exercise of its powers of superintendence under S. 107 of the Government of India Act. (*Devadoss, J.*). MUNIGADU *v.* EMPEROR.

88 I.C. 521=1925 M.W.N. 600=26 Cr.L.J. 1161=A.I.R. 1925 Mad. 1144.

—S. 107—Persona designata.

———The first (now Chief) Judge of the Rangoon Small Causes Court, when exercising the powers vested in him by S.18 of the Rangoon Rent Act, 1920 (S. 20 of Act 9 of 1925) exercises those powers not as a Court but as a *persona designata* and therefore his decision thereunder is not subject to the revisional jurisdiction of the High Court. A.I.R. 1926 Rang. 25, *Foll.*; A.I.R. 1923 Rang. 94 (F.B.), *Overruled.* (*Rutledge, C.J. Heald, Chari and Maung Ba, JJ.*). H.A. AZIZ *v.* KILYOBOY.

98 I.C. 902=4 Rang. 304=5 Bur. L.J. 117=A.I.R. 1927 Rang. 1 (F.B.).

—S. 107—Powers of High Court.

———The High Courts have under S. 107 of the Government of India Act not only administrative

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but judicial powers. In the exercise of its power of superintendence it can direct a subordinate Court to do its duty. It cannot however set it aside on the ground of error of law or of fact. In the exercise of its superintending power, it will not ordinarily interfere except in cases of grave and irreparable injustice. Thus it can interfere with orders under S. 36 of the Legal Practitioners' Act if the section has not been complied with or if the person proceeded against was not given a reasonable opportunity of defending himself. (*Addison and Hilton, JJ.*). CHATAR BHUJ *v.* EMPEROR.
31 P.L.R. 542=A.I.R. 1930 Lah. 889.

—S. 107—Powers of Vacation Judge.

———There is no provision of law by which the High Court can in the first instance receive a plaint which ought to be filed in some inferior Court within the Presidency and pass orders pending the disposal of the suit and although the Court in which it was to be filed was closed owing to vacation, the Vacation Judge of the High Court cannot entertain such a suit except perhaps where the claim has arisen within the limits of the ordinary original civil jurisdiction of the High Court and where the High Court has concurrent jurisdiction along with other Courts of the Presidency town: C. M. P. 1498 of 1919, *Foll.* (*Ramesam, J.*). JUMNA BAI *v.* RAMANATHAN CHETTIAR. 113 I.C. 412=28 M.L.W. 684=52 Mad. 52=A.I.R. 1929 Mad 29=55 M. L. J. 690.

—S. 107—Powers when exercised.

———Although an order may be wrong and may involve hardship to one or other party, S. 107 cannot be invoked to revise such orders when the resulting hardship is not unusually grave or irreparable. (*Bhide, J.*). TOMLINSON *v.* WILLIAMS.
A.I.R. 1930 Lah. 448.

———The powers vested in High Court under S. 107 should be exercised very rarely and in exceptional circumstances to prevent real hardships or injustice. (*Jai Lal, J.*). BURMA OIL CO. *v.* ADAMJI MAMOONJI. 97 I. C. 390=27 P.L.R. 831=8 L.L.J. 578=A.I.R. 1927 Lah. 14.

———*Order for local investigation.*

The High Court should not interfere in revision or under powers of superintendence to prevent what would be a calamitous waste of time and money if local investigation were to take place. If it would be not only fruitless but would be determining the rights of the parties upon an improper basis and would inevitably and unnecessarily prolong a litigation, High Court ought to interfere to prevent such a calamity. (*Dawson-Miller, C.J. and Foster, J.*). RAMJI RAM *v.* RAMASRE RAUT.
83 I.C. 124=1924 P.H.C C. 217=A.I.R. 1924 Pat. 761.

———Where the record of a case before the Court is so erroneous as to manifestly amount to an injustice, the High Court would exercise the powers of superintendence vested in them under S. 107. 56 I.C. 155 (Pat.), *Ref.* (*Spencer and Venkatasubba Rao, JJ.*). VENKATA RANGABHUSANAM *v.* KARELLA RAMASWAMI. 73 I. C. 131=17 M. L. W. 375=1923 M W.N. 244=A. I. R. 1923 Mad. 500=45 M.L.J. 78.

———*Powers should be exercised when other remedies are exhausted.*

———Ordinarily, a party should exhaust all remedies in the Courts below before he comes to the High Court. This is a very desirable practice, but there is, however, no absolute bar in law to the party coming direct to the High Court under S. 107 of the Government of India Act. (*Dawson-Miller, C. J., Mullick and Jwala Prasad, JJ.*). SHEBALAK SINGH *v.* KAMRUDDIN MANDAL.
68 I.C. 149=2 Pat. 94=1 Pat. L.R.Cr. 2=1922 P. H. C. C. 241=3 P. L. T. 573=23 Cr. L.J. 549=A.I.R. 1922 Pat. 435 (F.B.).

GOVERNMENT OF INDIA ACT (1915), S. 107—Refusal to issue injunction.

—S. 107—Practice and procedure.

———On a difference of opinion in matters under S. 145, Cr.P.C., the Senior Judges' opinion prevails as the jurisdiction exercised by the High Court is under S. 107 of the Government of India Act and not under Ss. 435 and 439, Cr. P. Code. (*Choudhuri and Newbould, JJ.*). THE INDIAN IRON AND STEEL COMPANY *v.* BANSO GOPAL TEWARI.
59 I. C. 403=22 Cr. L. J. 99=32 C.L.J. 54.

—S. 107—Refusal of sanction.

———Where the lower Courts refused to give sanction for prosecution under S. 195, Cr.P.C.,

Held, that S. 107 of the Government of India Act could not be invoked in support of the application for sanction to prosecute.

Per *Ghose, J.*—Although the High Court is vested with very wide powers of superintendence over the proceedings of subordinate Courts, these powers are not to be exercised for the purpose of interfering with the order of a subordinate Court, merely on the ground of error in law or error in fact. In other words, the powers of superintendence are not applicable where the only question is whether the decision of the lower Court is against the weight of the evidence.

Per *Cuming, J.* —The power under S. 107 of the Act is exercised only in exceptional cases and this is not an exceptional case. (*Ghose and Cuming, JJ.*). SARAT CHANDRA MANDAL *v.* RAM SASTRI ROY. 69 I. C. 153=36 C.L J. 265=26 C. W. N. 1016=23 Cr. L. J. 665=A. I. R. 1923 Cal. 45.

—S. 107—Refusal to add party.

———Section 115 is clearly not applicable where the lower Court has refused in the exercise of its jurisdiction to add a party as plaintiff. Possibly S. 107 of the Government of India Act might apply to cases where the result is denial of the right of fair trial. (*Mullick and Ross, JJ.*). KALI RAI *v.* TULSI RAI. 93 I.C. 932=4 Pat. 723=7 P.L.T. 499=A.I.R. 1926 Pat. 207.

—S. 107—Refusal to frame issue.

———Where upon the pleadings clearly an issue arises whether the rent payable by the defendant is below the prevailing rate and the Trial Court on being so requested refuses to frame the same,

Held, that the case is perhaps near the border line so far as S. 115 of the Civil Procedure Code is concerned, but it is clear that under S. 107 of the Government of India Act it is a fit case for interference in revision: 15 C.W.N. 682, *Dist.* (*Mullick and Ross, JJ.*). SHEO PRASAD SINGH *v.* SUKHU MAHTO. 72 I.C. 148=1 P L.R. 89=4 P.L.T. 401=A.I.R. 1923 Pat. 518.

—S. 107—Refusal to issue injunction.

———*Obiter*—A petition under S. 107, Government of India Act, lies for revision of the order of a Magistrate rejecting an application to issue a clear temporary injunction restraining the Government from rejecting the nomination paper of the petitioner who has been removed from the Town Committee by a Government notification. (*Tapp, J.*). JIWAN SINGH *v.* SECY. OF STATE.
A.I.R. 1930 Lah. 899.

GOVERNMENT OF INDIA ACT (1915), S. 107—Rent Controller's orders.

—S. 107—Rent Controller's orders.

———The jurisdiction of the High Court in revision is not conferred by the Rent Act. The High Court exercises its jurisdiction under S. 115 of Civil P. C. and S. 107 of the Government of India Act and there cannot be any doubt that it has the power to revise an order passed by the Rent Controller without jurisdiction, although the order did not admit of revision by the President of the Tribunal. (*Greaves and B. B. Ghose, JJ.*). SATYA NERANJUN SHAW *v.* THE CARNANI INDUSTRIAL BANK, LTD. **93 I. C. 56=30 C. W. N. 236=A.I.R. 1926 Cal. 708.**

———(Per *Heald and Rutledge, JJ., Robinson, C.J. dissenting*)—The Controller of Rents is not a Court nor a Civil Court. The High Court is not a Court of appeal from him as a Court nor has appellate jurisdiction over him nor is he a Court subject to the appellate jurisdiction of the High Court within the meaning of S. 107 of the Government of India Act nor subordinate to the High Court within the meaning of S. 115 of the Civil P. C. so as to make his decisions subject to revision by the High Court: A.I.R. 1923 Cal. 169; 26 C.W.N. 30; A.I.R. 1922 Cal. 427; 26 C.W.N. 102; 26 C.W.N. 53 and 9 Cal. 295 (P.C.), *Dist.*; A.I.R. 1923 Rang. 94 (F.B.), *Expl.* (*Robinson, C. J., Heald and Rutledge, JJ.*). K. A. M. MOHIDEEN *v.* BUKSHI RAM. **91 I.C. 627=3 Rang. 410=A.I.R. 1926 Rang. 33 (F.B.).**

———The Rent Controller's Court is a Court of civil jurisdiction and the High Court has power to revise the Controller's orders under its general power of superintendence under S. 107 of Government of India Act. (*Woodroffe and Ghose, JJ.*). ABDUL HUQ. *v.* MOHAMADDIN. **67 I C. 302=A.I.R. 1923 Cal. 311.**

———High Court has the power of revision under its general powers of superintendence over the Rent Controller's Court under S. 107 of the Government of India Act. (*Chatterjee and Cuming, JJ.*). H. D. CHATTERJEE *v.* L. B. TRIBEDI. **68 I.C. 274=49 Cal. 528=26 C.W.N. 78=A.I.R. 1922 Cal. 427.**

—S. 107—Revenue cases.

———No revision lies under S. 115, C.P.C. or S. 107 of the Government of India Act or Cl. 16 of the Madras Letters Patent against an order of the Revenue Divisional Officer acting under Act III of 1895 as such officer is not a Court subject to the superintendence of the High Court. Meaning of 'appellate jurisdiction' discussed—*Case-law discussed.* (*Ayling, Offg. C.J. and Odgers, J.*). PALANIKUMARA CHINNAYYA GOUNDEN. *In re.* **66 I.C. 566=14 M.L.W. 548=1921 M. W. N. 757=A.I.R. 1922 Mad. 337=41 M.L.J. 577.**

—S. 107—Revenue Court exercising judicial powers.

———Where the Sub-Deputy Collector after inquiry refused the application of the opposite party for prosecution of petitioner under Penal Code, S. 471 but on appeal the Collector set aside the order of the Sub-Deputy Collector and made a formal complaint under S. 200, Criminal Procedure Code, for the prosecution of the petitioner.

Held, that the Collector was clearly acting as a Revenue Court and he was exercising judicial powers in setting aside the order of the Sub-Deputy Collector and in making a complaint under S. 200 and was therefore subject to the superintendence of the High Court and his order is revisable under

GOVERNMENT OF INDIA ACT (1915), S. 107—Scope.

S. 115, Civ. Pro. Code, as also under S. 107 of the Government of India Act: 6 Pat. L. J. 178, *Ref.* (*Mullick, J.*). FAUJDAR RAI *v.* EMPEROR. **90 I.C. 445=26 Cr.L.J. 1565=7 P.L.T. 199=A.I.R. 1926 Pat. 25.**

—S. 107—Revision.

———Revision application against order passed under Ss. 476, 476-A and 476-B, Cr. P. C. by Civil Court does not lie under S. 439 of the Code as it is not a matter connected with any proceedings before any inferior criminal Court within the meaning of S. 435 of the same Code. In such matters, the High Court can only interfere under S. 115, Civil Procedure Code, or S. 107, Government of India Act, and the order can therefore only be challenged for wrong, illegal or irregular exercise of jurisdiction: 40 Cal. 477, *Rel. on.* (*Suhrawardy and Costello, JJ.*). PURNA CHANDRA DUTTA *v.* SHEIKH DHALU. **A.I.R. 1930 Cal. 721.**

—S. 107—Revocation of sanction.

———The High Court can only interfere with the order of District Judge revoking the order of the Munsif granting sanction for the prosecution of a party for perjury either under S. 115, Civil Procedure Code, or under S. 107 of the Government of India Act, and the ground that the learned Judge should have considered not whether the prosecution was likely to succeed put whether a *prima facie* case has been made out which was a sufficient justification of removing the bar imposed by the Legislature to a prosecution for perjury, is not one which would justify interference under either of these sections. (*Newbould and Suhrawardy, JJ.*). JAINUDDIN *v.* KERAMATULLA. **71 I. C. 595=24 Cr.L.J. 179=A.I.R. 1924 Cal. 641.**

—S. 107—Scope.

———Section 107 of the Act does not give wider powers to High Court than S. 115, Civil P.C. (*Wort and Kulwant Sahay, JJ.*). SHAM NARAIN SINGH *v.* BASUDEO PRASAD SINGH. **122 I.C. 152=11 P.L.T. 172=A.I.R. 1930 Pat. 277.**

———The powers of superintendence conferred on High Courts under the Government of India Acts are not merely administrative but judicial and are very wide: 9 All. 104 (F.B.) and 7 Bom. 341 (F.B.), *Ref.* (*Percival, J.C. and Rupchand and Wild, A.J.Cs.*). KHUDABUX *v.* PANJO. **A.I.R. 1930 Sind 265 (F.B.).**

———Per *Heald, J.*—Where the jurisdiction of the High Court has been questioned as to the High Court's revisional powers reference must be made to the provisions of S. 107 of the Government of India Act rather than to S. 115 of the Civil P.C. (*Robinson, C.J. Heald and Rutledge, JJ.*). K.A.M. MOHIDEEN *v.* BUKSHI RAM. **91 I.C. 627=3 Rang. 410=A.I.R. 1926 Rang. 33.**

———Per *Heald* and *Rutledge, JJ., Robinson, C.J. dissenting*—Section 107 does not confer on the High Court any powers of revision in respect of any Courts for which the High Court is not a Court of appeal or over which it does not exercise appellate jurisdiction. (*Robinson, C.J., Heald and Rutledge, JJ.*). K. A. M. MOHIDEEN *v.* BUKSHI RAM. **91 I.C. 627=3 Rang. 410=A.I.R. 1926 Rang. 33 (F.B.).**

———The High Court has no power under S. 107 to order the expungement of certain paragraphs in the judgment of a Subordinate Court on the ground of their containing language misrepresenting the conduct of a vakil and damaging to him at

GOVERNMENT OF INDIA ACT (1915), S. 107—Scope.

the instance of a third party. (*Oldfield and Devadoss, JJ.*). DANDAYUDAPANI IYER *v.* DISTRICT MUNSIF, KALLAKURCHI. **78 I.C. 6= A.I.R. 1925 Mad. 402.**

———*Proceedings instituted without jurisdiction under Criminal P. C., S.* 145—*High Court has inherent power to set aside proceedings and pass consequential orders.*

It is now well settled that a High Court is competent in the exercise of the power of superintendence vested in it under S. 107 of the Government of India Act, 1915 (which replaced S. 15 of the Indian High Courts Act, 1861) to set aside proceedings instituted without jurisdiction by a subordinate Court under S. 145 of the Cr. P. C. such power of superintendence can be exercised notwithstanding S. 435 (3), Cr. P. C., which lays down that proceedings under Chapter XII (which comprises Ss. 145-148) are not proceedings within the meaning of that section. The High Court can, when it sets aside the proceedings, proceed to give such consequential directions as may be found necessary in the interests of justice in the circumstances of the particular case. Although the Criminal Procedure Code does not contain a provision corresponding to S. 151 of the Civil P. C. yet the inherent power of Courts is in no sense restricted in application to civil cases: it is equally applicable to criminal matters. The power is not capriciously or arbitrarily exercised; it is exercised *ex debito justitiae* to do that real and substantial justice for the administration of which alone Courts exist: but the Court, in the exercise of such inherent power must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intentions of the Legislature as indicated in statutory provisions. Where in a dispute as to lac between tenants and zamindars it was manifestly impossible to restore the physical conditions of things as they existed when the proceedings under S. 145 were instituted and where the title was in dispute and the Court was not in a position to make an assumption as to possession in favour of either party.

Held, that in such circumstances the best course to adopt was to keep the property in the custody of the Court pending decision by a Civil Court on the question of title: 1 L. W. 1032; *Hood Barrs* v. *Heriot*, (1896) A. C. 174 and *Peruvian Guno Co.* v. *Dreyfus Bros.*, (1892) A. C. 166, *Ref.* (*Mookerjee, A.C.J., Fletcher, Chatterjea, Richardson and Ghose, JJ.*). **60 I.C. 325=48 Cal. 522=22 Cr. L.J. 213= A.I.R. 1921 Cal. 30 (S.B.).**

—S. 107—Stay of criminal proceedings.

———It would be within the jurisdiction of the High Court under its general powers of superintendence to direct a presiding officer of any Civil Court subordinate to it to adjourn for a time any proceeding, of whatsoever nature, which he might have initiated by virtue of any powers, exercisable by him as the presiding officer of such Court, including proceedings under S. 476 of the Cr. P.C.

On the general question of the stay of criminal proceedings when these, on the face of them, raise a question of fact which is still under adjudication by a Civil Court of competent jurisdiction, as for instance by the High Court as a Court of first appeal, the High Court need not stay the proceedings under S. 476, Criminal Procedure Code. When those proceedings are terminated and the prosecution is actually instituted, it will be open to the

GOVERNMENT OF INDIA ACT (1915), S. 107—Want of jurisdiction.

accused to move the High Court, which has, under the Criminal Procedure Code itself, very large powers over Criminal Courts of subordinate jurisdiction, to direct a temporary postponement of the prosecution pending further action in the High Court. The further action should take the form of moving the High Court to expedite the hearing of the First Civil Appeal in connection with which applications were originally made to stay proceedings under Criminal Procedure Code, S. 476: 1905 A.W.N. 254, *Ref.* (*Piggott, J.*). RAJ KUNWAR SINGH *v.* EMPEROR. **60 I.C. 428=22 Cr. L.J. 236= 43 All. 180=A.I.R. 1921 All. 365.**

—S. 107—Transfer of cases.

———Under S. 107 the Bombay High Court has power of superintendence over the Mewas Agent (West Khandesh) and has a right to direct a transfer of any suit from the Court of the Mewas Agent to any other Court of equal or superior jurisdiction. The District Court is a Court of equal jurisdiction to that of the Mewas Agent. (*Patkar and Baker, JJ.*). PESTANGI RATANGI DABU & CO. *v.* COLLECTOR OF WEST KHANDESH. **101 I. C. 582=51 Bom. 416=29 Bom. L. R. 361= A.I.R. 1927 Bom. 272.**

———The High Court in its general powers of superintendence over all inferior Courts can direct the transfer of a case where a District Judge has refused to exercise that power of transfer under S. 24. (*Suhrawardy and Cuming, JJ.*). SAROJ BASHINI *v.* GIRIJA PROSHAD. **87 I. C. 170= A.I.R. 1926 Cal. 326.**

———The High Court can, in the exercise of its powers of general superintendence under S. 107, direct a transfer of proceeding under the Legal Practitioners' Act. (*Shadi Lal, C. J.*). LAKSHMI NARAIN *v.* MT. RATNI. **93 I.C. 700= 27 P.L.R. 225=27 Cr.L.J. 476= A. I. R. 1926 Lah. 199.**

—S. 107—Want of jurisdiction.

———When there is initial want of jurisdiction it is clear that the proceedings though they may purport to be under S. 145 are not really proceedings under it and the High Court can interfere under S. 459, Cr.P.C. but if the proceedings were properly started, all interference on the ground of serious irregularity amounting to improper exercise of jurisdiction or improper refusal to exercise it can be only under S. 107 of the Charter Act, 31 Mad. 318, *Foll.*; 26 M. L. J. 280, *Ref.* (*Ramesam, J.*). THYALYEE AMMAL *v.* SRIRANGAROYA GOUNDAN. **71 I. C. 228=1922 M.W.N. 629= 16 M. L. W. 497=31 M.L T. 202= 24 Cr. L.J. 100=A.I.R. 1923 Mad. 60= 43 M.L.J. 624.**

———If an order is challenged to be without jurisdiction, that is to say, if it be outside the section the mere fact of the order purporting to be so passed will not bring it within the section so as to debar the exercise of the powers of revision by the High Court to set it aside as null and void and without jurisdiction. (*Venkatasubba Rao, J.*). SHUKULATHI *v.* GULAM MOIDEEN. **71 I.C. 503=16 M.L.W. 338=1922 M W.N. 689= 24 Cr. L.J. 156=A.I.R. 1923 Mad. 24.**

———It is now well settled that a High Court is competent, in the exercise of the power of superintendence vested in it under S. 107 of the Government of India Act, 1915 (which replaced S. 15 of the Indian High Courts Act, 1861), to set aside proceedings instituted without jurisdiction by a subordinate Court under S. 145 of the Cr.P.C.;

GOVERNMENT OF INDIA ACT (1915), S. 107—Withdrawal of suit.

such power of superintendence can be exercised notwithstanding S. 435 (3), Cr. P. C., which lays down that proceedings under Chapter XII (which comprises Ss. 145-148) are not proceedings within the meaning of that section. The High Court can, when it sets aside the proceedings, proceed to give such consequential directions as may be found necessary in the interests of justice in the circumstances of the particular case. Although the Criminal Procedure Code does not contain a provision corresponding to S. 151 of the C. P. C., yet the inherent power of Courts is in no sense restricted in application to civil cases; it is equally applicable to criminal matters. The power is not capriciously or arbitrarily exercised; it is exercised *ex debito justitiae* to do that real and substantial justice for the administration of which alone Courts exist: but the Court, in the exercise of such inherent power, must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intentions of the Legislature as indicated in statutory provisions. (*Mookerjee, A.C.J., Fletcher, Chatterjea, Richardson and Ghose, JJ.*). PIGGOT *v.* ALL MUHAMMAD MANDAL.
60 I.C. 325=48 Cal. 522=22 Cr. L.J. 213=A. I. R. 1921 Cal. 30 (S.B.).

—S. 107—Withdrawal of suit.

———Per *Mullick, J.*—Whether the order of a Court which has given leave to withdraw with permission to bring a fresh suit in contravention of the terms of O. XXIII, R. 1 can be revised under S. 115, C.P.C., if the section is strictly construed, is a matter of some doubt. But the practice of the Court has been to interfere either under the powers conferred, by S. 115, C. P. C. or by the Government of India Act. (*Dawson-Miller, C. J., Mullick and Jwala Prasad, JJ.*) RAJ KUMAR MAHTON *v.* RAM KHELAWAN SINGH.
64 I.C. 337=1922 P.H.C.C. 17=3 P.L.T. 80=1 Pat. 90=A.I.R. 1922 Pat. 44.

—S. 108—Power to make rules.

———Section 35 of the Letters Patent as well as S. 122 of the C. P. Code, and S. 108 of the Government of India Act (1915) merely give the High Court power to make rules and orders for the purpose of regulating proceedings in civil cases. (*Rutledge, C. J., Brown and Maung Ba, JJ.*). MA THAN *v.* MG. BA GYAW. **93 I.C. 124=3 Rang. 546=4 Bur. L. J. 185=A. I. R. 1926 Rang. 1 (F.B.).**

—S. 110—Issue of mandamus.

———Although the High Court cannot issue an order in the nature of a mandamus to the Governor, there is nothing to prevent it issuing such an order to persons, though eminent, holding a public office. A. I. R. 1923 P. C. 138, *Ref.* (*Rutledge, C. J. and Brown, J.*). U PO THIN *v* N. N. BURJORJEE.
105 I. C. 428=5 Rang. 504=6 Bur. L. J. 240=A.I.R. 1927 Rang. 324.

—S. 110—Writ of Certiorari.

———The power to issue writs of *certiorari* falls within the "original jurisdiction" of the High Court from which the Government is exempted by the terms of S. 110 of the Government of India Act. (*Venkatasubba Rao and Madhavan Nair, JJ.*). VENKATARATNAM *v.* SECY. OF STATE.
32 L. W. 475=A. I. R. 1930 Mad. 896.

—S. 112—Custom.

———Evidence must be adduced when a custom is set up in derogation of the personal law applicable to the parties. (*Baker, J. C.*). MT. BASHIRBI *v.* ABDUL SATTAR. **82 I. C. 815=A. I. R. 1925 Nag. 179.**

—S. 124—Misdemeanour.

———*Procedure.*

The rules of procedure laid down in England for setting into motion the machinery of the law or for instituting prosecutions do not apply to India in the absence of express statutory provision to the contrary. Therefore, the Lahore High Court is competent to take cognizance of an offence of misdemeanour under S. 124, Government of India Act on being moved by the person aggrieved if otherwise it has jurisdiction to entertain the complaint. (*Jai Lal, J.*). FAQIR SINGH *v.* ALI MAHOMED.
115 I. C. 428=30 Cr. L. J. 460=12 A. I. Cr. R. 413=A.I.R. 1929 Lah. 217.

—S. 124—History.

———History of legislation with respect to trial of the offences of misdemeanours traced. (*Jai Lal, J.*). FAQIR SINGH *v.* ALI MAHOMED. **115 I.C. 428=30 Cr.L.J. 460=12 A.I. Cr. R. 413=A.I.R. 1929 Lah. 217.**

—S. 124—Issuing of notice.

———Issuing of a notice to the respondent in criminal case instituted on a petition by way of complaint under S. 124 (1) to show cause why process should not issue against him, is permissible in certain exceptional cases. (*Jai Lal, J.*). FAQIR SINGH *v.* ALI MAHOMED. **115 I. C. 428=30 Cr. L.J. 460=12 A.I.Cr.R 413=A.I R. 1929 Lah. 217.**

—S. 127—Scope.

———Section 127 does not confer exclusive jurisdiction on His Majesty's High Court of Justice in England, on the other hand it expressly saves the jurisdiction of the other Courts. It is an enabling provision of law and, therefore, it cannot be read to exclude the jurisdiction of other Courts who might otherwise have been competent to take cognizance of the offences. (*Jai Lal, J.*). FAQIR SINGH *v.* ALI MAHOMED. **115 I.C. 428=30 Cr. L.J. 460=12 A.I.Cr.R. 413=A.I.R. 1929 Lah. 217.**

—Ss. 128 and 129—Scope.

———Sections 128 and 129 cannot be read as conferring jurisdiction on the High Courts in India to try the offences under S. 127. They merely provide for the manner in which the jurisdiction of such Courts, if it otherwise exists, is to be exercised, (*Jai Lal, J.*). FAQIR SINGH *v.* ALI MAHOMAD.
115 I.C. 428=30 Cr.L.J. 460=12 A.I. Cr.R. 413=A.I.R. 1929 Lah. 217.

GOVERNMENT SERVICE—FUNDAMENTAL RULES.

—R. 52—Leave allowance.

———Master and servant—Government servant entering private employment without permission—Dismissal for misconduct—Government has no right to a refund of leave allowance paid before dismissal. (*Waller, J.*). RAM NARAYANA SARMA *v.* SECY. OF STATE. **101 I.C. 23=25 M.L.W. 394=A.I.R. 1927 Mad. 460=52 M.L.J. 285.**

GOVERNMENT TRADING TAXATION ACT (3 of 1926).

—S. 2 (3)—Applicability.

———Tehri State is included in the territory which is under "His Majesty's protection" and

GOVERNMENT TRADING TAXATION ACT (3 of 1926), S. 2 (3)—Applicability.

GOVERNMENT TRADING TAXATION ACT (1926), S. 2 (3)—Trading, what is.

so the Government Trading Taxation Act is applicable to it. (*Mukerji and Niamatullah, JJ.*). RAM PRASAD, *In the matter of.* **1930 A.L.J. 579= A.I.R. 1930 All. 389.**

—S. 2 (3)—Trading, what is.

———Act of a State in arranging for the sale of a commodity and in receiving proceeds of the contract in British India, constitutes trading in British India. (*Mukerji and Niamatullah, JJ.*). RAM PRASAD, *In the matter of.* **1930 A.L.J. 579= A.I.R. 1930 All. 389.**

—S. 3—Liability under.

———Although Government Trading Taxation Act only came into force on 1st April, 1926, a State or Government liable to income-tax under the provisions of the Act is liable to assessment with reference to transactions which took place during the year 1925-1926 by virtue of Income Tax Act, S. 3. (*Mukerji and Niamatullah, JJ.*). RAM PRASAD, *In the matter of.* **1930 A.L.J. 579= A. I. R. 1930 All. 389.**

GRAMANATHTHAM.

See (1) GRANT INAM.
(2) LAND TENURE.

GRANT.

See also CROWN GRANTS ACT, 1885.

Brahmottar.
Construction.
Darkhast.
Fishery.
Inam.
Jagir.
Khorposh.
Law applicable.
Life-estate.
Maintenance grant.
Marwat.
Pension.
Presumption.
Relinquishment.
Resumption.
Rights of alienee.
Rights of grantee.
Rights of grantor.
Rights of holder.
Sankalp.
Saranjam.
Service grant.
Shrotriem grant.
Succession to.
Vatan.

—Brahmottar.

———*Brahmottar interest created by Ghatwal is not burdened with service—It is liable to be sold in execution of a decree.*

A Brahmottar interest created by a Ghatwal is not burdened with any services as a Ghatwali estate is, and although the interest created by the Brahmottar grant is liable to resumption under certain circumstances, such interest can be sold in execution of a decree. The Brahmottar interest cannot be held to be inalienable because the Ghatwal who created the Brahmottar right had no power to alienate his own estate. So long as the interest created under the Brahmottar grant is in existence such interest is liable to be attached and sold in execution of a decree against the Brahmottadar. (*Adami and Kulwant Sahay, JJ.*). SARDA DEVI *v.* RAM LONEHAN BHAGAT. **97 I.C. 210= 7 P.L.T. 570=1926 P.H.C C. 254= A. I. R. 1926 Pat. 444.**

GRANT—Construction—Ambiguity.

—Construction—Absolute ownership.

———*Karnam inam held by husband granted to his widow and daughter by Government after his death on condition of paying certain quit rent—Grant confers absolute estate.*

Where a grant is an absolute grant, it cannot be cut down by any considerations as to the status of the family and the position of the members (grantees) at the date of the grant. The fact that other donees are mentioned does not make any difference as regards the construction of the grant: A. I. R. 1926 Mad. 227, *Appl.*

Where Karnam Inam lands held by the husband were enfranchised by the Government in favour of the widow and daughter under the terms: "This inam being held for karnam service now otherwise provided for, will be subject to the payment of an annual quit rent of Rs. 11 which is hereby imposed upon it in commutation both of the service and the reversionary interest possessed by the Government in the inam. The inam is now confirmed to you in freehold, in other words, the inam will be your own absolute property to hold or dispose of as you think proper, subject only to the payment of the above mentioned quit rent."

Held, that the widow and daughter obtained an absolute right to the property and their interests were not merely that of a Hindu widow or daughter succeeding to the property of her husband or father having only a limited right therein: A. I. R. 1922 P. C. 96, *Appl.* (*Kumaraswami Sastri and Reilly, JJ.*). PALANIYANDI *v.* VEYILAMUTHU PILLAI. **112 I.C. 320=52 Mad. 6= 28 M.L.W. 530=1928 M.W.N. 723= A.I.R. 1929 Mad. 93=55 M.L.J. 579.**

———*Grant proved to be for generation after generation——Nothing contrary—Grant confers absolute estate.*

Wazir Hasan, J.—Ordinarily a transfer of land without restrictions carries with it every incident of ownership and passes to the transferee all interests which the transferor is then able to pass in the property and in the legal incidents thereof. Therefore, where a grant is proved to be for "generation after generation" it must be construed, in the absence of anything to the contrary to be a grant of an absolute estate: 14 I. A. 7, *Ref. to.*

Stuart, C. J.—Where a man is proved to have hereditary rights, and there is nothing to show that they are non transferable, they must be presumed to be transferable. (*Stuart, C.J. and Wazir Hasan, J.*). SHEO BAHADUR SINGH *v.* BISHUNATH. **99 I.C. 876=2 Luck. 4=4 O W.N. 15= 8 L.R.A. Rev. 48=A.I.R. 1927 Oudh 74.**

———Grantee to collect revenue and to take a fixed sum out of it—Grantee is not absolute owner. The Government had the right to levy non-agricultural assessment on warkas land that had passed out of the possession and enjoyment of the grantee but not on land in the actual occupation and enjoyment of the grantee. (*Macleod, C.J. and Madgavkar, J.*). JAMSHEDJI *v.* SECY. OF STATE. **93 I.C. 184=28 Bom. L.R. 25= A.I.R. 1926 Bom. 209.**

—Construction—Ambiguity.

———Where, the document of a grant is produced in evidence and contains no latent ambiguity extrinsic evidence of intention can hardly be admissible. (*Dawson-Miller, C.J. and Kulwant Sahay, J.*). UDAI PRATAP NATH *v.* JAGAT MOHAN. **106 I. C. 399=6 Pat. 638=9 P.L.T. 25= A.I.R. 1928 Pat. 66.**

GRANT—Construction—Annuity.

—Construction—Annuity.

———Inam—Grant of cash allowance changed to grant of village—After calculating revenue, surplus over the allowance to be paid by grantee to the Government—Grant is not of an annuity but of the village. (*Viscount Dunedin.*) BOWANJI ARDESHIR *v.* SECY. OF STATE. **114 I.C. 1= 31 Bom. L. R. 256=53 Bom. 230=56 I.A. 51= 1929 A.L.J. 47=49 C.L.J. 179=33 C.W.N. 293= A.I.R. 1929 P. C. 34 (P.C.).**

—Construction—Cypres.

———Where a charitable gift is made upon a condition precedent the gift fails if the condition is not satisfied. To attract the application of the cypres doctrine an absolute declaration of intention to give to charity must be established. (*Mookerjee and Fletcher, JJ.*). SANTONA ROY *v.* ADVOCATE GENERAL, BENGAL. **62 I. C. 193=48 Cal. 124= 25 C.W.N. 343=A.I.R. 1921 Cal. 389.**

—Construction—Duty of Court.

———Decision of Inam Commissioner, as to nature of grant is not conclusive—It is for the Court to see what it is. (*Phillips and Devadoss, JJ.*) JAGGA ROW *v.* GORI BIBI. **72 I.C. 789=17 M.L.W. 521= 1923 M.W.N. 347=A.I.R. 1923 Mad. 545.**

—Construction—English law.

———Principles of common law of England should not be applied. (*Dawson-Miller, C.J. and Kulwant Sahay, J.*). UDAI PRATAP NATH *v.* JAGAT MOHAN. **106 I.C. 399=6 Pat. 638= 9 P.L.T. 25=A.I.R. 1928 Pat. 66.**

—Construction—Extrinsic evidence.

———Construction must depend upon the terms of the instrument—Extrinsic evidence is inadmissible.

Except in a case of ambiguity, extrinsic evidence would not be admissible. (*Mookerjee and Chotzner, JJ.*). ABINAS CHANDRA DAS *v.* MAJUB ALI CHOUDHURY. **70 I.C. 273=27 C.W.N. 328= 36 C. L. J. 196=A.I.R. 1922 Cal. 461.**

—Construction—Grant of mouje.

———*Words and phrases "Mouje."*

Grant of a mouje indicates 'a village in which there were peasant proprietors owning cultivable lands even then.' The view that the word in the particular context merely means a defined place cannot be accepted: 38 Mad. 891 (892) *view of Sadasiva Aiyar, J. Appr.*; 43 Mad. 92; A.I.R. 1923 Mad. 1; 70 I.C. 729 (F.B.), *Reversed.* (*Lord Atkin.*) V. SEETHAYA *v.* P. SUBRAMANYA. **117 I.C. 507= 33 C. W.N. 578=52 Mad. 453=29 M.L.W. 804= 31 Bom. L.R. 756=49 C.L.J. 566= 56 I.A. 146=1929 M.W.N. 553= A. I. R. 1929 P.C. 115=56 M.L.J. 730 (P.C.).**

—Construction—Inheritance.

———From the year 1799 until 1865 the Barwe estate was a putra putradik jagir resumable by the Maharaja on failure of male heirs of the original grantee of Chota Nagpur and it was not an absolute estate of inheritance. (*Dawson-Miller, C.J. and Jwala Prasad, J.*). UDAINATH SAHI DEO *v.* GANESH NARAIN SAHI. **70 I.C. 232= 1921 P.H C.C. 369=A.I.R. 1921 Pat. 218.**

—Construction—Minerals.

———*Grant of all zamindari rights.*

A grant of patni taluk provided: "You shall be in possession of all the zamindari rights and interests as prevailing from before in the lands included in the said mauza from before". There was nothing to show that sub-soil rights were included in the grant.

Held, that the zamindari rights were conferred in the subject-matter of the grant and the grant of

GRANT—Construction—Patta.

zamindari rights on what was expressly conveyed did not increase the actual corpus of the subject affected by the patta. They only gave expressly what might otherwise quite well be implied, namely, that that corpus being ascertained there will be carried with it all rights appurtenant thereto, including not only possession of the subject itself, but it may be of rights of passage, water, or the like, which enure to the subject of the patta and may even be derivable from outside properties. A.I.R. 1917 P.C. 163, *Ref.* (*Das and Allanson, JJ.*). IRANGOBINDA SAHU *v.* SATYA NIRANJAN. **112 I.C. 659= 8 Pat. 190=9 P.L.T. 593=A. I. R. 1928 Pat. 482.**

———*"Oil" does not include "gas"—Words—Upper Burma Oil fields Regulation* (4 *of* 1910), *S.* 2—*Petroleum Act* (1899)—*Burma Oil-fields Act* (1918), *S.* 2.

Where by a grant by Government, dated 25th April, 1912, the Secretary of State for India in Council granted to the respondents the right to win and get earth-oil from a certain well site and to dispose of all earth-oil to be gotten therefrom on certain conditions.

Held, that the grantee did not by his grant obtain any right to win, get or dispose of gas.

Held further, that the ownership of natural gases, so far as they are capable of ownership, remained with Government and did not pass either in 1912 or in 1919 by the rules under Burma Oil-fields Act (1918) to the grantee. (*Rutledge, C.J. and Brown, J.*). BURMA OIL CO., LTD. *v.* U. PO NAING. **102 I. C. 830=5 Rang. 133= A. I. R. 1927 Rang. 201.**

—Construction—Mining lease.

———*Right of using surface—Limits.*

It is settled law that a right of using the surface to which the mine owner may be entitled by implication is confined to such things as are reasonably and strictly necessary for the convenient working of the mines. The mine owners have no other rights of any description whatsoever unless these rights are to be found within the four corners of the grant in their favour. (*C. C. Ghose and Panton, JJ.*). HARIPARDE PANDOPADYA *v.* EQUITABLE COAL CO., LTD. **76 I. C. 413= A.I.R. 1923 Cal. 335.**

—Construction—Patta.

———*Whether confers title—Distinction between cases where the Government is owner and cases where it is not owner.*

In cases where Government is not the owner of the land, the mere issue of a patta in favour of a person does not operate in law to convey a title to the land in the pattadar to the prejudice of the real owner. The patta in such cases is only a memorandum of one extent of land and the Government assessment due thereon. It may be entitled to such weight as the Court thinks fit in the circumstances in considering whether the person in whose name the patta stood and who paid the Government revenue was in possession of the land; but as evidence of ownership of land a patta by the Government is *per se* of no real use. But as regards lands of which Government is the owner and which is at their absolute disposal either because it is assessed waste land, an escheated land or land resumed it is open to the Government to make a grant of such land to any person it thinks fit. In such cases, the order granting such land to such person has the effect of conveying to such person the title to the land subject to the payment of revenue. The grant itself may take the form of a patta.

GRANT—Construction—Permanency.

Held, on the facts, that the patta in question belonged to the latter category. (*Ananthakrishna Aiyar, J.*). SAMPATHU RAO *v.* APPASAMY NAINAR. **1930 M.W.N. 385.**

—Construction—Permanency.

———*Grant of tank for public purpose—Presumption is in favour of permanency.*

Where in the case of a grant of land made for the excavation of a tank the evidence showed that there was scarcity of water in the village, and the original grantee undertook to remove the difficulty felt by the villagers, if land were granted to him in perpetuity, so that he might excavate a tank at considerable expense of money and the grant was made accordingly and the tank was excavated for public benefit.

Held, that according to Hindu religious notions, such grant of land for digging tank was supremely meritorious and in these circumstances, it is inconceivable that the grant could have been of a temporary character or that the landlord could ever have intended to resume the grant: 39 C. 439, *Foll.*; 46 C. 683 (P. C.), *Dist.* (*Mookerji and Rankin, JJ.*). TARAKESWAR PAL CHOWDHURY *v.* SIRISH CHANDRA GHOSH MANDAL. **80 I. C. 628=27 C.W.N. 964= A.I.R. 1924 Cal. 236.**

—Construction—Personal grant.

———*Head of religious institution—Grant to, in personal capacity.*

Where the proprietary rights in certain lands are granted to a person by way of reward in recognition of his energy and zeal in looking after a sacred house and bringing the surrounding waste land into cultivation and not as the head or member of a religious institution, the grant is a personal one and the mere use of the word 'dharmarth' by the grantee's son with reference to the land, does not create any presumption that the land had been for any charitable or religious purpose. Even the head of a religious institution may hold and acquire property in his own right. (*Broadway and Johnstone, JJ.*). GURDWARA PRABANDHAK COMMITTEE *v.* SOHAN SINGH. **A.I.R. 1930 Lah. 609.**

———*Grant to mahant in personal capacity.*

The Settlement Officer, gave a Mahant and his heirs rights as occupancy tenants without a right of transfer, without any condition as to the purposes to which the income of the land was to be devoted, without any reference to their being Mahants of a particular temple and without suggesting that the temple was to benefit from their possession. There were no conditions requiring the Mahant and his successors to devote any portion of the income towards the expenses of the temple. They were granted the property subject only to the condition that they might retain it so long as the temple was in existence.

Held, that the grant was not a grant to the temple, but a grant to an individual on the condition that he satisfied certain expenses of the temple from the income of the property granted, and the land given by the settlement decree was not *wakf* property given for religious or charitable purpose and Act 14 of 1920 was not applicable.

Wazir Hasan, J.—The essence of a trust for a public or religious purpose lies in its characteristic of permanency. The possibility of such a trust cannot be conceived in a tenure where the tenure can come to an end on default or even on the exercise of a volition on the part of the trustee. Where the right of occupancy which the plaintiff's predecessor had obtained in the lands in suit from the

GRANT—Construction—Words.

settlement Court is liable to be extinguished altogether in the event of non-payment or refusing to pay rent to the superior proprietor, the case is not one of trust falling within the purview of Act 14 of 1920 : A.I.R. 1924 P.C. 109 and 5 Cal. 438 (P. C.), *Foll.* (*Stuart, C. J. and Wazir Hasan, J.*). JAGATJIT SINGH *v.* BRIJ MOHAN DAS. **108 I. C. 98= 3 Luck. 392=5 O. W. N. 50= A.I.R. 1928 Oudh 241.**

—Construction—Principles.

———A grant in respect of its amplitude is always construed (unless it be a Crown grant) against the grantor. (*Lord Phillimore.*) BASIRAM SAHU ROY *v.* RAM RATAN ROY. **101 I.C. 359=54 Cal. 586= 54 I.A. 196=8 P.L.T 255=1927 M.W.N. 437= 31 C.W.N. 885=39 M.L.T. 170= 26 M.L.W. 642=A.I.R. 1927 P.C. 117= 53 M.L.J. 117 (P.C.).**

———Inam grant should be construed strictly in favour of the Crown though in ordinary cases the construction should be in favour of grantee. (*Shah, Ag. C. J. and Fawcett, J.*). SECY. OF STATE *v.* SHANTARAM NARAYAN DABHOLKER. **84 I.C. 397=49 Bom. 99=26 Bom. L.R. 847= A.I.R. 1925 Bom. 12.**

—Construction—Recitals.

———The entries in the settlement statement or in the Alienation Register do not in any way outweigh the express statements in sanads on the subject. (*Fawcett and Madgaikar, JJ.*). SECY. OF STATE *v.* INDOORAI BHAKRAI. **98 I.C. 933= 50 Bom. 698=28 Bom. L.R. 1308= A.I.R. 1927 Bom. 40.**

———*Recitals alone not sufficient proof.*

Ordinarily, the recitals in a document upon which the grant depends would not be sufficient evidence that the grant was made for the purposes mentioned therein, but they are required to be supported by proof *aliunde* that they were made for those purposes. No presumption as to the correctness of the recitals arises from the mere fact that a document is more than 70 years old, without considering other circumstances. 42 C. 876 (P.C.), *Ref.* (*Ayling and Odgers, JJ. afterwards Spencer and Venkatasubba Rao, JJ.*). KELU KARUP *v.* RAMAN NAIR. **73 I.C. 275= A.I.R. 1924 Mad. 247.**

—Construction—Service grant.

———*Kazhagam service—Grant was held not to be one of service.*

Having regard to the terms in a deed :—"You are to enjoy the same conducting Vazhipadu to the deity," and to the meaning of the terms Vazhipadu in Gundart's Dictionary :—"offering of rice of which the greater part returns to the donor,"

Held, that the grant was not at all a service grant. The obligation to make the show of an offering being a nominal obligation was merely a moral one. (*Ayling and Ramesam, JJ.*). RAMASWAMI *v.* LAKSHMI VARESSIAR. **72 I.C. 627= 17 M L.W. 514=32 M.L.T. 399= 1923 M.W.N. 343=A.I.R. 1923 Mad. 572.**

—Construction—Words.

———*Words and phrases—Muafi.*

For some peculiar reasons where small amounts are granted, more specially to a religious institution, the word muafi is wrongly used to cover not only the cases where the institution owns the property but also where it does not and merely enjoys the property assigned. (*Broadway and Harrison, JJ.*). SHIROMANI GURDWARA PRABHANDHAK COMMITTEE *v.* KARAM SINGH. **123 I.C. 835=A.I.R. 1930 Lah. 46.**

GRANT—Construction—Words.

———The use of the words *sab sudha* in a grant does not cause mineral rights to be included within it: A.I.R. 1917 P.C. 163, *Rel. on.* (*Dawson Miller, C.J. and Kulwant Sahay, J.*). UDAI PRATAP SINGH *v.* JAGAT MOHAN.

106 I.C. 399=6 Pat. 638=9 P.L.T. 25= A.I.R. 1928 Pat. 66.

———*Total relinquishment of rights was inferred from the use of words like 'for ever'—Grant held as heritable though no express words used.*

A service grant to one *B* by proprietor of Bettiah Raj contained the following passage:—'Hence because of that good work it is ordered that whatever trees have been planted by his ancestor and also if he plants any, the share of the Raj in them is given up. Hence this *parwana* is written to all forbidding you in any way to interfere with the trees standing on the *nakdi* holdings of the said *B* for ever.

Held: that, considering the context and the other provisions in the document and the evidence relating to subsequent conduct of the parties, the intention was the landlord should relinquish his right to the trees both present and future. Even if a document should contain word such as "always" or "for ever" or similar words, if the grant is clearly the grant of a life-interest only the mere use of such words will not have the effect of extending the grant beyond the life-time of the grantee. But it is equally true if there are no words of limitation in a grant then, even if there are no specific words of inheritance, it may still be a grant in perpetuity. 23 A. 324 (P. C.); 23 C. 838 (P. C.); 14 M. I. A. 247, *Ref.* (*Dawson-Miller, C.J. and Mullick, J.*). MAHARAJ RAI *v.* MAHARANI JANKI KUER. **75 I.C. 103=A.I.R. 1924 Pat. 655.**

———*Madras Estates Land Act* (1908), *S.* 189—*Grant of whole village—No presumption as to grant of* melvaram *only exists*—"Mousa," *use of, does not show existence of occupancy rights.*

The grant of a whole village will not be presumed to be the grant only of *melvaram* interest unless it is shown that the *kudivaram* interest was already in the hands of some one else than the donee. The division of produce between the Agraharamdars and the cultivators, throws light on the system then prevalent of paying *kist* to the land-owner, but it is no indication whether the tenant had or had not occupancy rights. The word '*mouza*' does not necessarily import the meaning that there were occupancy ryots on the land. The word "*Kadim*" does not convey anything as to the existence of occupancy rights. (*Spencer and Venkatasubba Rao JJ.*). JAVVADI SOORAYYA *v.* TAVVALA SURYARAO NAIDU. **72 I.C. 795=17 M.L.W 555= A.I.R. 1923 Mad. 623=45 M.L.J. 41.**

—Darkhast.

———*Benami.*

When a land is granted on *darkhast* it cannot be said that it is given to a man *benami* for some other individual. The onus would be heavily on the party setting up such a case to make out his case. (*Devadoss, J.*). DHANAMATHI AMMAL *v.* JAYAKEERTHI NARAIN. **85 I.C. 958= 22 M.L.W. 352=A.I.R. 1925 Mad. 973.**

—Fishery.

———Jalkar—Meaning of rights—Whether grant was of right of fishing or sub-soil must depend upon terms of grant or subsequent history of property. (*Mookerjee and Chotzner, JJ.*). PRAN KISHORE TARAFDAR *v.* SARODA PRASAD PAKRASI. **72 I. C. 55=37 C.L.J. 580= A.I.R. 1923 Cal. 358.**

GRANT—Inam—Charity.

———*Lost grant.*

There are serious legal difficulties in accepting a contention that a right of several fishery had its origin in a lost grant by the Government to a certain unincorporated community who granted it to the men of certain localities, who lastly granted it to the parties in question. (*Marten, J.*). LAKSHMAN GOWROJI *v.* RAMJI ANTONE.

23 Bom. L.R. 939=A.I.R. 1921 Bom. 93.

—Inam—Alienation.

———*Unenfranchised inam lands granted purely as a favour for maintenance of donee and his heirs are not incapable of alienation—Madras Board of Revenue Standing Orders* 52.

Unenfranchised inam lands granted not for the performance of future services either public or private, but as a pure matter of favour for the maintenance of the donee and his heirs are not incapable of alienation. It is very doubtful whether the Board's Standing Order 52, paragraph 1, Cl. (5), sub. Cl. (3) has the force of law.

The prohibition of alienation mentioned in the standing order was merely intended to indicate that the Government had the right of resumption in consequence of the prohibited alienation though it would not exercise that right if the alienees agreed to enfranchisement and to pay the ordinary rent or to pay a quit-rent without the option of refusal. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*). VENKATARAMA AIYAR *v.* CHANDRASEKHARA AIYAR. **62 I.C. 625=44 Mad. 632= 13 M.L.W. 383=1921 M.W.N. 204= A.I.R. 1921 Mad. 292=40 M.L.J. 344.**

—Inam—Assignee's liability.

———If the assignee of a share from the original inamdar holds his share in physical severalty he is separately liable for his share and if they are jointly in possession as tenants-in-common of the whole (even if such possession is through subtenants) they will be jointly liable though it will be open to them to cut down their liability by division: *United Diaries* v. *Public Trustee*, (1923) 1 K.B. 469; *Dooner* v. *Odlum*, (1914) 2 I.R. 441, *Foll.*; 11 L.W. 523, *Dist.* (*Ramesam and Reilly, JJ.*). MUSAFKANNI RAVUTHAR *v.* DORIASINGAM.

105 I.C. 179=26 M.L.W. 288= A.I.R. 1927 Mad. 931=54 M.L.J. 30.

—Inam—Charity.

———*Inam Dharmadaya — Determination of the nature of tenure is one for Government—Summary Settlement Act* (*II of* 1863), *S.* 16.

Where the grant made was *Inam Dharmadaya* and was to be hereditary,

Held, the signification of such a grant is that it was made on grounds of religion and not on political grounds. The mere fact that in occasional correspondence the grant is referred to as "*jagir*" or "*saranjam*," *i.e.*, political, cannot derogate from the effect of the language of the grant itself. The question whether the tenure was political was one which was for determination by the Government under the provisions of the Interpretation S. 16 of the Summary Settlement Act (II of 1863) and that, by treating the title as one to which the Act applied, the Government must determine that the tenure was not political. (*Viscount Haldane.*) MAHARAJA, KOLHAPUR *v.* BALAMAHARAJ.

77 I.C. 100=28 C.W N. 906=1923 M.W.N. 638= 48 Bom. 1=50 I.A. 308=26 Bom.L.R. 252= 33 M.L.T. 378=A.I.R. 1923 P.C. 194 (P.C.).

———*Construction—Deed effected by trustee prejudicial to the trust does not bind the Trust—Trust.*

GRANT—Inam—Charity.

In a suit for an injunction restraining the defendants from interfering with the plaintiff's possession of the suit lands, the plaintiff alleged that he had been the *kudiwaramdar* of the suit lands prior to 1882 on condition of delivering *waram* to the landlord and that in 1882 the predecessor-in-title of the defendants executed a deed under which the *waram* was commuted into a fixed money rent and that the defendant claiming to revert to the *waram* rate, were interfering with the plaintiff harvesting his crops. The defendants contended that as the *inam* was a charity *Inam*, the deed of 1882 was not binding on them.

Held, that the suit lands were *inam* lands and the deed of 1882 was not binding on the charity nor the defendants who were trustees of the charity. The fact that a third share of the proceeds is being appropriated by the *inamdars* for their private uses does not make it the less a charity *inam* as the grant was only one and cannot be split up into two parts—a personal grant of one third and a charity grant of two-thirds of the *inam*: 40 M. 116, *Ref.* (*Ayling and Ramesam, JJ.*). SUNDARARAJACHARIAR *v.* ALI MUHAMMAD. **72 I.C. 690. A.I.R. 1923 Mad. 661=44 M.L.J. 649.**

———The *Inam proceedings* did not create any dedication. They were instituted only with the object of investigating titles to hold lands revenue-free as belonging to valid endowments. (*Mr. Ameer Ali.*) VIDYA VARUTHI THIRTHA SWAMIGAL *v.* BALUSWAWI AYYAR. **65 I.C. 161= 15 M.L.W. 78=3 P.L.T. 245= 26 C.W.N. 537=20 A.L.J. 497= 24 Bom. L.R. 629=30 M.L.T. 66= 48 I.A. 302=44 Mad. 831=1921 M.W.N. 449= A.I.R. 1922 P.C. 123=41 M.L.J. 346 (P.C.).**

—Inam—Construction.

———The words in an Inam title-deed, "The Inam is now confirmed to your representatives and assigns, to hold or dispose of, as you or they think proper", are not mere words of limitation but are effective to secure the grant to the heirs of the deceased grantee. (*Phillips, J.*). NARASIMHAM *v.* CHANDRAMMA. **92 I.C. 321=22 M.L.W. 669= A.I.R. 1926 Mad. 154= 49 M.L.J. 547.**

—Inam—Devadayam.

———Devadayam inam lands are inalienable. 45 Mad. 620, *Foll.* (*Odgers, J.*). SUBBAYYA *v.* SETTIPILLI RAMAYYA. **91 I.C. 666= 22 M.L.W. 225=A.I.R. 1925 Mad. 1046= 51 M.L.J. 131.**

—Inam—Dharmila.

———"*Dharmila*" *means* "*granted subsequent to permanent settlement*"

An inam granted subsequent to the settlement is a dharmila inam as opposed to inams granted prior to the settlement and excluded from the assets of a permanently settled estate and afterwards enfranchised by the inam rules in 1861 to 1864. (*Kumaraswami Sastri and Ramesam, JJ.*). S. SUBBARAYULU *v.* SECY. OF STATE. **105 I.C. 864=50 Mad. 961=26 M.L.W. 513= 1927 M.W.N. 854=A.I.R. 1927 Mad. 988= 53 M.L.J. 868.**

—Inam—Enfranchisement.

———Enfranchisement confers title: A.I.R. 1925 Mad. 726, *Foll.* (*Phillips and Madhavan Nair, JJ.*). ANANTHALAKSHMI *v.* NARASIMHACHARLU. **97 I.C. 687=A.I.R. 1926 Mad. 1210.**

———Service grant—Subsequent possession cannot divest previous title created by inam patta in favour of persons in possession: 20 Mad. 454, *Rel. on.* (*Deavdoss, J.*). VENKATA RAO *v.* MANGA RAO. **87 I.C. 376=1925 M.W.N. 808= A.I.R. 1925 Mad. 1184=49 M.L.J. 71.**

—Inam—Forfeiture.

———*Disloyalty to Government.*

Where an inam was granted with a condition that the grantee thereof should remain a faithful subject of the British Government, grantee presiding over a meeting convened to boycott the visit of H.R.H. the Prince of Wales was held to be sufficient ground for forfeiture of the grant. (*Macleod, C. J. and Crump, J.*). SHRIPAD VISHNU *v.* SECY. OF STATE. **98 I.C. 448= 28 Bom. L.R. 1175=A.I.R. 1926 Bom. 581.**

—Inam—Register.

———Object was to record terms of inam—Reference to rent payable by ryots is made only to exhibit material for assessing quit-rent—Rate therein is average rate. (*Curgenven, J.*). ANDI MOOPAN *v.* MOHIDEEN MEERAL BIVI. **98 I.C. 882=A.I.R. 1927 Mad. 226.**

—Inam—Kadim Haks.

———Kadim Haks are grants made prior to the grant of the village in favour of the inamdars and independently of them. (*Fawcett and Madgavkar, JJ.*). SECY. OF STATE *v.* INDURAI BHAURAI DESAI. **98 I.C. 933=50 Bom. 698= 28 Bom. L.R. 1308=A.I.R. 1927 Bom. 40.**

—Inam—Nature of.

———*Property allowed to remain in possession of the eldest member of the eldest branch—Inference is that it is vadiliki inam.*

If successive generations have treated a certain property as an acquisition to the inam to which the rule of primogeniture and impartibility applied then it requires strong evidence to treat it as subject to partition. The intention is the test by which the Courts should be guided in cases of this nature. When for a hundred years the property has been allowed to remain in the possession of the eldest member of the eldest branch, it is a justifiable inference that the family have for generations agreed that it would be treated as appertaining to vadilki inam: 29 Cal. 433 (P.C.); 35 All. 391 (P.C.) and A.I.R. 1923 P.C. 59, *Ref.* (*Madgavkar and Patkar, JJ.*). GANESH *v.* SHRINIWAS. **113 I.C. 620=30 Bom.L.R. 457= A.I.R. 1928 Bom. 211.**

———There is no presumption that an Inam grant is a grant of both the varams; each case has to be decided on its facts and the merits: A.I.R. 1922 P.C. 292, *Ref.* (*Waller and Madhavan Nair, JJ.*). T. VENKATA SUBBA RAO *v.* B. SIVAJI. **106 I.C. 30=39 M.L.T. 208=1927 M.W.N. 609= A.I.R. 1927 Mad. 946.**

———There is no presumption that grant was of both varams—Each case will depend on its own facts—Where inam grant is proved to be of both varams, onus is on tenants to prove their occupancy rights: A.I.R. 1924 P.C. 65 and A.I.R. 1922 P.C. 292, *Expl.*; A.I.R. 1924 P.C.65, *held not to overrule*; A.I.R. 1922 P.C. 292; A.I.R. 1926 Mad. 136, *Foll.* (*Phillips and Madhavan Nair, JJ.*). ZAMINDAR OF PARLAKIMIDI *v.* RAMAYYA. **98 I.C. 313= A.I.R. 1927 Mad. 10=51 M.L.J. 510.**

———*No presumption can be raised in favour of either party—Tenants holding as occupancy tenants since* 1843—*Grant of* melvaram *only in favour of grantee can be presumed.*

In considering the nature of an inam grant, namely, whether it was a grant of *melvaram* only or a grant of both *melvaram* and *kudivaram*, no

GRANT—Inam—Nature of.

presumption can be made in favour either of the grantee or of the cultivator, and therefore where an *inamdar* sues to evict the tenants, the ordinary principle that a person suing in ejectment must prove his right to eject will apply : A. I. R. 1922 P.C. 292, *Foll.*; A.I.R. 1924 P.C. 65, *Expl.* and *Dist.*

Where it was found that the defendants-tenants and their predecessors in-interest had been in possession of the suit lands from 1843 onwards and that they had been disposing of their rights in those lands and dealing with them as if they had this right of occupancy and there was no evidence to show that the original grantee was himself in occupation of the suit lands before the grant and the only available evidence as to the tenants in possession showed that so far back as there was any record, the defendants and their predecessors had been cultivating the lands and dealing with them as if they had this right of occupancy.

Held, that the evidence does not support a grant to any greater extent than a grant of *melvaram* only. (*Phillips, J.*). PERIA KARUPPA THEVAN *v.* A. KANIYALASWAMIGAL KOVIL. **91 I.C. 1027= 22 M.L.W. 625=1925 M. W. N. 821= A.I.R. 1926 Mad. 136=49 M.L.J. 602.**

———Question as to grant being of soil or of share of revenue is one of fact in each case—Presumption that grant passes only share in revenue does not exist. (*Shah, Ag. C. J. and Fawcett, J.*). SECY. OF STATE *v.* SHANTARAM NARAYAN DABHOLKER. **84 I.C. 397=49 Bom. 99= 26 Bom.L R. 847=A.I.R. 1925 Bom. 12.**

———*Grant of whole inam village is subject to the rights of community—Where the rights are easements enjoyed by the public the soil belongs to inamdar and he can eject trespasser.*

In the case of inam villages the grant of a whole inam village must be taken subject to the rights of the community. In the case of burial grounds, threshing floors, etc., such rights (so long as the character of the site does not charge) may be regarded as vested in the Government. (36 M.L.J. 203, *Ref.*). But where the rights of the public amount to a bare easement, the *inamdar* has title to the soil. In the case of an irrigation tank, irrigating certain lands, it is doubtful if there are any rights belonging to the community, as the rights of irrigation appertain to the lands irrigated as easements and the grant must be taken to be subject to the easements. If the tank is one for public drinking and bathing, the grant may be subject to the rights of the public for these purposes ; but there is no reason to hold that the bed does not belong to the *inamdar*. On the other hand, it is proper to say that it belongs to him. So that, if the tank ceases to be a tank, all rights vest in him and if it continues to be a tank, in the interests of the public, the proper person to take action against a trespasser is the *inamdar* who is still the owner of the bed and can take action to remove the trespass. (*Ramesam and Jackson, JJ.*) KANNAYIRAM PILLAI *v.* VIRUDUPATI GINS LTD. **81 I. C. 1021= 20 M. L. W. 185= A.I.R. 1925 Mad. 139.**

———There is no presumption that an Inam grant is grant of the land revenue only and each case must be decided with reference to the circumstances connected with it. (*Venkatasubba Rao, J.*). CHIDAMBARA GURUKKAL *v.* SIVAJNANASUNDARAM PILLAI. **79 I.C. 619=1924 M. W. N. 487= A. I. R. 1924 Mad. 833=47 M.L.J. 598.**

———There is no presumption that an inam grant by a zamindar is a grant of the *melvaram* only or of both varams: 41 M. 1132 and 43 M.166 ; A.I.R. 1922 P. C. 292, *Ref.* (*Phillips and Devadoss, JJ.*). VENKATARANGAYYA APPARAO BAHADUR *v.* MORAMPUDI BAJIRAJU. **76 I. C. 61=1923 M.W.N. 755= 19 M. L. W. 619=A. I. R. 1924 Mad. 93= 45 M.L.J. 238.**

GRANT—Inam—Origin of.

———*Right to minerals—Language of grant is essential.*

A grant of a village in inam may be no more than an assignment of revenue, and even where it is or includes a grant of land, what interest in the land passed must depend on the language of the instrument and the circumstances of each case. The title deed of the Inam Commissioners confers no higher title than was originally granted. The fact that Government at one time disclaimed its right to minerals does not deprive them of their title conclusively. (*Sir Lawrence Jenkins.*) SECY. OF STATE *v.* SRINIVASA CHARIAR. **60 I. C. 230= 44 Mad. 421=48 I.A. 56= 19 A.L.J. 201=33 C L.J. 280=26 C.W.N. 818= 13 M.L.W. 592=1921 M.W.N. 111= 29 M.L.T. 181=A.I.R. 1921 P. C. 1= 40 M.L.J. 262 (P.C.).**

———*Presumption is that grant is of both warams.*

There is a presumption in the case of grants of even inam lands (whether granted by the former ruling power or by a Zamindar) that the grant was of both warams. (*Sadasiva Aiyar and Spencer, JJ.*). SUBRAMANIA GURUKKAL *v.* AMMAKANNU AMMAL. **70 I.C. 477=14 M. L. W. 376=1921 M.W.N. 696= A.I.R. 1921 Mad. 595=41 M.L.J. 450.**

———The decision of the Judicial Committee in 41 Mad. 1012 that there was no presumption in favour of the restriction of the grant to the *melwaram*, applies to grant by Government as well as by private individuals and to British as well as pre-British grants. (*Oldfield, J.*). PERAYYA LINGAM *v.* VENKATAPATHIRAJU. **63 I.C. 804= 13 M L.W. 601= A.I.R. 1921 Mad. 302.**

———There is no presumption in inam grants that it is the *melwaram* alone that is granted: 41 Mad. 1012 and 37 M.L.J. 42, *Foll.* (*Ayling and Seshagiri Aiyar, JJ.*). VENKATAPPA CHARYULU *v.* TIRUMALAREDDI PAPIREDDI. **62 I.C. 309= 13 M.L.W. 203=44 Mad. 550= A.I.R. 1921 Mad. 40.**

———*Third party, right of, to eject grantee.*

Where, the Government makes a grant of land at its absolute disposal, a third person cannot deprive the grantee's title on the ground that he was a landlord of the grantee and such third person's prior right as landlord is destroyed by the act of grant of the Government. There is no presumption of law that an inam grant of a village is *prima facie* a grant of the land revenue only. The terms of the grant, and whole circumstances connected therewith have to be looked into. In a suit for ejectment, the burden of proving that the tenancy is terminated and there is a ground for eviction lies on the plaintiff. (*Sadasiva Aiyar and Spencer, JJ.*). SUBRAMANIA AIYAR *v.* ONNAPPA GOUNDAN. **61 I.C. 597=12 M.L.W. 576=28 M.L.T. 389= 39 M L.J. 629.**

—Inam—Origin of.

———Suit for declaration that suit land was Government grant—Mittadar pleading that it was ryoti land—Real question to be decided is whether the inam was or was not granted or continued by Government—So, before deciding this question it is not proper to raise the question of Limitation under Lim. Act, Art. 14. (*Anantkakrishna Ayyar, J.*). CHIDAMBARA *v.* NAGAMMAL. **123 I.C. 341= A.I.R. 1930 Mad. 710.**

GRANT—Inam—Partibility.

—Inam—Partibility.

———*Berar Inam Rules, R.* 59—Jagir—*Land is liable to partition.*

Property consisting of an ordinary *Inam* village is liable to partition at the suit of a co-sharer except when it is held on *Saranjam* or other impartible tenure or where the terms of the original grant impose a condition upon its enjoyment that the management should rest with a particular branch of the family of the grantees. Under R. 9 of the Berar Inam Rules "Land" which term includes a village acquired by Pargana servants as Government officials, admits of division through Civil Courts. (*Dhobby, A.J.C.*). KRISHNA RAO *v.* NILKANTHA. **69 I.C. 800=18 N.L.R. 163=5 N.L.J. 25=A.I.R. 1922 Nag. 52.**

—Inam—Perpetual lease.

———The distinction between a grant in inam and a perpetual lease on a favourable rent is indeed very fine although in law it is quite sound. (*Venkatasubba Rao and Madhavan Nair, JJ.*). SEETAYYA GARU *v.* APPADU. **92 I. C. 814=A.I.R. 1926 Mad. 526.**

—Inam—Proof.

———*Reference to Inam Registers when permissible.*

In determining the nature of property granted in inam, in the absence of the original grant, the entry in the Inam Registers may be referred to as evidencing the history of the property in question and the terms upon which it is held ; but where the original grant is available, the Court must be guided by its terms alone : 43 Mad. 253 (P.C.) and A.I.R. 1921 P. C. 1, *Appl.* (*Odgers and Jackson, JJ.*). DOST MD. KHAN *v.* HASSARATH KIBULUE SAYYAD. **102 I.C. 473=38 M.L.T. 248=A.I.R. 1927 Mad. 599.**

—Inam—Resumption.

———Right of Government to resume unenfranchised personal inams is not absolute and unqualified—Pensions Act, S. 7 (1): 12 Mad. 98; 26 Mad. 339; 26 All. 617 and 32 All. 148, *Dist.*; 1 M. H. C. 465, *Not cons.* (*Devadoss and Mackay, JJ.*). SECY. OF STATE *v.* ABDUL RAHIM. **114 I.C. 626=1928 M.W.N. 763=A. I. R. 1928 Mad. 1246.**

———Persons having no claim to hold the office for which the inam is granted by hereditary right, cannot maintain a suit to recover inam land when it is resumed by Government. (*Reilly, J.*). VELU PILLAI *v.* SECY. OF STATE. **107 I.C. 785=A.I.R. 1928 Mad. 852.**

———When the right of Government to resume an inam is questioned the Government or its assignees will have to substantiate the same. (*Waller and Madhavan Nair, JJ.*). VENKATASUBBA RAO *v.* B. SIVAJI. **106 I.C. 30=39 M.L.T. 208=1927 M.W N. 609=A.I.R. 1927 Mad. 946.**

———Dharmilla Inam—If services to be rendered are public, inam is not resumable—If services are private presumption is of resumability. (1911) 2 M.W.N. 406, *Ref.*; 30 M. L. J. 132 (F.B.), *Rel. on.*

Even where the lands are Dharmilla inam lands and services are private and personal, if the terms of the grant show that they were given partly for past services and partly for future services, then it would be more a grant burdened with service, rather than a grant as remuneration for future service and thus not resumable. (*Ramesam, J.*). RAJAH OF VIZIANAGRAM *v.* RAMASWAMI. **101 I.C. 49=A.I.R. 1927 Mad. 448=52 M.L.J. 283.**

———*Court cannot order resumption.*

The discretion of exercising its power to resume the grant lies with the Government and a Court

GRANT—Inam—Service inam.

cannot, on the assumption that the object of the grant has failed, make any direction, that the inam should revert to the temple and that the trustee should manage it and treat it as property belonging to the temple. (*Spencer and Devadoss, JJ.*). SESHADU REDDI *v.* SUBRAMANIA AIYAR. **74 I.C. 35=16 M.L.W. 839=32 M.L.T. 89=A.I.R. 1923 Mad. 163.**

———Ferpetual inam—Resumption by Government—Ryotwari patta granted to Inamdar—Occupancy rights of tenants are not defeated : 12 L. W. 576, *Diss. from*; 33 M. L. J. 370; 28 M. L. J. 44 ; 2 Mad. 226 and 12 Mad. 422, *Ref.* (*Ayling and Seshagiri Aiyar, JJ.*). VENKATAPPACHARYULU *v.* TIRUMALAREDDI. **62 I.C. 309=44 Mad. 550=13 M.L.W. 203=A. I. R. 1921 Mad. 40.**

—Inam—Saranjam.

———*Construction of grant.*

The mere use of wide expressions such as the grant of land "for ever" or "from generation to generation" does not prevent the grant being one of saranjam. Nor again is the use of the word "inam" instead of "saranjam" conclusive. It is for Government to determine in a particular case whether a grant is one of saranjam only. (*Fawcett, Ag. C.J. and Murphy, J.*). SAYAJI RAO, GAIKWAR OF BARODA *v.* MADHAVRAO RAGHUNATHRAO DHAVADE. **115 I. C. 369=30 Bom. L.R. 1463=53 Bom. 12=A.I.R. 1929 Bom. 14.**

—Inam—Service inam.

———*Resumption.*

Where a village carpenter committed default in the discharge of his duties and the Collector passed orders resuming the carpenter's inam and directed that ayan patta should be issued to the purchaser who was in possession of the lands.

Held, that the inam being of both warams the Government could resume the same and grant it to another, and that the purchaser was entitled to a declaration of his title and for possession on the basis of the patta issued by Government. Incidents of patta discussed. (*Ananthakrishna Aiyar, J.*). SAMPATHU RAO NAINAR *v.* APPASAMI NAINAR. **1930 M.W.N. 385.**

———*Resumption.*

A grant of lands burdened with *vinayaka* services to be rendered in connection with a temple is one for public service rendered to the whole Hindu community and so long as the service to the deity is being regularly rendered, it is not liable to be resumed. Similarly an inam relating to a *valluva* or astrologer inam cannot be resumed so long as the service is being performed. (*Ananthakrishna Ayyar, J.*). PRAYAG DOSS JEEWARU *v.* ABBU PILLAI. **123 I.C. 28.**

———*Sagubadi inam incidents—Resumption.*

A *sagubadi* inam is an inam granted to headryots with a view to their encouraging the cultivating of Government's lands. Lands thus granted are burdened with the *sagubadi* service. If the inamdar to whom such a grant hasbeen made should fail to perform that service when the service was performable, it would be open to the zamindar to resume the inam but if the services have long ceased to be performed for the simple reason that there is little or no cultivable land yet remaining to be cultivated and the terms of the grant have not been violated, the zamindar is not entitled to resume the inam. (*Ananthakrishna Ayyar, J.*). PRAYAG DOSS JEEVARU *v.* ABBU PILLAI. **123 I.C. 28.**

———Inam for private service to the zamindar is not the same as an inam for public service.

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(*Jackson and Reilly, JJ.*). LAKSHMI VENKAYAMMA *v.* SECY. OF STATE. **117 I.C. 292= A.I.R. 1929 Mad. 399.**

———*Construction of grant.*

Inam granted in favour of some persons so long as service therein is rendered—Every person is entitled to share although he does not personally render the service. (*Kumaraswami Sastri and Reilly, JJ.*). MIR MAHABOOB *v* MIR SURAJUDDIN. **115 I.C. 150=A.I.R. 1928 Mad. 1148.**

———*Resumption.*

The Government have no right to resume service Inam lands forming part of the property of zamindar or to make a fresh grant of them to any other person. (*Devadoss, J.*). ANKAMA NAIDU *v.* BEEKI NAIDU. **99 I.C. 699= 38 M.L.T. 9=A. I. R. 1927 Mad. 449.**

———The phrase "sarva dambala inam" shows only that no money payment is insisted on the holding of the inam, but it does not necessarily show that it was not a service inam. (*Ramesam, J.*). BRAHMAYYA *v.* MADHURAM. **94 I.C. 489= A.I.R. 1926 Mad. 496=50 M.L.J. 282.**

———Karnam—Inam Commissioner refusing to grant patta in the name of karnam but giving pattas to other persons in the family who were in possession—Such pattas give them good title—Such enfranchisement enures for their benefit and not for that of karnam: A.I.R. 1925 Mad. 780, *Foll*; A.I.R. 1922 P.C. 96, *Dist.* (*Devadoss, J.*). VENKATA RAO *v.* MANGA RAO. **87 I.C. 376=1925 M.W.N. 808= A.I.R. 1925 Mad. 1184=49 M.L.J. 71.**

———Inams for public service—Leases for a period are valid—Sale is invalid even during alienor's lifetime: A.I.R. 1922 Mad. 197 (F.B.), *Appr.* (*Case-law referred to.*) (*Devadoss and Madhavan Nair, JJ.*). KADIYALA BASWAYYA NAIDU *v.* MUNISAMI REDDI. **86 I.C. 1041= A.I.R. 1925 Mad. 1155.**

———Karnam service inam—Enfranchisement in favour of stranger to office—Holder of office at the time cannot claim benefit of enfranchisement: A.I.R. 1922 P.C. 96 and S.A. Nos. 287 and 288 of 1921, *Foll.*; 30 M.L.T. 334, *Dissented from.* (*Phillips and Odgers, JJ.*). G. RAMAKRISHNAYYA *v.* G. PITCHAYYA. **91 I.C. 165=1925 M.W.N. 480= 21 M.L.W. 474=A.I.R. 1925 Mad. 726= 48 M L.J. 500.**

———*Service inam and personal inam distinction —Exclusive prior possession against grantee of a title-deed after enfranchisement is of no avail against the grantee.*

The lands comprising the emoluments of the karnam office are attached to the office as such, so that even if a stranger to the family is appointed the land goes with the appointment, eligibility to the office is a personal matter; the land goes with the office and is impartible and Government, in the act of enfranchisement, severs the land from the office and allows the office-holder for the time being to enfranchise it. The distinction between the enfranchisement of a service inam and that of a personal inam is that the latter is a mere release of the service obligation, release by the Crown of its reversionary interests, while the former is a resumption of the land by Government and a re-grant of it to whomsoever Government pleases, although no doubt ordinarily the re-grant would be to the holder of the office at the time of the enfranchisement. The enfranchisement of a service inam and the issue of a title-deed thereupon create a new title in the grantee, unless Government had at the time of the resumption no right to resume.

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Adverse possession prior to resumption does not count against the new grantee. (*Wallace, J.*). GOWRIKANTAM *v.* RAMAMURTHY. **80 I.C. 557= 19 M.L.W. 663=34 M.L.T. 234= 1924 M.W.N. 565=A.I.R. 1924 Mad. 783= 46 M.L.J. 482.**

———Inam burdened with trust of doing certain services—Surplus after services belongs to grantee. (*Spencer and Devadoss, JJ.*). SESHADU REDDI *v.* SUBRAMANIA AIYAR. **74 I.C. 35= 16 M.L.W. 839=32 M.L.T. 89= A.I.R. 1923 Mad. 163.**

———Karnam service woman being karnam at time of enfranchisement—Grant of title-deed to her conveys absolute estate descendible to her own heirs—Madras Hereditary Village Officers Act, III of 1895. (*Spencer and Devadoss, JJ.*). ANDUKURI VENKATARAMADAS *v.* PACHIGOLLA GAVARRAJU. **70 I.C. 677=16 M.L.W. 228= 1922 M.W.N. 305=31 M.L.T. 154= A.I.R. 1922 Mad. 173=43 M.L.J. 153.**

———Blacksmith's Inam—Inamdars who were owners of Kudivaram removed from service—Mirasdars and Pattidars not thereby entitled to possession. 26 M.L.J. 169, *Dist.* (*Oldfield and Odgers, JJ.*). P. ELLAPPA NAIDU *v.* BOOLOGACHARY. **1922 M.W.N. 180=16 M.L.W. 531= A.I.R. 1922 Mad. 97=42 M.L.J. 359.**

———*Hindu joint family—Partition—Subsequent enfranchisement—Divided member should prove that the inam was kept undivided at partition.*

The fact of partition from the person in whose name the service inam is enfranchised is not conclusive against a claim to co-parcenary rights in the enfranchised inam lands. Whether the co-parcenary right survives, will have to be determined as a fact in each case. It may be that the office with the inam attached to it was allotted at partition to the co-parcener then holding office as a part of his share. In such a case, persons divided from him would obviously have no rights after enfranchisement. It may be that in view of the peculiar nature of the tenure and the legal impossibility of severing the lands or any portion of them from the office, the inam was kept undivided on the understanding that although till enfranchisement only the office-holder could enjoy it, yet in the event of enfranchisement, all members would be entitled to share. It may be that the other co-parceners were actually allowed by the office-holder to enjoy some portion of the inam land or its profits. If a divided member claims to share in an enfranchised service land the onus lies on him of proving, not only that he is a member of the original service family, but that at any partition which has taken place the inam was kept out of partition as undivided property in which all the sharers retained joint rights.

View of Spencer, J., in (1918) M.W.N. 849, *Dissented from*; 26 Mad. 339 and 30 Mad. 434 (F.B.), *Ref. to.* (*Ayling and Odgers, JJ.*). VENKATA SUBBA RAO *v.* SATYANARAYANAMURTI. **60 I.C. 27= 44 Mad. 179=A.I.R. 1921 Mad. 86= 40 M.L.J. 31.**

—Inam—Trustees.

———Certain persons managing temple property as *de facto* trustees considering themselves to be Archakas—Surplus income appropriated to their use—Inam Register showing that property wholly belonged to temple—Their appropriation is not *bona fide* and they are liable to account for moneys received by them: 21 Bom. 556 and 24 Mad. 243,

GRANT—Inam—Waste land.

Dist. (*Phillips and Odgers, JJ.*). GOPALACHARYULU *v.* LAKSHIMINARAYANA. **114 I.C. 650= A. I. R. 1929 Mad. 87.**

—Inam—Waste land.

———Per *Venkatasubba Rao, J.*—It cannot be said that an inam grant of waste land is in law impossible. (*Venkatasubba Rao and Madhavan Nair, JJ.*). SEETAYYA GARU *v.* APPADU. **92 I.C. 814= A.I.R. 1926 Mad. 526.**

—Jagir.

———*Attachment—Exemption from.*

There is no initial presumption that a jagir is a political pension and the burden of proving that it is a political pension and as such exempt from attachment is on the person who alleges it: 111 I.C. 838, *Foll.*; 61 I.C. 895 and 95 P.R. 1906, *Doubted.* (*Shadi Lal, C. J. and Abdul Qadir, J.*). DUNI CHAND-TELO MAL *v.* GURMUKH SINGH. **31 P.L.R. 538=A.I.R. 1930 Lah. 816.**

———*'Jagir' and 'muafi' distinguished.*

The difference between muafi and jagir is that the former is remission of land revenue to the owner whereas the latter is an assignment of land revenue which is collected and paid to the jagirdar. The jagirdar may subsequently acquire the property and if he does, the grant technically becomes 'muafi' though it always continues to be shown as a jagir. (*Broadway and Harrison, JJ.*). SHIROMANI GURDWARA PRABHANDHAK COMMITTEE *v.* KARAM SINGH. **123 I.C. 836= A.I.R. 1930 Lah. 46.**

———*Alienation—Right of.*

The Government in granting jagirs of the first class did not intend to put them on a par with grants of Cl. 3 which are governed by R. 5 of the Inam Rules subject to the four kinds of restrictions enumerated in sub-R. 2 of the said rule. Hence in the case of a jagir of the first class, as the jagir of Mahan in Akola District is future alienation of it is not prohibited. (*Subhedar, A.J.C.*). (KHWAJA) JALALUDDIN *v.* MOHAMAD AMIR. **A.I.R. 1930 Nag. 279.**

———*Co-jagirdars—Profits, suit for.*

A managing jagirdar has a right to collect the available profits and to make them available for distribution among the co-jagirdars and consequently, a suit for the assessed rental of a home farm due from co-jagirdar is maintainable: 13 C.P. L.R. 48, *Ref.* (*Subhedar, A.J.C.*). VITHAL *v.* LAXMAN. **119 I.C. 678=A.I.R. 1930 Nag. 132.**

———*Right of the head of family.*

Where a jagir belongs to the head of the family (jagirdar) by virtue of right under the rule of primogeniture in matters of descent and junior members of the family are entitled only to such parts thereof as are actually allotted to them for purposes of residence or maintenance, it must be presumed that the head of the family is in possession of the unallotted portion thereof and it is for those who claim any title either by grant or by adverse possession to any portions of the estate to establish their claim by affirmative evidence. (*Jai Lal, J.*). UPENDAR CHAND *v.* HARNAM SINGH. **110 I.C. 436 (Lah.).**

——— A jagir includes a khorposh tenure. (*Mullick and Kulwant Sahay, JJ.*). KAMAKSHYA NARAYAN SINGH *v.* JADO CHARAN. **114 I.C. 194= A.I.R. 1928 Pat. 294.**

——— A jagir granted to a *kazi* for services which were for the convenience of the tenants of the zamindar is a private, and not of a public nature.

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(*Ross and Kulwant Sahay, JJ.*). BIBI UMATUL RASUL *v.* NAGESHWAR BUSE RAI. **103 I.C. 679=7 Pat. 36=A.I.R. 1927 Pat. 386.**

———*Proof—A village cannot become a jagir only because it is so called.*

To call a village a jagir is not sufficient to constitute a jagir.

Where the granting authority was the Government who presumably at the time of the grant were perfectly aware of the nature and constituent elements of a jagir and the Government styled the villages in the grant deed as a jagir, and its own officers consistently adopted that nomenclature:

Held, there were strong grounds for holding that the grant was the grant of a jagir. (*Wallace and Madhavan Nair, JJ.*). RAMASAMI *v.* TIRUPATHI. **98 I.C. 291=50 Mad. 10=24 M.L.W 460= A.I.R. 1926 Mad. 1167=52 M.L.J. 259.**

———*Jagir and inam—Distinction.*

That distinguishing feature of a jagir in olden days was that it was a grant of landed property for life or for a definite number of lives in lieu of pension for services, usually military, rendered to Government in order that the grantee may maintain a certain dignity and state: 40 Mad. 664, *Rel. on.*

The word "jagir" primarily points to occupancy: (1918) M.W.N. 384 (P. C.), *Foll.* (*Wallace and Madhavan Nair, JJ.*). RAMASAMI *v.* THIRUPATHI. **98 I.C. 291=50 Mad. 10=24 M.L.W. 460= A.I.R. 1926 Mad. 1167=52 M.L.J. 259.**

———*Jagir is presumably for life.*

Jagir grant conveys only an estate for life unless clear words indicating a different intention appear in the instrument. (*Dawson-Miller, C.J. and B.K. Mullick, J.*). MAHADEO ASRAM PRASAD SAHI *v.* MT. JAGATRAJ KUER. **71 I.C. 929= A.I.R. 1924 Pat. 298.**

———*Resumable grants—Circumstances leading to the inference that grant is resumable—Service tenures—'Resumption' does not mean that on failure of heirs it 'escheats' to zemindar but only that latter can make a new settlement.*

Where the *jagir* was specifically mentioned as a service tenure involving the performance of police and other duties and a new settlement with the *Taluqdar* showed that the rent was increased from Rs. 735 to Rs. 1,000, four villages were taken out of the Pargana and set apart for the maintenance of the widows of the previous holder, and a new patta was granted to him by the Maharajah and a new *Parvana* was issued to him at the zemindar's instance for possession of the *jagir*.

Held, in face of these facts it is idle to contend that the settlement with the *talukdar* was a continuance of the old tenure. Had the *talukdar* succeeded to the *jagir* by right of inheritance the maintenance of the Ranis, the widows would have exclusively devolved on him and the superior landlord would have had no concern with it or the right to take away any part of the property to provide for their maintenance. The Maharajah's interference on behalf of the widows is explainable only on one hypothesis, *viz.*, that he was making a new arrangement by virtue of a right recognized by the authorities.

"Resumption" in connection with these service tenures does not mean that on failure of the direct male line it "escheats" to the zemindar and becomes what is called his *sir* or *khas* property; the *jagir* retains its character, but the zemindar becomes entitled to make a new settlement with the

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knowledge and sanction of the authorities. (*Mr. Ameer Ali.*) SRINATH RAY *v.* P. UDAI NATH.
82 I. C. 879=28 C.W.N. 145=33 M.L.T. 408=1923 M.W.N. 702=A.I.R. 1923 P.C. 217 (P.C.).

———Tenant of jagir in Berar—Mortgage of tenancy is not invalid. (*Mittra, A.J.C.*). MT. SONI *v.* MEGHASHYAN. **18 N.L.R. 195=A.I.R. 1923 Nag. 103.**

———*Previous jagirdar claims in connection with.*

Each new jagirdar gets his jagir free of claims in connection with his predecessor, and it is doubtful whether funeral expenses of the previous holder are a legal charge on the jagir income. Declaratory decree in favour of a jagirdar who refused to pay funeral expenses, was refused especially because he did not claim refund of expenses paid under order of Collector. (*Chevis, J.*). ASAD ALI KHAN *v.* MT. SHARIF-UN-NISSA BEGAM. **A.I.R. 1922 Lah. 365.**

———The interest of a jagirdar is ordinarily that of a life-tenant. 46 Cal. 683 and 3 Bom. 186 (P.C.), *Foll.* (*Dawson-Miller, C.J. and Jwala Prasad, J.*). (MAHARAJA PRATAB) UDAI NATH SAHI DEO *v.* GANESH NARAIN SAHI. **70 I.C. 232=1921 P.H.C.C. 369=A.I.R. 1921 Pat. 218.**

———*Trees—Right to cut.*

Though the zemindar is proprietor of the soil, yet by custom he might not have the right to cut trees without the jagirdar's permission.

The right to cut and sell timber in the jagir of Unerpur, in Sind, is (at any rate as between the jagirdar and the zamindar) vested in the zamindar who has more proprietary interest in the soil than the jagirdar. (*Fawcett. A.J.C.*). PIR MAKHDUM *v.* MALIK BOOLA KHAN. **79 I.C. 819=16 S.L.R. 87=A.I. R. 1921 Sind 109.**

—Khorposh.

———In a common parlance, a grant to any member of the family would be a khorposh grant. It need not necessarily be limited to grants by a senior member of the family to a junior member. (*Mullick and Kulwant Sahay, JJ.*). NARAYAN SINGH *v.* JADUCHARAN SINGH. **114 I.C. 194=A.I.R. 1928 Pat. 294.**

———*Intention to separate.*

Asserting in excess of what a person has in khorposh mouzahs does not by itself show any intention to separate. (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMAR DEBI *v.* SIVA PROSAD SINGH. **93 I. C. 385=42 C.L.J. 280=A. I. R. 1926 Cal. 1.**

———*Reversion.*

In all cases of *korposh* grants, there is always the possibility of a reversion to the parent estate, on the extinction of heirs of the grantee. (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PROSAD SINGH. **93 I.C. 385=42 C.L.J. 280=A.I.R. 1926 Cal. 1.**

—Law applicable.

———Village service tenure—Two Kotwars—In the settlement one was selected for service by lot and the other was recorded in the *wazib-ul-arz* as sub-tenant of the first—In the next settlement this arrangement was not recorded and the sub-tenant was dispossessed—He was held entitled to possession and a proper record of his life tenancy—This case not governed by the Tenancy Act of 1883, S. 50-B (2). (*Drake-Brockman, J. C.*). GHIBLIA *v.* DAWLATIA. **18 N.L.R. 34=A.I.R. 1922 Nag. 158.**

—Life estate.

———*Acceptance of rent from life-tenant's heir—Effect.*

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Where an heir of the grantee enters into possession of the grant after the death of the grantee and the grantor accepts rent from him, the mere acceptance of rent by the grantor should not constitute the heir anything more than a mere tenant-at-will.

The mere assertion of a jagirdari right acquiesced in by the superior landlord cannot be taken to import a claim or an acknowledgment of a larger interest than that of a life-estate. (*Dawson-Miller, C. J. and Jwala Prasad, J.*). MAHARAJA PRATAP UDAINATH *v.* G. N. SAHI. **70 I. C. 232=1921 P. H. C. C. 369=A.I.R. 1921 Pat. 218.**

—Maintenance grant.

———Annuity in the nature of maintenance is not heritable. 23 All. 194 (P. C.), *Foll.* (*Stuart, C. J. and Wazir Hasan, J.*). DEPUTY COMMR., HARDAI *v.* SYED MIRAJ RASUL.
98 I. C. 298=2 Luck. 398=13 O.L.J. 821=3 O.W.N. 866=A.I.R. 1928 Oudh 42.

———Impartible estate—Grants for maintenance to junior members are for life. (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PROSAD SINGH. **93 I.C. 385=42 C. L. J. 280=A.I.R. 1926 Cal. 1.**

———*Duration of estate.*

Where the object of a grant is maintenance it is *prima facie* for the life of the grantee in spite of the words 'for ever' or 'in perpetuity' but if the right of alienation has been also granted the intention is to confer an absolute estate. (*Wazir Hasan, J. C.*). TEJA SINGH *v.* MOTI SINGH. **80 I. C 918=27 O.C. 350=A.I.R. 1925 Oudh 125.**

———*Duration of estate—Construction.*

A maintenance grant is resumable on the death of the grantee and not on the death of the grantor. A maintenance grant is not absolutely inconsistent with a grant to the donee and his heirs. Such a grant is *prima facie* resumable on the death of the grantee, but the context may show that it was intended to make provision not only for the donee but for the heirs of the donee. Where the grant is so expressed, the grantor has the right to resume the grant on the extinction of the line of the grantee. It is all a question of construction. The operative clauses in a maintenance grant were in these terms: "I have made a grant of the *milkiat* right in the Mouzas named below by way of maintenance with the detail as follows. If any of the said three persons or their heirs put forward hereafter any objection against the *rais* of the Raj, as regards the difference in their maintenance grants which according to the custom obtaining in the family I am competent to assign more to one and less to another, such objection shall not be held legal or tenable in Courts".

Held, that the grantor by providing against the possibility of an objection on the part of the heirs of the grantee had clearly indicated that the grantees took a heritable but not an absolute interest under the grant. 27 Cal. 156, *Foll.*; 22 W. R. 225; 23 All. 194, *Ref.* (*Das and Ross, JJ.*). HON'BLE MAHARAJA BAHADUR KESHO PRASAD SINGH *v.* MADHO PRASAD SINGH. **83 I.C. 812=3 Pat. 880=5 P.L.T. 513=A.I.R. 1924 Pat. 721.**

—Marwat.

———In Oudh, a marwat grant is hereditary but non-transferable: A. I. R. 1924 Oudh 124, *Foll.* (*Ashworth and Misra, JJ.*). RAM SHANKAR SINGH *v.* LAL BAHADUR SINGH. **92 I.C. 637=1 Luck. 98=13 O.L.J. 216=3 O.W.N. 267=A. I. R. 1926 Oudh 277.**

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———*Marwat Definition.*

A grant made to grantee who was killed fighting for the Taluqdar, is called *marwat* and is not transferable nor resumable. (*Simpson, A. J. C.*). SIYA RAM *v.* SALIK. **77 I. C. 352= 10 O.L.J. 335=5 L. R. Oudh 13= A.I.R. 1924 Oudh 124.**

—Pension.

———*Pension from generation to generation—Predecessor of each generation is Government.*

Where a pension is granted from generation to generation, one generation cannot be said to be the successor-in-interest of the last. At the very moment when the grant was made by Government a right arose in favour of each successive generation and the predecessor-in-interest of each successive generation is the Government and not the father. (*Ashworth and Sen, JJ.*). BHOOPAL RAI *v.* SHIAM SUNDER. **1929 A. L. J. 724= 11 L.R.A. Rev. 65=A.I.R. 1929 All. 781.**

—Presumption.

———*Extent of grant.*

Absence of evidence of terms—Presumption of grantor passing all that he had not admissible—Rules of English law not applicable. (*Lord Tomlin.*) MAHIPATI SURYARAO *v.* SECY. OF STATE. **117 I.C. 481=1929 A.L.J. 702= 33 C.W.N. 725=31 Bom. L. R. 866= 30 M.L.W. 9=1929 M.W.N. 442=6 O.W.N. 503= 56 I. A. 223=52 Mad. 538=50 C.L.J. 30= A.I.R. 1929 P. C. 152= 57 M.L.J. 64 (P. C.).**

———It is reasonable to presume that where land is given for a cemetery there would be no reservation by the grantor. (*Lindsay, J.*). KHUDA BAX *v.* RAGHUNANDAN LAL. **100 I.C. 623= A.I.R. 1927 All. 381.**

———*Lost grant—Long possession without paying rent—Lost rent-free grant will be presumed—But possession must be as of right with notice to persons likely to be adversely affected.*

A person who claims to hold as a tenant land within the ambit of a zemindary must prove his right to hold it without payment of rent by a grant from the zemindar, but production of the grant itself is not the only way to prove such a grant.

When long possession (here for 62 years) without paying rent has been proved by direct evidence, the Court not only might, but ought to presume that the claim was based upon a grant which is lost. Care must, however, always be taken to see in these cases that long possession is clearly established to have been enjoyed under a definite claim of right in such a manner that in the circumstances it was likely to have attracted the notice of the person or persons whose rights are adversely affected by such a claim.

Whether a presumption of a lost grant should arise or not must depend upon the circumstances of each case: 42 Cal. 489 (P. C.); 6 Cal. 394 (P. C.); A. I. R. 1925 Cal. 309, *Rel. on.* (*Panton and Chakravarty, JJ.*). KIRAN CHANDRA *v.* SRINATH CHAKRAVARTY. **100 I.C. 453=31 C.W.N. 135= A.I.R. 1927 Cal. 210.**

———*Occupancy right.*

Where it is not in evidence whether the grant was of the whole land or only of the *melwaram* the usual presumption of occupancy right must be raised in favour of grantee and on resumption of grant he must pay rent as occupancy ryot. (*Phillips,*

GRANT—Resumption.

J.). CHOWDANNA *v.* VENKATAPATHINAYANI VARU. **93 I. C. 141=1926 M.W.N. 458= 24 M.L.W. 249=A.I.R. 1926 Mad.621= 50 M.L.J. 429.**

———Lost Grant—Immemorial user by public of a ghat—Title by lost grant is presumed. (*Suhrawardy and Duval, JJ.*). PEARY LAL MULLICK *v.* SURENDRA NATH. **88 I. C. 505= A.I.R. 1925 Cal. 1233.**

———Where the enjoyment may be explained as a mere user of a public right, a presumption of a lost grant need not be made. (*Marten, J.*). LAKSHMAN GOWROJI *v.* RAMJI ANTONE. **23 Bom. L.R. 939=A.I.R. 1921 Bom. 93.**

—Relinquishment.

———Government seizing village in which owner had right to both *varams*—Afterwards Government relinquishing same—Both *varams* deemed relinquished. (*Waller and Madhavan Nair, JJ.*). SRINIVASA AYYAR *v.* NALLAMUTHU PADAYACHI. **111 I.C. 204=A.I.R. 1928 Mad. 1245.**

—Resumption.

———*Grant in lieu of wages and grant burdened with services—Distinction—Presumption.*

Where a zamindar wants to resume lands granted before the permanent settlement and held by the grantees from father to son, the onus is always on the plaintiff to prove that grant was one in lieu of wages resumable at will.

A village in the Vizianagaram zamindari was granted as early as 1752. The grantees were hillmen. They and their predecessors were in possession for more than 250 years and had brought the land under cultivation. The lands had been descending from father to son and had been alienated without question.

Held: that on the facts, the onus was very heavy on the zamindar seeking to resume the lands to show that the grant was merely a grant in lieu of wages resumable at will and not a grant burdened with service in which case it could not be resumed without at least showing that the services were required to be done and were refused: 13 M.I.A. 438 (P.C.); 28 Bom. 305 and A.I.R. 1926 Mad. 511, *Rel. on.* (*Kumaraswami Sastri, Curgenven and Walsh, JJ.*). PUSHAVATI ALAKH NARAYANA *v.* VUGGINA APPALASWAMI. **A.I.R. 1930 Mad. 755=59 M.L.J. 183 (F.B.).**

———*Kadim grants.*

If grants were kadim or in existence at the date when the village itself was granted in inam, the right of resumption would be vested in the Government and not in the inamdar: A. I. R. 1927 P. C. 217, *Foll.* (*Sir John Wallis.*) LAKHAMGOWDA BASVAPRABHU *v.* APPANNA. **113 I. C. 467= 29 M.L.W. 617=53 Bom. 222=56 I. A. 44= 31 Bom. L.R. 235=A. I. R. 1929 P. C. 30= 56 M.L.J. 429 (P.C.).**

———*Effect.*

Inam—Resumption by Government extinguishes all interests acquired before enfranchisement—Subsequent grantee gets free of all such interest. (*Devadoss, J.*). RAMANNA *v.* VENKATNARAYAN. **99 I.C. 468=25 M.L.W. 238=38 M.L.T. (H C.) 20= A. I. R. 1927 Mad. 301=52 M.L.J. 52.**

———*Status of holder.*

As to whether in a particular case, the status of the holder of the resumed grant is that of a tenure-holder or that of a raiyat must be determined by reference to the entry in the record of rights. (*Das and Foster, JJ.*). GOPINATH SARANJI *v.* AJHARRUL HAQUE. **101 I.C. 119=8 P.L.T. 578= A.I.R. 1927 Pat. 225.**

GRANT—Resumption.

———*Zamindar can resume grant only if land is in his zamindari and is assessed to revenue—Inclusion of revenue is presumed if services for the grant were personal.*

Whether a zamindar can resume a grant, will depend upon whether the revenue from the land was or was not included in the assets of the zamindari at the time of the settlement. If it was included, the right of resumption would be with the zamindar, if not, he would not have that right. If there is no direct evidence to show whether the revenue was or was not included, one may turn to the nature of the services as they may furnish a clue. If the services were personal to the zamindar, it may reasonably be assumed that the Government would not have exempted the land from the revenue, but would have treated it, for the purpose of the settlement, as revenue-paying land. (*Venkatasubba Rao, J.*). THIRUVENKATACHARLU *v.* ALTOO SAHEB. **94 I. C. 458= 1926 M.W.N. 344=A.I.R. 1926 Mad. 511= 50 M.L.J. 251.**

———*Right of.*

In case of grants there is no presumption that it was made in lieu of wages for service, or when the grantor proves that the services were personal, that the grant was made in lieu of wages. The person claiming resumption must make out his title to resume : *Case-law reviewed.* (1911) 2 M.W.N. 406, *Dist.* (*Venkatasubba Rao, J.*). THIRUVENKATACHARLU *v.* ALTOO SAHEB. **94 I.C. 458= 1926 M W.N. 344=A.I.R. 1926 Mad. 511= 50 M L.J. 251.**

———*Land not burdened with service—Liability to resumption.*

Where a menial servant of a temple holds no office a hereditary character and is remunerated for the performance of his duties by the use of certain lands on payment of annual cess the lands are not burdened with any service in connection with the temple nor is the holder a trustee. Upon cessation of his service the land is liable to immediate resumption. (*Chaudhuri and Cuming, JJ.*). JOYNATH SARKAR *v.* HARI MOHAN DAS. **59 I.C. 469 (Cal.).**

———*Effect.*

The fact that the grant is resumable cannot affect the character of the tenures created by the grantor or raise any presumption as to the existence of persons having an interest in the property prior to the grant. (*Oldfield, J.*). PERAYYA LINGAM *v.* VENKATAPATHI RAJU. **63 I.C. 804= 13 M.L.W. 601=A.I.R. 1921 Mad. 302.**

—Rights of alienee.

———A purchaser of a definite extent from one of the agraharamdars is not liable jointly and severally with the other agraharamdars to pay *kattubadi* and his liability rests only on the privity of estate and must be limited to the proportionate share due on the portion he purchased. A.I.R. 1927 Mad. 931, *Foll.* and 11 L. W. 523, *Rel. on.* (*Ramesam. J.*). SURYANARAYANA *v.* VENKATA RAMAYYA APPA. **115 I.C. 351=29 M.L.W. 600=56 M.L.J. 273.**

———*Crown grant—Transferee obtaining renewal.*

Where a Crown grant under which the grantee's interest as for thirty years, was transferred by him during period of thirty years and the transferee after expiration of thirty years got it renewed in his name.

Held, that the transferor can no longer claim ownership in the subject of the grant. (*Lord Shaw.*) MI ASHA *v.* JOGENDRA LAL CHOWDHURY. **A.I.R. 1921 P. C. 135 (P. C.).**

GRANT—Rights of grantee.

—Rights of grantee.

———*Minerals—Right to.*

When a grant is made by a zemindar of a tenure at a fixed rent although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect : A.I.R. 1916 P.C. 191, *Appl.* (*Lord Tomlin.*) MAHIPATI SURYA RAO *v.* SECY. OF STATE. **117 I.C. 481= 1929 A L.J. 702=33 C.W.N. 725= 31 Bom.L.R. 866=30 M.L.W. 9=1929 M.W.N. 442= 6 O.W.N. 503=56 I A. 223=52 Mad. 538= 50 C.L.J. 30=A.I.R. 1929 P.C. 152= 57 M.L.J. 64 (P.C.).**

———*Mirasi rights.*

Where there is grant of the soil, the mirasi rights in the land would be covered by the grant. (*Fawcett, Ag. C.J. and Murphy, J.*). SAYOJI RAO GAIKWAR *v.* MADHAVA RAO RAGHUNATH RAO. **115 I.C. 369=53 Bom. 12=30 Bom. L.R. 1463= A.I.R. 1929 Bom. 14.**

———*Prescription.*

Where a person was granted a *cowle* under which the grantee was authorised to collect certain fees from each house, the mere fact that quit rent was not collected for over a century would not exempt the house-owners from the payment of quit rent. (*Devadoss and Jackson, JJ.*). G. R. ADIKESAVALU NAIDU *v.* C. S. B. LAKSHMANA AYYAR. **113 I.C. 36=A.I.R. 1929 Mad. 204.**

———*In Oudh, Shankalap and Marwat grants are ordinary grants—Grantor restricting the right of the grantee—Grantee can make a valid transfer of the subject-matter of the grant—Such transfer can be valid only between the transferor and transferee—Prohibitions against transfer founded upon public interest are absolute.*

Shankalap and marwat grants in Oudh are ordinary grants which connote under proprietary tenure. Where, however, the grantor adds that the grantee will not have transferable right, the grantee and his successors will hold lands with heritable but non-transferable rights under a grant. The grantee or his successor can make a valid transfer of the subject-matter of the grant in spite of the restraint on the power of alienation imposed originally by one of the terms of the grant; but having regard to that term such a transfer can only be valid as between the transferor and the transferee. The restraint against alienation being for the benefit of the grantor will be given effect to in his favour only. There is an essential difference between restrictions on transfers imposed by the Legislature and those imposed by a Court or decree by grant and there are cases in which for the protection of particular interest it is deemed expedient to depart from the general principle and to fetter the privilege of free alienation. In such cases, the prohibition against transfer being founded upon consideration of public interest must be treated as absolute : 15 O. C 67, *Appr.* (*Stuart, C. J. and Wazir Hasan, J.*). BALBHADDAR SINGH v. KUSHAR DAS. **110 I.C. 357= 3 Luck. 636=5 O.W.N. 487=10 L.R.A. Rev. 38= A. I. R. 1928 Oudh 344.**

———*Inamdar accepting settlement is bound and can upset it only on the basis of contract.*

Inamdar accepting the settlement, as evidenced by the sanad, is *prima facie* bound by the terms therein contained, and he can only upset that settlement on some basis recognized by contract law such as mistake, fraud or misrepresentation.

GRANT—Rights of grantee.

(*Fawcett and Madgavkar, JJ.*). SECY. OF STATE *v.* INDURAI BHAURAI DESAI. **98 I.C. 933=50 Bom. 698=28 Bom.L.R. 1308=A.I.R. 1927 Bom. 40.**

———*Riparian rights.*

When a water-course not merely bounds but flows through the land of the grantee, the presumption that the bed is included in the grant must necessarily be stronger, and where no express reservation exists, it lies on the grantor to show that presumption should not prevail: 41 Mad. 840 (F.B.) and 12 L.W. 371, *Ref.* (*Curgenven, J.*). VENKAYYA *v.* SECY. OF STATE. **99 I.C. 446=24 M.L.W. 833=1926 M.W.N. 969=A. I. R. 1927 Mad. 207.**

———*Permanent and inalienable lease—Lessor acquiescing in transfers—Lease becomes alienable.*

Where a perpetual lease without power of alienation granted to a certain person was subsequently sold in auction and was again conveyed for consideration by the purchaser to the original grantee and where the lessor was unsuccessful in his attack on the auction-sale and did not object at all to the re-transfer subsequently made by the auction-purchaser.

Held, that the original condition against alienation was no longer operative and that the interest in the hands of the lessee was transferable and liable to attachment. (*Dalal, A.J.C.*). AMBIKA PRASAD *v.* ATTAR ALI. **89 I.C. 182=A.I.R. 1926 Oudh 15.**

———*Minerals—Rights to.*

Express words in the grant are not necessary for the transfer of the right to mines and minerals in the lands granted. (*Shah, Ag. C. J. and Fawcett, J.*). SECY. OF STATE *v.* SHANTARAM NARAYAN DABAOLKER. **84 I.C. 397=49 Bom. 99=26 Bom. L.R. 847=A.I.R. 1925 Bom. 12.**

———Ejectment—Suit for—Patta granted to plaintiff by Government—Plaintiff must prove Government had title at the time.

Otherwise, the grantee cannot maintain a suit in ejectment against persons who were in possession at the time of the grant. (*Ramesam, J.*). ADINARAYANA *v.* KALAMALLA VENKATASUBBAYYA. **87 I.C. 46=A.I.R. 1925 Mad. 752=48 M.L.J. 411.**

—Rights of grantor.

———*Dedication for public use.*

The fact that the plaintiff dedicated his Ghat for public use for the purposes of bathing does not destroy the plaintiff's right as proprietor. (*Tudball and Rafique, JJ.*). RAMU GHATIA *v.* HEMANTA KUMARI. **63 I.C. 498=19 A.L.J. 483=A.I.R. 1921 All. 294.**

—Rights of holder.

———*Mortgagee of unenfranchised land—Possession of.*

Where unenfranchised land is mortgaged and the mortgagee remains in possession for over 12 years, he acquires by prescription the right of a usufructuary mortgagee and is liable to be redeemed as such; and the taking of a sale in discharge of the mortgage does not alter the nature of the possession of the mortgagee when the alleged purchase is not valid: 44 Mad. 946; 14 Bom. 279 and 14 Mad. 38 *Rel. on.* (*Viswanatha Sastri, J.*). BUTCHI RAJU *v.* SEETHARAMAYYA. **93 I. C. 955=1926 M.W.N. 9=23 M. L. W. 707=A.I.R. 1926 Mad. 377.**

———Lands constituting emoluments of office, held as owner by person not entitled to office, for more than 12 years—The holder gets absolute title even as against succeeding office-holders: 38 M. L. J. 320, *Foll.* (*Sadasiva Aiyar and Spencer, JJ.*). SUBRAMANIA GURUKKAL *v.* AMMAKANNU AMMAL. **70 I.C. 477=14 M. L.W. 376=1921 M.W.N. 696=A.I.R. 1921 Mad. 595=41 M.L.J. 450.**

GRANT—Saranjam.

—Sankalap.

———A *Sankalap* grant is resumable but not transferable. (*Simpson, A.J.C.*). SIVA RAM *v.* SALIK. **77 I. C. 352=10 O.L.J. 335=5 L.R. Oudh 13=A. I. R. 1924 Oudh 124.**

———*Presumption.*

The Courts should be very careful about raising any presumption in favour of deeds of *shankalap* which are produced practically for the first time during the trial of cases in which under proprietary rights are claimed on the basis of those deeds. (*Lindsay, J.C.*). HAR PRASAD *v.* BIKRAMAJIT SINGH. **61 I.C. 959=8 O. L. J. 131=A.I.R. 1921 Oudh 36.**

—Saranjam.

———*Alienation of.*

Where a saranjamdar who has occupancy rights in the lands included in the saranjam, grants the saranjam to a third party, together with the occupancy rights in the lands, and the alienation is absolutely rent-free and no benefit is reserved to the saranjam estate in the way of rent or in any other manner, and where there was no acquiescence in the continuance of the saranjam grant after the life-time of the original grantee, such mirasi or occupancy rights are resumable when the grant of the saranjam is resumed, and an alienation is not binding on the saranjamdar's successors: A.I.R 1927 P. C. 238; 40 Bom. 606; A.I.R. 1921 Bom. 303; A.I.R. 1926 Bom. 316, *Dist.*; A.I.R. 1925 Bom. 177, *Foll.* (*Fawcett, Ag. C. J. and Murphy, J.*). SAYOGI RAO GAEKWAR *v.* MADHO RAO RAGHUNATH RAO. **115 I.C. 369=53 Bom. 12=30 Bom. L.R. 1463=A. I. R. 1929 Bom. 14.**

———*Effect.*

The grantee of saranjam grant is not entitled to create in his own favour occupancy rights in lands unoccupied at the time the grant was made or held by others then but forfeited on one ground or another during the subsistence of the grant. When the saranjam is resumed, the Government becomes entitled to resume not only the land revenue, but also all the rights and benefits that the grantee, had secured by virtue of his grant: A.I.R. 1925 Bom. 197, *Reversed*; 10 Bom. 112, *Diss. from*; 6 Bom. 598, *Dist.* (*Lord Sinha.*) SECY. OF STATE *v.* MT. GIRJABAI. **106 I. C. 1=51 Bom. 957=54 I.A. 359=26 A.L.J. 32=29 Bom. L.R. 1503=46 C.L.J. 420=39 M L.T. 463=27 M.L.W. 124=32 C.W.N. 329=A.I.R. 1927 P. C. 238=53 M.L.J. 431 (P.C.).**

———*Alienation.*

A grant of mirasi rights is not necessarily an alienation which will not be binding beyond the life-time of the saranjamdar making the grant. (*Fawcett and Madgavkar, JJ.*). MADHAVRAO *v.* IMAM BABU. **94 I.C. 737=50 Bom. 195=28 Bom. L.R. 433=A.I.R. 1926 Bom. 316.**

———*What it includes—Presumption.*

A grant of Saranjam may be either of the soil and the whole revenue derived from it, or a grant of the Royal share of the revenue only. There is no presumption that a grant of Saranjam is a grant of Royal revenue only. It must be determined in each case upon the facts what was the quality of the original grant although it may be

GRANT—Saranjam.

that it is ordinarily a grant of the Royal revenue only. (*Lord Salvesen.*) SECY. OF STATE *v.* LAXMI BAI. **72 I.C. 898=47 Bom. 327= 28 C.W.N. 49=17 M.L.W. 405=32 M.L.T. 111= 50 I.A. 49=25 Bom. L.R. 527=37 C.L.J 464= A.I.R. 1923 P.C. 6=44 M.L.J. 471 (P.C.).**

———The grant of Inam and Mirasi rights by a Saranjamdar whose estate descends by inheritance to the eldest member of the family is binding on his successor. (*Shah and Crump, JJ.*). SAKHARAM GOVIND *v.* TRIMBUKRAO RAMACHANDRA. **61 I.C. 40=45 Bom. 694=23 Bom. L.R. 314= A.I.R. 1921 Bom. 303.**

—Service Grant.

———*Commutation—Effect.*

Where the land, which was service land and therefore originally inalienable, is subsequently commuted for a quit rent and treated as "kaush baus," the tenure of that land is altered from service to rent, as long as the donee's descendants continue to pay rent, and such land becomes alienable: 19 W.R. 211 (P.C.) and A.I.R. 1918 P.C. 135, *Foll.* (*Fawcett and Mirza, JJ.*). BABA SAHEB BAIROGIRAO *v.* GOPAL HANMANT. **113 I.C. 254=30 Bom. L.R. 917.**

———*Resumption.*

As long as the holders of the grant are able and willing to perform the service, the landlord has no right to put an end to the tenure, whether the services are required or not. 29 Mad. 52 (P.C.), *Foll.* (*B. B. Ghose and Cammiade, JJ.*). K. S. BANNERJI *v.* KAMDAR ALI. **117 I.C. 848=32 C.W.N. 727.**

———*Lease for long term—Validity—Test.*

In dealing with the question whether a lease for a long term of inalienable property like service inam is void, the Court has to see the nature of the transaction rather than the form. The real question is whether the transaction in effect places the income from the lands beyond the disposal of the holder of the office and prevents him from enjoying the emoluments which were intended to go to the holder of the office in order to enable him to discharge his duties properly.

Permanent leases or leases for so long a period as would practically amount to an alienation will be invalid as against the successor-in-office who will be entitled to the rents and other emoluments, arising out of the land which goes with the office, but if the lease is not of this character, it is not absolutely void but only voidable at the instance of the successor-in-office. Where a premium is taken, one test will be whether the rent paid is sufficient to maintain the holder of that office in such a way as not to interfere with the due performance of the duties attached to the office. (*Case-law discussed.*) (*Kumaraswami Sastri and Devadoss, JJ.*). SUNDARA RAJU *v.* SESHADRI. **106 I.C. 426=26 M.L.W. 739= 1927 M.W.N. 556=A.I.R. 1928 Mad. 35= 54 M.L.J. 76.**

———*Resumption—Right of.*

A grant for Kattu Kaluva service was originally made for service to the villagers and not for private service to the Zamindar himself, and, therefore, it is not resumable by the landlord at his pleasure and without concurrence on the part of the villagers. (*Srinivasa Aiyangar, J.*). THE RAJAH OF VIZIANAGARAM *v.* J. GANGADU. **106 I.C. 671= 39 M.L.T. 338=A.I.R. 1927 Mad. 1001.**

———*Resumption.*

In the case of a grant, burdened with service the grant is not resumable merely because the necessity for service has ceased, though it will be liable to forfeiture in case of wilful failure in the performance of service. (*Odgers, J.*). GURUSWAMI PILLAI *v.* VEERABHADRA. **95 I.C. 325= 23 M.L.W. 540=A.I.R. 1926 Mad. 695.**

GRANT—Service Grant.

———*Grant* in lieu *of wages—Resumption.*

A post-settlement grant for a service to attend daily on the zemindar as he performs devotions, etc. is a grant *in lieu* of wages, and the zemindar is entitled to put an end to such service at his pleasure and resume the grant. (1911) 2 M.W.N. 406 and (1914) M.W.N. 179, *Foll.* (*Phillips, J.*). CHOWDANA *v.* VENKATAPATHINAYAM VARU. **93 I.C 141=1926 M.W.N. 438=24 M.L.W. 249= A.I.R. 1926 Mad. 621=50 M.L.J. 429.**

———*Resumption—Right of—Grant* in lieu *of wages and Grant burdened with service—Distinction.*

To determine whether a certain grant is resumable or not, regard must be had to the nature of the tenure and to the fact whether the grant was made *in lieu* of wages for service or it was an absolute grant subject to the condition of the performance of the service. The relation between the grantor and the grantee is that of master and servant in the first case. In the second case, in absence of contract to the contrary, whether grantor requires the service or not is immaterial, the only question being whether there has been default on the part of the grantee. (*Venkatasubba Rao, J.*). TIRUVENKATACHARLU *v.* ALLOO SAHEB. **94 I.C. 458= 1926 M.W.N. 344=A.I.R. 1926 Mad. 511= 50 M.L.J. 251.**

———*Enfranchisement—Hindu widow in favour of —Effect.*

A service inam enfranchised in the name of a Hindu widow and confirmed to her in freehold confers absolute property and not merely a widow's estate although some other persons are joined with her as grantees. (*Jackson, J.*). VENKATASUBBA RAO *v.* ADINARAYANA RAO. **92 I.C. 472= 22 M.L.W. 631=A. I. R. 1926 Mad. 227= 50 M. L.J. 46.**

———*Resumption—Grant* in lieu *of wages.*

If a mere servant is allowed to cultivate land instead of being paid in money for his services, it is open to the grantor to dismiss him at any time, with of course, such notice or compensation as might be equitable, just as he can, any other servant paid in money, if he is dissatisfied with him and wishes to get rid of him. (*Hallifax, A.J.C.*). MANBODH *v.* HIRASAI. **93 I.C. 650= A.I.R. 1926 Nag. 339.**

———*Karnam, Land attached to office of, goes with office and is impartible—Enfranchisement gives the then owner full rights—Other members of family cannot claim partition thereof—Law governing palayam tenures are not applicable to this case.*

In Madras the Karnam of the village occupies his office not by hereditary or family right, but as personal appointee, though in certain cases that appointment is primarily exercised in favour of a suitable person who is a member of a particular family. Therefore it followed that lands held as appurtenant to the office so enjoyed should continue to go with that office and should accordingly be impartible. *Venkata* v. *Rama*, (1884) 8 Mad. 249 (F. B.); *Venkatarayudu* v. *Venkataramayya*, (1891) 15 Mad. 284. *Appr.*

A case of a Palayam tenure and that of Karnam are quite separate and cannot be treated as being governed by analogical principle.

When a Palayam was abolished in so far as the duty of rendering military service was concerned,

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the estate was continued with all its hereditary incidents to the Palayaghar in the same manner as is possessed by a zamindar. It is different with regard to a case of a Karnam. A hereditary right in a Karnam or his family can only, at the utmost be said to constitute a certain *spes* among persons within the area of selection of those eligible for the office. But it is not even so limited. The power of selection rests with the administrative officials, who alone are Judges of the eligibility of the Karnam for the time being, and it is the settled law of Madras that the emoluments in the shape of lands follow the office, *ex-necessitate*. Otherwise the holder of the lands might be some person other than the holder of the office. *Pingala Lakshmi* v. *Bommireddipalli Chalamayya*, (1907) 30 Mad. 434, *Overruled*.

Therefore the title deed, granted to the appellant's father at the time of enfranchisement of the Karnam by way of an Inam, which was in express words confirmed to him, and was, "now confirmed to you, your representatives and assigns to hold or dispose of as you or they think proper," must be given full effect to and hence it is not subject to be eviscerated or altered by any claim for partition or division put forward by way of defence to such a suit. (*Lord Shaw.*) MUSTI VENKATA JAGANNADA SARMA *v.* MUSTI VEERABHADRAYYA.

61 I. C. 667=30 M. L. T. 14=
26 C. W. N. 302=48 I. A. 244=
44 Mad. 643=1921 M. W. N. 401=
34 C. L. J. 16=14 M. L. W. 59=
A.I.R. 1922 P. C. 96=41 M.L.J. 1 (P. C.).

———*Adverse possession—Against grantor.*

A person who gets possession of land as emoluments for a service to be performed by him cannot be allowed to treat the lands as his own by merely denying his liability to do service or by neglecting to do that service. He should first surrender the land to his master and again take possession thereof adversely to his master and enjoy them for 12 years after so re-taking possession before he could set up title by adverse possession: 12 Bom. 322, *Foll.* (*Sadasiva Iyer and Napier, JJ.*). (TAMIRISI) VENKATASAMI *v.* VIVVALA AMANNA.

62 I.C. 771=1921 M.W.N. 378=
A.I.R. 1921 Mad. 640.

———*Alienation.*

Lands attached as emoluments to a religious office are inalienable in the same manner as the office itself and the sale of such lands is a void transaction. (*Sadasiva Iyer and Spencer, JJ.*). SUBRAMANIA GURUKKAL *v.* AMMAKANNU AMMAL.

70 I.C. 477=14 M.L.W. 376=
1921 M.W.N. 696=A. I. R. 1921 Mad. 595=
41 M.L.J. 450.

—Shrotriem grant.

———*No presumption of inclusion of kudivaram and melvaram or of exclusion of kudivaram.*

There is no presumption that a shrotriem grant includes both melvaram and kudivaram or that it does not include kudivaram. Each case must be decided on its own circumstances: A.I.R. 1922 P.C. 292, *Foll.*; 43 Mad. 92; A.I.R. 1923 Mad. 1; 70 I.C. 729 (F.B.). *Reversed.*

"Shrotriem" according to Wilson's Glossary means "a grant of lands or a village held at favourable rates, properly an assignment of lands or revenue to a Brahmin learned in the Vedas but latterly applied to similar assignments to native servants of Governments, Civil or Military, and both Hindus and Mahomedans as a reward for past services. A shrotriem grant gives no right over

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the lands and the grantees cannot interfere with the occupants as long as they pay the established rents." But the effect of latter legal decisions is that a shrotriem grant may in fact grant the kudivaram as well as melvaram. Where the document itself in the final recital uses the term again "as we have granted to you the said agraharam you should enjoy the same from son to grandson, paying the shrotriem thereon and be happy." The term can only mean revenue though this consideration in itself is not conclusive. Where the grantors were Deshpandyas who were revenue officials of farmers of revenue under the paramount authority, the strong probability is that they granted that which in their position as Deshpandyas they would possess, *viz.*, the rights over the revenue. (*Lord Atkin.*) V. SEETHAYA *v.* P. SUBRAMANYA.

117 I. C. 507=33 C. W. N. 578=
52 Mad. 453=29 M.L.W. 804=
31 Bom. L.R. 756=49 C.L.J. 566=
56 I.A. 146=1929 M. W. N. 553=
A.I.R. 1929 P.C. 115=56 M.L.J. 730 (P.C.).

—Succession to.

———In the case of property attached to a maniem office the devolution very frequently does not follow the rules laid down by the Hindu Law. The appointment rests with the Government and very frequently the appointment is made on other grounds than direct heirship alone. (*Phillips and Madhavan Nair, JJ.*). ANANTHALAKSHMI AMMAL *v.* K. NARASIMHACHARLU.

97 I.C. 687=A.I.R. 1926 Mad. 1210.

—Vatan.

———An endorsement appended to the Register of *Sanads* will not be a sufficient proof that the *Vatan* property became ordinary property: 25 B. 470, *Foll.*; F. A. 177 of 1920, *Ref.* (*Macleod, C.J. and Crump, J.*). DULANBI *v.* MUHAMMAD HANIF.

A.I.R. 1923 Bom. 296.

———Vatan *lands—Bombay Hereditary Offices Act, S. 5 — Auction sale against widow—Reversioners bound by sale if purchaser is also a* vatandar.

The sale of the *vatan* lands in execution against the widow of a *vatandar* in respect of a decree that had been passed against him is valid and binding upon reversioner provided the auction-purchaser is a *vatandar* of the same *vatan* since the widow would be able to alienate her husband's immovable property for legal necessity under S. 5 of the Bombay Hereditary Offices Act. (*Macleod, C. J. and Shah, J.*). GANESH RAMCHANDRA KULKARNI *v.* LAXMIBAI VENKATESH NARAYAN.

67 I.C. 209=46 Bom. 726=24 Bom. L.R. 249=
A.I.R. 1922 Bom. 96.

———*Adverse possession.*

Assuming that the Nadgirs were entitled either by agreement or by custom to get back their *Vatan* lands on payment of *Judi*, time would not begin to run against them until they were made aware that the *Jahagirdars* were setting up a title to hold the *Vatan* lands in their own right. Nor is it easy to see how the *Jahagirdars* could acquire the offices of Patil and Kulkarni by adverse possession.

The *Vatan* lands had not become the absolute property of the *Jahagirdars* considering the way of, in which they were treated both by Government and its assignees the *Jahagirdars*. (*Macleod, C.J. and Shah, J.*). SHRINIVAS LINGO NADGIR *v.* SECY. OF STATE.

24 Bom.L.R. 214=A.I.R. 1922 Bom. 18.

———*Palkhi Inam to Vatandars.*

The village granted to the Deshpande *Vatandars* as *Palkhi Inam* by the Mahomedan King was to

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pay their *Palkhi* expenses and therefore it was an appanage of the vatan. It was not merely a grant of the Royal share of Revenue.

In the Bombay Presidency, Inams and other similar grants are being treated as implying a grant of the royal share of the revenue and not necessarily of the soil unless words suitable to indicate grant of the soil are used in the document evidencing the grant.(*Macleod, C.J. and Shah, J.*). TUNGABAI GOPAL DESAI *v.* KRISHNAJI RAMCHANDRA DESHPANDE. **67 I.C. 215=24 Bom. L.R. 252=46 Bom. 741=A.I.R. 1922 Bom. 5.**

———*Alienation.*

Vatans like Desaigiri Hak under the service commutation settlement effected in Gujarat in or about 1873 are alienable : 25 Bom. 470, *Foll.* (*Macleod, C. J. and Fawcett, J.*). KHUSHAL BAI PARAGJI *v.* DULABHBHAI PARAGJI. **61 I. C. 411=45 Bom. 948=23 Bom. L. R. 304=A. I. R. 1921 Bom. 281.**

GRANT OF LEASES REGULATION (Ben. Reg. 44 of 1793).

—S. 5—Enhancement of rent.

———*Talukdar made to pay enhanced rent under S. 5—Original term as to fixity of rent is not affected.*

Section 5 deals with an exception to the provisions of S. 4. The mere fact that the talukdar had to pay enhanced rent by reason of the provisions of S. 5 does not show conclusively that the rent was not fixed. The revenue sale would not affect the terms of the contract which there might have been between the parties at the time of the creation of the tenure. (*Sanderson, C.J. and B.B. Ghose, J.*). SARODA PROSAD PAKRASI *v.* UMASHANKAR SANYAL. **99 I.C. 258=44 C. L.J. 385=A.I.R. 1927 Cal. 168.**

GRATUITOUS ACT.

See CONTRACT ACT, Ss. 69, 70.

GRATUITY.

See C. P. C., S. 60.

GRAVE AND SUDDEN PROVOCATION.

See PENAL CODE.

GRAZING RIGHTS.

See (1) ADVERSE POSSESSION.
(2) EASEMENT.
(3) EASEMENTS ACT.

GRIEVOUS HURT.

See PENAL CODE, Ss. 320, 326.

GROSS NEGLIGENCE.

See TORT—NEGLIGENCE.

GROUNDS FOR REMAND.

See C. P. C., O. 41, Rr. 23, 25.

GROUNDS FOR REVIEW.

See C. P. C., O. 47.

GROUNDS FOR TRANSFER.

See C. P. C., S. 24.

GROUNDS OF APPEAL.

See (1) APPEAL.
(2) C. P. C., O. 41.
(3) PRACTICE.

GROUNDS OF TRANSFER.

See CR. P. CODE, Ss. 426-428.

GROVE.

See (1) LANDLORD AND TENANT.
(2) OUDH RENT ACT.

GROVE HOLDER.

See AGRA TENANCY ACT.

GROWING CROPS.

See (1) GENERAL CLAUSES ACT, S. 3 (25).
(2) IMMOVABLE PROPERTY.
(3) T. P. ACT, S. 3.

GUARANTEE.

See CONTRACT ACT, Ss. 124-147.

GUARDIAN AND WARD—Alienation by guardian.

GUARDIAN.

See (1) C. P. C., O. 32.
(2) GUARDIANS AND WARDS ACT.
(3) HINDU LAW—GUARDIANSHIP.
(4) MAHOMEDAN LAW—GUARDIANSHIP.
(5) MINOR.

GUARDIAN AND WARD.

Alienation by guardian.
Arbitration.
Debts contracted by guardian.
Eligibility for guardianship.
Gross negligence.
Guardian's rights and liabilities.
Minor's liability for guardian's acts.
Rights and liabilities.
Transactions between.
Miscellaneous.

—Alienation by guardian.

———Where the mother and guardian of a minor alienated certain property but the deed did not describe her character as such,

Held, that in the absence of a recital that she was conveying it as owner it could be inferred from other circumstances that she was acting as guardian. (*Mukerji and Bennet, JJ.*). SHEONANDAN PRASAD *v.* TAHIRAN BIBI. **1930 A.L.J. 852.**

———*Gifts—Customary gifts of moderate value.*

Where a guardian purported to release a debtor of the estate from his indebtedness by giving him a receipt, the effect of which was to wipe out his indebtedness under the bond for Rs. 800 executed by him in favour of the minor and the consideration was expressed to be a gift at the time of the marriage of the minor and also as recognition of his services as a mukaddam,

Held, that though the guardian had authority to make such gifts as would be customary on the occasion of his ward's marriage, he had certainly no authority to make a gift of this extent as the effect of that gift was to reduce the value of the minor's estate by that amount. The authority of the guardian extended only to making disbursements which were legally compellable on behalf of the minor and customary gifts of a moderate value and that there was no legal compulsion to make this unusual gift and that the generosity could be challenged. (*Mears, C. J.*). COLLECTOR OF MEERUT *v.* SAGAR MAL. **117 I. C. 99=1929 A.L.J. 605=A. I. R. 1929 All. 454.**

———*Substantial portion of consideration applied for necessary purposes.*

Suit by minor for setting aside sale—Major portion of consideration found for legal purposes—Sale should be upheld.

To disturb a *bona fide* purchaser who has reason to believe after a lapse of considerabe time that his title is secure is serious thing to do and is really a serious menace to the peace of people's minds. (1914) 1 L. W. 877; (1915) M. W. N. 8; (1916) 1 M.W.N. 163 and (1921) M.W.N. 715, *Foll.*; (1919) 41 All. 63; (1922) 44 All. 683; (1923) 45 All. 429 and (1924) 46 All. 531, *Not foll.* (*Odgers, J.*). PHAKIRU PANIGRAHI *v.* KOTHAPALLI CHENDRASEKARAM. **99 I.C. 681=1926 M.W.N. 956=A.I.R. 1927 Mad. 215.**

———Where a Mahomedan widow who had one-eighth share, alienated property on behalf of her minor children but it did not appear either from the recitals or from evidence on record that she intended or contracted to transfer property, or any portion thereof in her own individual right,

GUARDIAN AND WARD—Alienation by guardian.

Held, the alienation was not valid the extent of her share. (*Kinkhede, A.J.C.*). GULAM JAFFAR *v.* RAMDHAN. **103 I.C. 209=A.I.R. 1927 Nag. 290.**

———*Transfer in lieu of maintenance.*

Guardian should not permanently alienate immovable property to provide maintenance for person entitled to be maintained only for life—But such aliention is voidable only and not void. 39 All. 61 and A.I.R. 1922 Mad. 112, *Foll.* (*Spencer and Odgers, JJ.*). DEVIACHILA AIYANGAR *v.* VENKATACHARIAR. **88 I.C. 967=22 M.L.W. 188=1925 M.W.N. 556=A. I. R. 1926 Mad. 46=49 M.L.J. 317.**

———*Sale by step-mother—Setting aside of—Refund of consideration.*

Where the step-mother of a minor sold property belonging to the minor in order to pay off a mortgage executed by his father and to meet the marriage expenses of the minor,

Held, that the sale could be set aside at the instance of the minor, but the minor was bound to refund the consideration money. (*Macleod, C.J. and Crump, J.*). LIMBAJI RAVJI HAJARE *v.* RAHI RAVJI HAJARE. **88 I.C. 643=49 Bom. 576=27 Bom. L. R. 621=A.I.R. 1925 Bom. 499.**

———*Legal necessity for half the consideration—Rest retained with vendee to be paid to minor on attaining majority—Sale valid.*

A minor's guardian sold minor's property for a reasonable price. There was legal necessity for half the purchase money, in the shape of the necessity to discharge loan borrowed by the minor's father. The remaining half of the price was allowed to remain with the vendee subject to the condition that on the minor attaining majority, it should be paid to the minor with interest at 6 per cent. per annum. A promissory note was taken for the sum and the vendee acted in good faith,

Held, that the sale was valid and that the execution of the promissory note for the unpaid half of the purchase money did not put an end to the vendor's lien for the unpaid purchase money and was not imprudent. (*Spencer, Offg. C.J. and Srinivasa Aiyangar, J.*). K. MUNAYYA *v.* M. KRISHNAYYA. **84 I.C. 949=20 M.L.W. 693=A.I.R. 1925 Mad. 215=47 M.L.J. 737.**

———*Specific performance of contract by minor's guardian.*

Specific performance of a contract by minor's guardian for the sale of immovable property which at the time was for the benefit of the estate, can be decreed notwithstanding there is an offer of better price subsequent to the contract: 42 Mad. 183, *Foll.* (*Devadoss, J.*). KASIVASI CHIDAMBARA SWAMIGAL *v.* RAMAKRISHNA REDDIAR. **82 I.C. 926=20 M.L.W. 559=35 M.L.T. 110=1924 M.W.N. 878=A.I.R. 1924 Mad. 863=47 M.L.J. 683.**

———*Specific performance—Grant of, against minors.*

Specific performance will not be granted where *de facto* guardian has entered into a contract with a third party for the sale of the minor's property. To direct the contract to be carried into effect as against the minors is to sanction a plain breach of trust on the part of *de facto* guardian: 45 C. 878, *Foll* (*Das and Foster, JJ.*). ABDUL HAQ *v.* MOHAMMAD YEHIA KHAN. **78 I.C. 483=4 P.L.T. 553=2 P.L.R. Civ. 181=A.I.R. 1924 Pat. 81.**

GUARDIAN AND WARD—Arbitration.

———De facto *guardian—Step-mother—Alienation for benefit of minor is valid—Delegation of authority by guardian is not invalid.*

Where there is ample proof that the step-mother the *de facto* guardian of the minor managed the estate of the minor that she increased the value of that estate very much, that from the time of plaintiff's grandfather it was usual as it is in the case of ground landlords of a rising town to grant licenses and leases for building purposes, and that the mother continued what family had been doing,

Held, that step-mother as the *de facto* guardian had power to make or to extend the licenses covering the sites in suit, and that the granting of the licenses was beneficial to the minor's estate: 10 N. L. R. 133, *Disapp.*

Held, further that if the *de facto* guardian could herself grant these licenses she can delegate her power to another person. (*Prideaux, A. J. C.*). GANPAT *v.* FIRM OF BISSESARLAL GOVINDRAM. **71 I.C. 491=8 N.L. J. 110=A. I. R. 1921 Lah. 365.**

———*Unauthorised person—Alienation by.*

Sale of minor's property by unauthorised person purporting to act as guardian—Sale is void—Minor is entitled to recover possession free from all payments but having regard to the provisions of Ss. 38 and 41 of the Specific Relief Act, the vendees are entitled to claim that the parties should be relegated to the position they were in before the deed of sale was executed. (*Broadway and Beewan Petman, JJ.*). FATEH KHAN *v.* LANGRA. **68 I. C. 15=94 P.L.R. 1922=A.I.R. 1923 Nag. 230.**

—Arbitration.

———*Reference to, by guardian on competent legal advice.*

In a suit by a minor to set aside a decree on the ground of the guardian's negligence, it is necessary to show that firstly, the guardian was guilty of negligence, that is to say, of such want of care as was required of him under the circumstances and secondly that such negligence resulted in a decision being given against him.

Thus, where the guardian acting under competent legal advice and with the Court's sanction on behalf of the minors referred the dispute to the arbitration of a sole arbitrator, empowering him to decide the dispute *uko bil mukto*, within or beyond the issue as he likes," such expression being commonly used in references filed in Court in these parts, and the arbitrator after arriving at his decision on merits has used *uko bil mukto* powers (power of awarding lump sum) for the benefit of the minors and the decision with regard to the outstandings is also in favour of the minors,

Held, (*a*) that the reference to arbitration did not amount to negligence : (*b*) that the reference is not rendered *ipso facto* invalid by use of the expression *uko bil mukto* within or beyond the issues, (*c*) that the minors actually benefitted by the act of the guardian and cannot succeed. (*Percival, J.C. and Rupchand, A.J.C.*). PHAGUNMAL *v.* TAEJMAL. **123 I.C. 301=A.I.R. 1930 Sind 186.**

———*Reference to by guardian—Validity.*

All acts of the guardian which were such as an infant might, if of age, reasonably and prudently do for himself, must be upheld when done for him by his guardian.

When the reference to arbitration by guardian is for the benefit of the minor and is not an act which the minor, if of age, would not have done reasonably and prudently for himself, it is binding on the minor: 2 M. H. C. R. 47 ; 19 Cal. 334 ;

GUARDIAN AND WARD—Debts contracted by guardian.

35 Bom. 153, *Foll.* (*Heald and Rutledge, JJ.*). PUNUSHWAMI *v.* VEERAMUTHU. **91 I.C. 676= 3 Rang. 452=A.I.R. 1926 Rang. 31.**

—Debts contracted by guardian.

———*Test of validity.*

Where a guardian borrows money on behalf of a minor, the proper test in a suit by the lender is whether the minor could reasonably and prudently have incurred the debt himself. It is not sufficient for the lender to show only that the loan was for necessary purpose: A.I.R. 1926 Nag. 75, *Foll.* (*Dalip Singh, J.*). MANOHAR LAL SIS RAM *v.* RATAN SINGH. **A. I. R. 1930 Lah. 588.**

———De facto *guardian has power to bind ward's estate for his necessities.*

Where minors or incapacitated persons who are unable to take care of themselves are left adrift, a person who takes pity on them and looks after them and raises money for their maintenance out of the family property does what is expected of an ordinary human being and any debt incurred for the maintenance of such incapacitated persons or minors must be discharged out of the estate of such persons or minors: A.I.R. 1926 Mad. 457, *Rel. on.* (*Devadoss and Madhavan Nair, JJ.*). RAVUNNI NAIR *v.* NALANAD. **116 I.C. 127. A. I. R. 1928 Mad. 1131.**

———Bona fide *act in course of management.*

A minor is bound by the act of his guardian done *bona fide* for his benefit in the management of the estate, even though his name does not appear in the connected transaction: 35 Cal. 320, *Dist.*; 1 N.L.R. 66; A.I.R. 1922 Nag. 104; and 20 Bom. 286, *Rel. on.* (*Findlay, J.C.*). BAJIRAO MAHAR *v.* RAMRAO. **110 I.C. 48=A.I.R. 1928 Nag. 292.**

———*Necessity or benefit.*

When a loan is taken by a guardian on behalf of a minor for the purpose of some necessity or for the benefit of the minor's estate then the minor's estate can be held liable: 39 Mad. 915 and 26 Mad. 330, *Foll.* (*Mears, C.J. and King, J.*). PHALRAM *v.* AIYUB KHAN. **98 I.C. 657=49 All. 52= 24 A.L.J. 895=A.I.R. 1927 All. 55.**

———*Personal liability of guardian.*

A guardian executed a hypothecation bond as guardian containing a stipulation "I have agreed to pay,"

Held: that the expression did not amount to a personal covenant to re-pay, by the executant but was only a covenant in his capacity as guardian. No difference in the legal position will take place and a personal liability will not be imposed upon the guardian simply because it was represented by the guardian that the money would be utilised for the benefit of the minor's estate and despite such application, the minor's business suffered loss: 24 Bom. 166 and *Beattie* v. *Ebury*, 7 Ch. A. 777, *Foll.*; 46 I.C. 665, *Not foll.* (*Odgers, J.*). NAGALINGAPPA *v.* VENGANNA. **83 I.C. 139= 20 M.L.W. 746=A.I.R. 1925 Mad. 425.**

———*Debts incurred for purchase of lands.*

The guardian has no right whatever to involve the ward's estate in debt, for the purpose of purchasing land to be added to his estate. Where a guardian incurs debt for purchasing lands, the creditor will not be entitled to proceed against the minor's estate but can have a decree, only against the lands actually purchased with the money borrowed by him. (*Krishnan and Odgers, JJ.*). J. BURRAYYA *v.* RAMAYYA. **78 I.C. 90=47 Mad. 449= 19 M.L.W. 67=33 M.L.T. 254=1924 M.W.N. 42= A.I.R. 1924 Mad. 472=46 M.L.J. 49.**

GUARDIAN AND WARD—Eligibility for guardainship.

———*Land revenue—Debt incurred for paying.*

A debt contracted by guardian to pay land revenue due from the minor's estate is binding on the minor's estate. (*Baker, J. C.*). JAGESHWAR RAO *v.* GAJAL RAO. **79 I.C. 22=A.I.R. 1924 Nag. 168.**

———*Money borrowed for litigation—Promissory note by guardian—Construction—Liability of minor.*

The promissory note sued upon contained the words "I (the Sister) had taken these rupees because I conduct a suit in the Court as the guardian of minors named Thakordas and Shankerlal (brothers) and I shall pay you the rupees of the promissory note with interest at one per cent. per mensem whenever you will demand the same,

Held, that assuming that she the executant (sister of minors) was a *de facto* guardian she does not purport in the document to bind the minors. They cannot therefore be personally responsible on the note, nor could the sister, as the next friend or as sister of the minors, make a contract with the plaintiff which would bind the estate of the minors. The plaintiff may proceed against the minors to recover moneys which they might be liable to pay as a debt incurred by their father or by their mother or sister for necessary purposes in another suit properly framed (*Macleod, C. J. and Crump, J.*). PARBHUBHAI *v.* BAI LALITA. **76 I. C. 555= A.I.R. 1923 Bom. 304.**

—Eligibility for guardianship.

———*Mother.*

In absence of any evidence as regards the law which the Gonds follow a mother of a minor is a preferential guardian to a grandmother. (*Macnair, Offg. J.C.*). NARBADI *v.* CHOOTI. **117 I.C. 281= A. I. R. 1929 Nag. 129.**

———*Guardian* de facto *and guardian* ad hoc—*Distinction.*

There must be some course of conduct in that capacity before a person can be described as a guardian *de facto.*

A person who over many years has never intermeddled or acted as a guardian cannot come forward and claim to be a guardian *de facto* and authorized to sell on behalf of a minor. Such a person would be a guardian *ad hoc* and not a guardian *de facto.* (*Marten, C.J. and Crump, J.*). HARILAL RANCHOD *v.* GORDHAN KESHARE. **105 I. C. 722= 51 Bom. 1040=29 Bom. L. R. 1414= A.I.R. 1927 Bom. 611.**

———*Immorality of minor's mother.*

The mere fact that the minor's mother gave birth to an illegitimate child is not sufficient reason for not appointing her as a guardian of her son's person and property, where it is neither alleged nor proved that she was improperly dealing with the property while she was in possession of it. (*Kotval, A.J.C.*). MT. GANGU *v.* MT. KONGSHI. **74 I.C. 53=A.I. R. 1923 Nag. 305.**

———*Father—Suit between and minor son—Effect.*

Where a minor files a suit for partition against his father, the latter's interest is, from that date, adverse to the interest of the minor and he cannot therefore as the natural guardian of the minor seek to bind the minor's property by any alienation. (*Jwala Prasad and Adami, JJ.*). RAMJATAN RAI *v.* BALIRAM PRASAD. **70 I.C. 846= A.I.R. 1923 Pat. 25.**

———*Minor.*

A minor cannot be the guardian of his sister. So he cannot institute a complaint of kidnapping of his sister. (*Martineau, J.*). KARURA *v.* MAN RAJ. **67 I.C. 831=3 L.L.J. 588=A.I.R. 1921 Lah. 316.**

GUARDIAN AND WARD—Gross negligence.

—Gross negligence.

———*Failure to set up proper defence to suit.*

Failure to set up proper defences by the guardian to a suit against the minor is gross negligence and on that ground the minor can get the decree set aside. The fact that such defences might have been very successfully met by the plaintiff in that suit does not make the guardian not negligent. (*Devadoss, J.*). VADAPILLI JOGARAO *v.* VENKAMMA. **101 I.C. 143=25 M.L.W. 523=A. I. R. 1927 Mad. 497.**

———*Failure to defend suit.*

Mere failure on the part of the Guardian *ad litem* to defend a suit or to appeal from a decree is of itself not gross negligence, since it is possible, that there may be a good case against the minor and the guardian *ad litem* might have thought fit not to incur additional expense in defending the suit. (*Scott-Smith, A.C.J.*). NAWAB SINGH *v.* GURBAKSH SINGH. **82 I. C. 598=6 L.L J. 346=A.I.R. 1925 Lah. 116.**

———*Filing suit without taking legal advice.*

If the guardian of a minor acting perfectly in good faith but without taking into consideration the legal aspects of a case files a suit on the minor's behalf, although it might be that it would have been to the minor's advantage if the guardian had not instituted the suit, the guardian is not guilty of gross negligence. (*Phillips and Venkatasubba Rao, JJ.*). SUBBIAH PANDARAM *v.* ARUNACHALAM PANDARAM. **80 I. C. 992=A. I. R. 1925 Mad. 379.**

———*Failure to be present at hearing of suit against minor.*

The guardian *ad litem* of a minor was absent at the hearing ; consequently the vakil for the guardian was unable to explain the circumstances under which the witnesses to whom *subpoenas* were taken out were not present in Court. Consequently the adjournment applied for was refused and a decree was passed by the Court against the minor defendant.

Held, that there was gross negligence on the part of the minor's guardian and that the decree must be annulled : 45 Mad. 425, *Ref. to.* (*Devadoss, J.*). DADA SAHIB *v.* K. GAJRAJ SINGH. **85 I.C. 258=20 M. L. W. 854=A.I.R. 1925 Mad. 204=47 M.L.J. 928.**

———*Failure to produce relevant document in litigation.*

Where in a suit by a guardian on behalf of a minor against a Hindu father and his four sons for the recovery of a debt, the guardian based the claim on the Hindu law liability under which father and sons are liable for debt borrowed for a purpose such as the marriage of one of the sons : and where the suit was decreed only against the father but was dismissed against the sons.

Held, that the non-production by the guardian of a document executed by two of the sons who thereby undertook to share the liability with their father, did not under the circumstances amount to gross negligence by the guardian so as to entitle the minor to re-open the decree on his attaining majority. (*Devadoss, J.*). ANJANEYULU *v.* CHINNA SUBBIAH. **82 I. C. 952=20 M. L. W. 529=1924 M. W. N. 758=A.I.R. 1924 Mad. 860.**

—Guardian's rights and liabilities.

———*Father—Ceremonies.*

Where a minor's interests are in no way affected, the father, who is a natural guardian of the minor, until his guardianship is set aside by a competent Court has the first right to perform ceremonies

GUARDIAN AND WARD—Guardian's rights and liabilities.

regarding the minor, in preference to another person (maternal grandmother) acting as a *de facto* guardian of the minor for many years. (*Beaumont, C. J. and Madgavkar, J.*). JALBHAI CURSETJI DRIVER *v.* JERBAI HORMASJI PALKHIVALA. **32 Bom. L.R. 1301.**

———*Adverse possession.*

The possession of a *de facto* guardian or of his mortgagee as a derivative owner cannot be legally deemed to be adverse to the minor, but when the *de facto* guardian effects a sale of the minor's property, the possession of purchasers would become adverse since the date they got into possession : 35 Bom. 79 and 30 Mad. 145, *Rel. on.* (*Sundaram Chetty, J.*). SORIMUTHU THONDAMAN *v.* PERUMAL AMMAL. **A. I. R. 1930 Mad. 703.**

———*Accounts, liability for.*

Where it has not been proved that there has been a regular rendering of accounts by a guardian a suit by the ward for accounts lies and an order requiring the guardian to render the accounts can be passed. Where the evidence indicates that the guardian of property acted as guardian of the minor before his formal appointment he is liable for accounts during the earlier period also : A.I.R. 1925 Cal. 1069, *Ref.* (*Das and James, JJ.*). GAURI LAL *v.* RAJA BABU. **A.I.R. 1929 Pat. 626.**

———*Court of Wards—Ward's right to sue for damages.*

There is no privity of contract between the ward and the employee of the Court of Wards for the management of the ward's estate and so the ward cannot sue him for any damage caused during the period when the Court of Wards was managing his estate through the negligence of the employee and for which period the ward has granted the Court of Wards a release of all his claims after the estate is handed over to him. (*Sulaiman and Mukerji, JJ.*). MD. AYUB *v.* SURAJPAL SINGH. **91 I.C. 783=24 A. L. J. 225= A. I. R. 1926 All. 254.**

———*Claim against guardian personally—Liability of minor's estate.*

A claim for damages against the guardian cannot be litigated in any dispute between the minor and the assignee. A claim against a trustee or a guardian cannot be set off in a suit brought by a minor on attaining majority ; but a separate suit must be brought against the guardian or trustee. (*Baker, J. C.*). RAJARAM *v.* RAMCHANDRA. **89 I.C. 944=A.I.R. 1926 Nag. 33.**

———*Muhammadan Law*—De facto *guardian.*

A *de facto* guardian can only deal with the minor's property at his own risk and his acts are like those of any other person who arrogates to himself the power of transferring another's property. He can incur liability but can impose no obligation on the infant. This general rule is subject to certain well-defined restrictions such as acts arising out of the wants of an infant but even in such a case it appears that the guardian is only entitled to deal with the movable property of the infant and cannot pledge or sell the infant's immovable property : 45 Cal. 878 (P. C.), *Foll.* (*Ryves, J.*). ABDULLA KHAN *v.* MAHBUB ULLAH KHAN. **76 I. C. 556=A.I.R. 1923 All. 485.**

———*Reimbursement for expenses incurred as guardian.*

If at the time when the guardian accepted office some properties of the minor were in the possession of a third party and if the guardian then by his industry and by the expenditure of his own money brought the properties into his possession

GUARDIAN AND WARD—Minor's liability for guardian's acts.

he would undoubtedly be entitled to recover as against the minor the money spent by him in so recovering the property, but he is not entitled to recover the money spent by him in recovering the minor's properties lost through his own neglience during his office. (*Das and Ross, JJ.*). SHAIKH ABDUL RAHIM *v.* MT. BARIRA. **61 I.C. 807= 2 P.L.T. 556=6 P.L.J. 273= A.I.R 1921 Pat. 166.**

—Minor's liability for guardian's acts.

———*Unauthorised persons—Joining in transaction entered into by guardian.*

If a mother acted *bona fide*, in the capacity of the natural guardian of her son any disposition made by her is not invalid, for the mere reason that other persons who were not authorised to deal with the property, joined in the transaction. (*Spencer and Odgers, JJ.*). DEIVACHILA AIYANGAR *v.* VENKATACHARIAR. **88 I.C. 967=22 M.L.W. 188= 1925 M. W. N. 556=A.I.R. 1926 Mad. 46= 49 M.L.J. 317.**

———A guardian cannot bind a minor by a personal covenant. (*Baker, J.C.*). RAJARAM *v.* RAMCHANDRA. **89 I.C. 944=A.I.R. 1926 Nag. 33.**

———*Contract by guardian—Minor is bound if under his personal law he is bound to discharge that obligation.*

No decree can be passed against a minor or his estate on a contract entered into on his behalf by his guardian, under which covenant no charge is created on the estate except in such cases where the minor's estate would be liable to the obligation incurred by the guardian under the personal law to which he is subject. As a minor is bound to pay father's debt, his estate is also liable to pay such debts : 42 Mad. 185, *Appr.* (*Prideaux, A.J.C.*). LALCHAND *v.* NARHAR. **89 I.C. 896= A.I.R. 1926 Nag. 31.**

———*Tests.*

Per *Srinivasa Iyengar, J.*—When the question is whether a transaction by a guardian on behalf of a minor should be set aside the usual test namely whether a man of ordinary prudence would have entered into such a transaction in respect of his own property is too broad. However, it indicates one limit, namely, that no Court will uphold a transaction which it considers that a man of ordinary prudence would not have had in respect of his own property. The other limit is that, supposing that at the time of the transaction the guardians who acted actually were guardians appointed by the Court and they made an application to the Court for sanctioning a particular transaction, the circumstances must be such as the Court would consider justifiable for the purpose of sanctioning the transaction. (*Spencer, Offg. C.J. and Srinivasa Aiyangar, J.*). K. MUNAYYA *v.* M. KRISHNAYYA. **84 I.C. 949=20 M.L.W. 693= A.I.R. 1925 Mad. 215=47 M.L.J. 737.**

———*Decree against.*

A minor is as much bound by a judgment in his own action as if of full age, unless gross laches or fraud and collusion are established on the part of guardian. (*Wazir Hasan and Neave, A. J. Cs.*). RAMESHWAR BAKSH SINGH *v.* MT. RIDH KUER. **87 I. C. 238=A. I. R. 1925 Oudh 633.**

———*Sale in favour of minor.*

A sale in favour of a minor can be enforced, especially when the consideration for the sale had been paid in full to the vendor, as, after that the minor is under no further obligation to any one:

GUARDIAN AND WARD—Transactions between.

30 C. 539 (P.C.), *Dist.*; 40 M. 308 (F.B.), *Foll.* (*Broadway and Campbell, JJ.*). THOKAR DAS *v.* MT. PUTLI. **82 I. C. 96= 5 Lah. 317=A.I.R. 1924 Lah. 611.**

———*Contracts by Guardian.*

A contract which imposes an onerous obligation on a minor to pay a heavy sum as rent is not binding. A guardian has no power to enter into engagements on behalf of his minor ward making him liable under onerous covenants : 39 C. 232 (P.C.), *Ref.* The action of a *de facto* guardian will be binding on the minor's property only if it is for the minor's benefit or necessity. (*Krishnan and Ramesam, JJ.*). RARICHAN v. MANAKKEL RAMAN. **74 I.C. 309=17 M.L.W. 558= 32 M. L.T 107=1923 M.W.N. 301= A.I.R. 1923 Mad. 553=44 M. L.J. 515.**

———*Ordinary course of business—Transactions.*

In the case of a business undertaking where transactions are carried out in the ordinary course of business, it is not necesssary for the creditor to give specific evidence of benefit in each individual transaction. The fact that the transactions were carried out in the ordinary course of business is sufficient to raise a presumption that they were for the benefit of the business, and if the transaction is by the guardian of the minor the minor is bound by the transaction. 18 O. C. 84, *Foll.* (*Daniels, A.J.C.*). WILAYAT HUSAIN *v.* PUTTU LAL. **67 I.C. 982=25 O.C. 6= A.I.R. 1923 Oudh 35.**

———Bona fide *acts of Management.*

A minor is bound by the act of his guardian done *bona fide* and for his benefit in the management of his estate. (*Drake-Brockman, J.C.*). MANGULAL *v.* NANHI. **67 I. C. 806=5 N. L.J. 1= 19 N.L.R. 131=A.I.R. 1922 Nag. 104.**

———*Wrongful acts of guardian.*

If a guardian acted in the interests of the minor's estate and took over certain crops belonging to a third person, for the benefit of the estates the estate would be liable for the value of the crop, so taken. 23 Bom. 230 and 40 Mad. 632, *Foll.* (*Kotval, A.J.C.*). CHATARIA *v.* DAWLAT. **66 I.C. 468=5 N.L.J. 206= A.I R. 1922 Nag. 48.**

—Rights and liabilities.

———*Position of guardian.*

A guardian of a minor may be a *quasi* trustee for certain purposes, *e. g.*, for money received by him on behalf of his ward, but it is not clear that he can incur expenses to any extent he likes without seeking the intervention of any Court in the hope that he would be allowed to create a charge on the property of the minor to that extent. (*Broadway and Abdul Qadir, JJ.*). GOPI MAL *v.* PANNALAL. **72 I.C. 424=A.I.R. 1924 Lah. 339.**

—Transactions between.

———A transaction between a guardian and ward must be scrutinized with a great care and if the ward is not represented by independent persons the transaction must be regarded with suspicion. (*Spencer and Ramesam, JJ.*). NIMMAGADDA SESHAYYA *v.* CHERUKURY MEENAKSHAMMA. **98 I.C 691 (Mad.).**

———*Per* Wazir Hasan, A. J. C.—*Fiduciary relation—Person in such position cannot take advantage of his position as such.*

A person in a fiduciary position shall not be allowed to take any advantage of his position and the Court will not allow a person to be placed in a position in which his interest shall pull him one way and his duty the other. Whenever two persons stand in such a relation that, while it continues,

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confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed: 2 *White and Tudor's Leading Cases*, 722; 7 Rev. Rep. 56; L.R. 2 Ch. 55; L. R. 3 A.C. 254, *Appl.* (*Dalal and Wazir Hasan, A.J.Cs.*). MOHAN LAL *v.* MAHAMMAD ADIL. **89 I. C. 69=12 O. L. J. 453=2 O.W.N. 601=A.I.R. 1926 Oudh 88.**

—Miscellaneous.

———*Religion of Ward—Court's interference.*

A Hindu died leaving behind a widow and minor children. The widow embraced Mahomedanism and took her children to live with her and they lived with her for a period of nearly four years. Subsequently a Hindu on behalf of the Hindu Mahasabha demanded them to be brought up as Hindus,

Held, that it was the duty of people interested to intervene at once and to go to the Court and to ask that the Court should protect the minor children from being converted to Mahomedanism. But as nearly four years had been allowed to pass without any application, the application on behalf of the Mahasabha could not be granted. The right view in such a case must be what was best in the interests of the children. Where the children had for a long time remained as Mahomedans and were happy and well-looked after, no order changing their mode of life could be made. (*Mears, C. J. and Sen, J.*). ABDUL RAHMAN *v.* JAGANNATH PANDEY. **118 I. C. 707=A. I. R. 1930 All. 86.**

GUARDIANS AND WARDS ACT (8 of 1890).

—Applicability.

———A suit by minor with next friend for possession of property against a person who admits the minor's title but claims to be in possession as minor's guardian is not maintainable, the proper procedure being under the Guardians and Wards Act for the appointment of a guardian: 26 All. 594, *Appr.* (*Prideaux, A.J.C.*). MT. BHAGI *v* KASHRAM. **89 I.C. 55=21 N.L.R. 75=A.I.R. 1925 Nag. 328.**

—Construction.

———*Disciplinary powers—Minor's benefit.*

The provisions conferring special disciplinary powers on the Court for the benefit of minors must not be interpreted narrowly so as to leave no remedy against misbehaving guardians save by suit unless there are plain indications in the act prohibiting such a course. (*Walsh, Ag. C. J. and Neave, J.*). SITARAM *v.* MT. GOVINDI. **80 I.C. 592=46 All. 458=22 A.L.J. 585=A.I.R. 1924 All. 593.**

—Dispossession of third person.

———Where the District Judge appoints certain persons as guardians of minors, he has no jurisdiction to pass any order against the person who was in possession of the minor's properties as trespasser prior to such appointment. What he can do is only to direct the guardian now appointed to bring a suit against that person. (*Mukerji and Niamatullah, JJ.*). CHANDRIKA RAI *v.* SRIKANT RAI. **117 I.C. 98=1929 A.L.J. 798=51 All. 899=A.I.R. 1929 All. 697.**

———An order purporting to be passed under the Guardians and Wards Act cannot bind third parties who are in possession of the estate. Under the Guardians and Wards Act a District Judge has no jurisdiction to dispossess third persons from the property of which they may, be rightly or wrongly, in possession, but can at best give directions to the guardian to take necessary steps to recover the property. (*Walsh and Sulaiman, JJ.*). HARBANS SINGH *v.* RAJINDER KUAR. **85 I.C. 1047=47 All. 313=23 A.L.J. 28=6 L.R.A. Civ. 162=A.I.R. 1925 All. 277.**

GUARDIANS AND WARDS ACT (1890)—Nature of proceedings.

—Duty of Court.

———*State as guardian—Policy of law.*

The state from the earliest times is supposed to be the guardians of the infants and the earliest regulations gave effect to this principle and made provisions for the custody of the minors and when the state assumes direct custody of the infant it undertakes to bring up the boy as his natural father or guardian would have done, that is, in the traditions of the family to which after becoming major he has to revert. The state has made provisions for the care of infants by statutory provisions such as Court of Wards Act and the Guardians and Wards Act. The District Judge under the latter Act exercises the functions and becomes the protector and the guardians of infants by exercising the power to appoint guardians of the persons and properties of the infants. Therefore no Court should grudge the trouble and worry on assuming charge of the estate of the minor, that would necessarily occur so long as an infant has not attained majority. (*Jwala Prasad and Kulwant Sahay, JJ.*). MANMOHINI DASI *v.* HARI PRASAD BOSE. **81 I.C. 1045=5 P.L.T. 415=2 P.L.R. 200=A.I.R. 1924 Pat. 755.**

—Eligibility for guardianship.

———*Person having interest in estate after minor's death is not disqualified to be appointed guardian.*

Where *A* was appointed guardian of the person and *B*, her husband, as guardian of the property of a minor, and it appeared that *B* himself was entitled to succeed to the property in a fractional share on the death of the minor,

Held, that this did not make the appointment of the guardians invalid. (*Scott-Smith, J.*). MT. SHARFAN *v.* BHOLI. **4 L. L. J. 274=A.I.R. 1922 Lah. 395.**

—Guardian ad litem.

———Per *Devadoss, J.*—(In order of Reference)—Where there is a guardian appointed under the Guardians and Wards Act and another person is appointed as guardian *ad litem* and a decree is obtained against the minor, in such cases there should be no decree against the minor as he was not properly represented in the suit and an objection may be taken to execution on the ground that there is no decree against the minor. (*Coutts-Trotter, C.J., Madhavan Nair and Jackson, JJ.*). VENKATA SOMESHWAR RAO *v.* LAKSHMANASWAMI. **115 I. C. 801=52 Mad. 275=29 M.L.W. 125=A.I.R. 1929 Mad. 213=56 M.L.J. 175. (F. B.).**

—Guardian, appointment on affidavits.

———In uncontested proceedings an order appointing a guardian under the Guardians and Wards Act on the affidavits of the parties is not *ultra vires*. (*Suhrawardy and Graham, JJ.*). KAMINI MAYI DEBI *v.* BHUSAN CHANDRA GHOSE. **97 I. C. 692=44 C.L.J. 40=A.I.R. 1926 Cal. 1193.**

—Nature of proceedings.

———*Judicial or administrative.*

The proceedings under the Guardians and Wards Act, once initiated by an application either for

GUARDIANS AND WARDS ACT (1890) — Nature of proceedings.

appointment or for declaration of a guardian last or continue throughout the minority of the minor concerned and the filing of the papers do not put an end to the proceedings. The Court appointing the guardian, when it receives the report of the guardian, does not act in an administrative or executive capacity, but as a "Court" within the meaning of S. 195 (c), Criminal Procedure Code. (*Kinkhede, A. J. C.*). TULARAM MARWADI *v.* EMPEROR. **100 I.C. 1044=28 Cr. L. J. 388=7 A. I. Cr. R. 521=A.I.R. 1927 Nag. 184.**

——Proceedings under the Act are not intended to be summary. (*Kotval, A.J.C.*). GOPAL RAO *v.* SHRAWAN. **68 I.C. 291=A.I.R. 1923 Nag. 36.**

——*Non-appearance of parties—Procedure.*

It is a mis-conception of the Court's duty under the Act to treat an appplication for guardianship or proposed guardian as though the applicant was a party in a suit and to dispose of the matter in his absence merely by making an order in favour of his opponent as though the absent person was a defaul ter in a civil suit. (*Walsh and Ryves, JJ.*). RAM SAHAI *v.* CHOTEY LAL. **63 I. C. 567=19 A.L.J. 489=A.I.R. 1921 All. 256.**

—Order against third party.

——There is nothing in the Guardians and Wards Act which entitles a Court, while appointing a person guardian of a minor, to order a third party to pay anything towards the minor's support or maintenance. (*Campbell, J.*). MANSA RAM *v.* MT. NAURATI. **87 I.C. 650=7 L.L.J. 193=26 P.L.R. 213=A.I.R. 1925 Lah. 427.**

—Procedure.

——*Proceeding under—Court refusing leave to adduce evidence—Interference in revision.*

When a matter of guardianship is before the Court under Act VIII of 1890 it is incumbent on the Court to hear such evidence as the parties desire to put before it. Where it does not do so the High Court can interfere in revision. (*Suhrawardy and Costello, JJ.*). ROSULAN BIBI *v.* RAHAMATULLA KHAN. **34 C. W. N. 763.**

——*Interference by High Court.*

The District Judge who exercises a parental jurisdiction in proceedings under the Guardians and Wards Act, cannot be expected to observe the formality and precision of procedure laid down by the Civil Procedure Code to be followed by Court in the trial of ordinary suits. If the order passed by the District Judge is on the whole reasonable, the High Court will refrain from interfering because he has not acted with proper regard to any statute or loss of evidence or the procedure under Civil P. C. (*Walsh and Ryves, JJ.*). MT. KHUNDI DEVI *v.* CHOTEY LAL. **83 I.C. 288=44 All. 587=20 A.L.J. 468=A.I.R. 1922 All. 338.**

—Stay of proceedings.

——High Court has inherent power to pass an order, to stay proceedings under the Guardians and Wards Act, and can disallow the transfer of the custody of the minor to the guardian appointed by the lower Court pending the decision or the appeal to the High Court: 3 C. L. J. 29, *Rel. on.* (*Bhide, J.*). SHAM SINGH *v.* MT. THAVI. **110 I.C. 912=A.I.R. 1928 Lah. 912.**

—Visiting minors.

——There is no machinery under the Guardians and Wards Act to work out the right of the mother under Muhammadan Law, to visit her child in the custody of the father as guardian. (*Rigg, J.*). HAZARA BIBI *v.* SULAIMAN HAJI MOHAMAD. **59 I.C. 562=13 Bur. L.T. 86.**

GUARDIANS AND WARDS ACT (1890), S. 7—Applicability.

—S. 3—Joint Hindu family.

——*Jurisdiction of High Court to appoint guardian of member.*

Section 3 of the Act provides that nothing in that Act shall derogate in any way from the jurisdiction of the High Court. The High Court therefore has the inherent jurisdiction in a proper case to appoint guardian of person and property of the member of a joint Hindu family so as to prolong his period of minority notwithstanding the provision in the Guardians and Wards Act forbidding appointment of guardian of a minor in a joint family where there is any adult co-parcener alive: 32 Mad. 139; 30 Bom. 152; 25 All. 407 (P. C.); 19 Bom. 96 and 25 Bom. 353, *Ref.* (*Kemp, J.*). NARSI TOKERSEY & CO. *v.* SACHINDRANATH GAJANAM. **31 Bom. L.R. 1009=A.I.R. 1929 Bom. 475.**

—S. 3—Jurisdiction of High Court.

——*Non-residents.*

There is no restriction in the powers granted to either the Supreme Court or the High Court which limits the exercise of guardianship jurisdiction to the town or to European British subjects, and even if any such limitation exists, it does not apply where person who is outside the limits of ordinary original jurisdiction or who is not a European British subject desires to avail himself of the jurisdiction of the Court and there is no opposition thereto: 2 Cal. 357; 21 Bom. 137 and 2 N.W.P.H.C. R. 79, *Ref.* and 21 Cal. 206, *Dist.* (*Lort-Williams, J.*). TARUNCHANDRA GHOSH, *In re.* **A. I. R. 1930 Cal. 598.**

—S. 4—Hindu husband.

——Where a Hindu husband admittedly had the custody of his minor wife and the wife leaves him, the husband is by Hindu Law the natural guardian and entitled to custody and comes within the definition in S. 4 as being "a person having the care of the person of a minor." (*Barlee, A.J.C.*). KHETSI PACHAN MINDU *v.* DELA MEGHA MINDU. **121 I.C. 175=A.I.R. 1930 Sind 135.**

—S. 4—Interpretation.

——From the definitions of "guardian" and "ward" as given in S 4 it appears that the word guardian is of general import and includes natural and testamentary guardians and guardians appointed by Court. (*Bennet and Iqbal Ahmad, JJ.*). DIPCHAND *v.* MUNNI LAL. **1929 A.L.J. 1248=A. I. R. 1929 All. 879.**

—S. 4—Jurisdiction.

——An application under S. 25 must be made to the Court where the minor ordinarily resides. (*Rutledge, C.J.*). MAUNG BA THEIN *v.* MA THAN KIN. **118 I.C. 415=A.I.R. 1929 Rang. 129.**

—S. 4—"Person."

——*Meaning of.*

Per *Mukerji, J.*—The word 'person' as used in the definition of 'Guardian' in S. 4, Cl. (2), Guardians and Wards Act, is not to be read in the light of the meaning given to it by S. 3, Cl. (39), General Clauses Act. (*Mukerji and Guha, JJ.*). SM. ASALATA ROY *v.* SOCIETY FOR P.C. I. **51 C. L. J. 272=A. I. R. 1930 Cal. 397.**

—S. 7—Applicability.

——Habeas corpus—*Proceedings.*

Where Hindu minors were with the mother and the mother was inclined towards a belief in the Christian religion and it was likely she might be ultimately converted to that religion, and she was likely to bring them up in such a way that they would ultimately express a desire to be converted to Christianity.

GUARDIANS AND WARDS ACT (1890), S. 7—Costs—Unsuccessful application.

Held, the proper course for removal of the mother from guardianship and have another guardian appointed was under the Guardians and Wards Act.

The High Court refused to exercise any powers under Cr. P.C., S. 491 (a): 14 M.I.A. 309 (P.C.); 46 P.W.R. 1916; 20 C.W.N. 608 and 57 I. C. 651, *Ref.* (*Ramesam, J.*). VEERASAMI *v.* GUTTIKONDA RATNAMMA. **112 I. C. 472=1 M. Cr. C. 307=29 Cr. L.J. 1048=11 A. I. Cr. R. 323=A.I.R. 1928 Mad. 1087.**

—S. 7—Costs—Unsuccessful application.

———Where a philanthropic Society unsuccessfully sought to be made a guardian of a minor's property and claims costs which cannot be regarded as expenses either as on account of necessaries or as having been incurred for the welfare of the minor or for protection of his estate the society is not entitled to the costs. (*Mukerji and Guha, JJ.*). SM. ASALATA ROY *v.* SOCIETY FOR P.C.I. **51 C.L.J. 272=A.I.R. 1930 Cal. 397.**

—S. 7—Debuttar property.

———No guardian under S. 7 can be appointed for the management of *Debuttar* property on behalf of minor *shebait* who cannot possibly have proprietary interest in it: 39 All. 196, *Diss.*; 33 M.L.J. 297, *Foll.* (*Coutts and Das, JJ.*). KIBBY *v.* MT. BAHURIA SHURATAN KUAR. **70 I.C. 872=1 Pat. 432=3 P.L.T. 805=A.I.R. 1922 Pat. 527.**

—S. 7—Essentials for appointment.

———*Application.*

It is not open to the Court acting *proprio motu* to appoint as guardian of the property of the minor a person who had not applied to be so appointed: 135 P.R. 1893; 38 Cal 783, *Foll.*; A.I.R. 1924 Oudh 126, *Dist.* (*Tek Chand, J.*). MT. SAKINA BEGAM *v.* WALIULLAH KHAN. **107 I.C. 397=A.I.R. 1928 Lah. 456.**

———*Existence of property.*

It is not an essential preliminary to taking any proceedings under the Act for the appointment of a guardian that the minor should be shown to be possesssed of property and it is not necessary that the applicant should at first, as next friend of the minor, establish the right of the minor to the property in dispute: 3 All. 403, *Dist.* (*Gokaran Nath Misra and Raza, JJ.*). RAM NARAIN *v.* MT. GOURA. **99 I.C. 222=3 O.W.N. 985=A.I.R. 1927 Oudh 68.**

—S. 7—Executor under will.

———It is permissible to appoint a guardian of a minor's estate although that estate is not in possession of the minor but in that of the executor under a will. But the executor's possession cannot be disturbed by such appointment. (*Oldfield and Ramesam, JJ.*). ALWAR AMMAL *v.* NARAYANA NAICK. **70 I.C. 360=14 M.L.W. 706=A.I.R. 1921 Mad. 328.**

—S. 7—Family arrangement.

———An appointment of a guardian for the minor's property is not necessary where the previous family arrangements are quite satisfactory for the protection of the minors' interests: 93 P.R. 1914, *Foll.* (*Addison, J.*). USAF ALI *v.* ALIBHOY MAMOONJI. **101 I.C. 259=A.I.R. 1927 Lah. 789.**

—S. 7—Husband as guardian.

———Although a husband is the legal guardian of the person of his wife where there is no necessity for appointing a guardian, the husband should not be appointed a guardian. The provisions of the Guardians and Wards Act should not be put in force in order to enable a husband to get possession of the person of his wife. (*Scott-Smith, J.*). ASE BAI *v.* GIRDHARI RAM. **67 I.C. 882=3 L.L.J. 293=A.I.R. 1921 Lah. 68.**

GUARDIANS AND WARDS ACT (1890), S. 7—Removal of testamentary guardian.

—S. 7—Joint Hindu family.

———A member of a joint family cannot be appointed by a Court guardian of another member of the family in respect of joint family property. Under the Hindu Law itself the active eldest member is manager of joint family property without any order of Court. (*Dalal, J.C.*). BALBIR *v.* CHEDDI LAL. **85 I.C. 276=A.I.R. 1925 Oudh 642.**

—S. 7—No property.

———Court can exercise its jurisdiction to appoint a guardian of the person of the minor even if he is possessed of no property. It is the duty of the father to maintain and educate his children who are incapable of supporting themselves and although the law has always recognized this duty, the Civil Courts have no direct means of enforcing this obligation, so as to compel him to maintain them out of property in which they have no interest: 9 Bom. 96, *Rel. on.* (*Mukerji and Graham, JJ.*). V. J. WALTER *v.* M. J. WALTER. **111 I. C. 543=55 Cal. 730=A.I.R. 1928 Cal. 600.**

—S. 7—Power of Court.

———Once the power of the Court is properly invoked, it is competent to and advisable for the Court to go into the question of appointing a person itself under its statutory power. It is the duty of the Court, as soon as any dispute about the guardianship of the minor's property or any allegation of detriment to the minor's interests resulting from such dispute is properly brought to its notice, to sift the matter in the interest of the minor. It can appoint the applicant or any other person guardian. (*Kotval, A.J.C.*). JIWANDAS *v.* RAJRANI. **64 I.C. 433=A.I.R. 1921 Nag. 97.**

—S. 7—Procedure.

———Proceedings under the Guardians and Wards Act should not be summary, but a proper enquiry should be made and the Court should give an opportunity to the parties to produce evidence and show which of them is better entitled and qualified to act as guardian of the minors. Further it should be determined which of them is better entitled under the personal law of the parties: A. I. R. 1925 Lah. 567 and A.I.R. 1925 Nag. 233, *Foll.* (*Zafar Ali, J.*). MT. LACHHMI *v.* NANAKCHAND. **107 I.C. 606=A.I.R. 1928 Lah. 716.**

———*Fresh application from person finally appointed.*

Sections 7 and 8 do not necessarily require that when once proceedings have been instituted on a proper application, a separate application should be taken from the person whom the Court appoints though in practice it is more usual to take one. (*Daniels, A.J.C.*). MT. ISLAMAN *v.* MT. MAQBHULAN. **73 I. C. 255=A. I. R. 1924 Oudh 126.**

—S. 7—Property in hands of administrator.

——A guardian can be validly appointed of the property of a minor although an administratrix may have been appointed in respect of that property; 8 Ben. L.R. 208, *Foll.* (*Sanderson, C.J. and Mookerjee, J.*). LALIT KUMAR *v.* DASARATHI SINGHA. **66 I.C. 261=48 Cal. 802=A.I.R. 1921 Cal. 139.**

—S. 7—Removal of testamentary guardian.

———Where a guardian has been appointed under the Will of the minor's father, it is impossible for Court to ignore or disregard the provisions of the Will unless it is satisfied that the person appointed as guardian under the Will is not a fit and

GUARDIANS AND WARDS ACT (1890), S. 7—Removal of testamentary guardian.

proper person to have their custody. In such a case the Court must consider the welfare of the minors and also that any order that might be made will not infringe sub-S. (3) of S. 7 of the Act. (*Greaves, J.*). LIONEL ASHBY DURKLEY, *In re*. **101 I.C. 609=31 C.W.N. 394=A.I.R. 1927 Cal. 389.**

———*Neglect by such guardian.*

Where a testamentary guardian has taken no interest in the minor and has neglected the performance of his duties as such and has allowed the estate to deteriorate, it would be the duty of the Court to remove him under S. 39 and to appoint a new guardian instead. The paramount consideration for the decision of the Court in such cases is the welfare of the minor. (*Tek Chand, J.*). MT. KISHNO *v.* MT. PARTABO. **100 I.C. 738=28 P.L.R. 127=A.I.R. 1927 Lah. 876.**

—S. 7—Removal order.

———A person can apply for the appointment of another guadrian under S. 7, though an order of removal under S. 39 is not obtained. (*Stuart, C.J. and Raza, J.*). MAHOMEDI BEGAM *v.* MEHDI ALI KHAN. **104 I.C. 562=A.I.R. 1927 Oudh 516.**

—S. 7—Rival claimants.

———Where there was a dispute among the rival claimants for the appointment of guardian endangering the property of the minor and the Court accepted arrangement by which the contestants took each half of the property, but later on ordered delivery of whole property to one of them,

Held, that it was desirable that guardian should be immediately appointed for the property of the minor and proper steps taken for the safeguard of the property. (*Broadway, J.*). MT. MAHANDAN *v.* MT. AISHAN BIBI. **96 I.C. 283.**

—S. 7—Security.

———Order appointing guardian conditional on furnishing security is valid—Section 7 is not controlled by Guardians and Wards Act, S. 34 (a): 30 M.L.J. 508, *Disc.*; 40 Mad. 775, *Foll.*; A.I.R. 1927 Mad. 36 (F.B.), *Diss. from*; 24 I.C. 202, *Ref.* (*Shadi Lal, C.J. Broadway and Tek Chand, JJ.*). SHAMDAS *v.* UMER DIN. **A.I.R. 1930 Lah. 497 (F.B.).**

———A guardian to the property of a minor was appointed on condition of furnishing security in 1902. The guardian furnished security in 1909,

Held, that the appointment of the guardian took effect from 1909. (*Shadi Lal, C. J., Broadway and Tek Chand, JJ.*). SHAMDAS *v.* UMER DIN. **A.I.R. 1930 Lah. 497 (F.B.).**

———*Majority Act, S.* 3.

Where a person is appointed as guardian of the person or property of a minor under the Guardians and Wards Act on condition of his furnishing security, and fails to furnish the security, there is no appointment of a guardian within the meaning of S. 3 of the Majority Act such minor becomes major when he completes his 18th year. Such a conditional order is invalid under the Act.

Per *Sadasiva Ayyar, J.*—30 M. L. J. 508, *Foll.*; 40 Mad. 775, *Overruled.* (*Coutts-Trotter, C. J., Krishnan and Beasley, JJ.*). *In the matter of* NATHA VENKATESA PERUMAL. **99 I.C. 213=49 Mad. 809=24 M.L.W. 707=A.I.R. 1927 Mad. 36=51 M.L.J. 726 (F.B.).**

—S. 7—Suit.

———The question of the appointment of a guardian for a minor's person and property is a matter specially within the provisions of the Guardians and Wards Act, and no suit can be brought for that purpose. (*Ghulam Mohiuddin, A.J.C.*). MT. ANJANI *v.* VITHU. **110 I.C. 46=A.I.R. 1928 Nag. 297.**

GUARDIANS AND WARDS ACT (1890), S. 11—Grounds for appointment.

—S. 8—Eligibility for appointment.

———*Litigious person.*

Where there was nothing on the file to show that the applicant was not extremely fond of the minors, or that he was not actuated by what he believed to be his concern for their interest,

Held, that the fact that he was of a litigious disposition was not a sufficient cause for throwing out his application to be appointed guardian. (*Dalal and Wazir Hasan, A.J.Cs.*). NAWAB SARWAR-UL-MULK SARWARJUNG BAHADUR *v.* MIRZA WAKER ALI BEG. **87 I.C. 902=12 O.L.J. 281=2 O.W.N. 246=A.I.R. 1925 Oudh 398.**

—S. 8—Official Receiver.

———The appointment of an Official Receiver, as a guardian to the estate of a minor, without any application from him is contrary to the provisions of S. 8: 135 P.R. 1893; A.I.R. 1928 Lah. 456 and 38 Cal. 783, *Foll.* (*Tek Chand, J.*). MT. RALOO *v.* Y. LAL. **117 I.C. 901 (Lah.).**

—S. 8—Official trustee.

———Under the Official Trustees' Act, the Official Trustee is a Government officer appointed by Government and liable, under the provisions of S. 16 of the General Clauses Act, to be removed by Government. The Official Trustee as such should not be appointed the guardian of the property of a minor. (*Rangnekar, J.*). OMAR TYAB ABA SHARIF *v.* ISMAIL TYAB ABA SHARIF. **108 I.C. 495=30 Bom. L.R. 177=A.I.R. 1928 Bom. 69.**

—S. 9—Essentials for appointment.

———An applicant for guardianship should reside within the jurisdiction of the Court of which he makes the application: 36 All. 280, *Foll.* (*Zafar Ali, J.*). MT. LACHHMI *v.* NANAK CHAND. **107 I.C. 606=A.I.R. 1928 Lah. 716.**

—S. 9—Inherent powers.

———A District Court the jurisdiction of which is, as defined under Guardians and Wards' Act, has no inherent powers as are not expressly conferred upon it by the Act; A. I. R, 1914 P.C. 41, *Rel. on.* (*Rupchand, A.J.C. and Barlee, Ag. J.C.*). MOONDOMAL CHHADALDAS CHUGH *v.* NAZIR, J. C.'S COURT, SIND. **121 I.C. 168=A.I.R. 1930 Sind 43.**

—S. 10—Conditional appointment.

———*Conditional order of appointment as guardian of property is of no effect.*

Where a District Judge appointed the father guardian of the property of a ward and directed the respondent to restore the child to her father, remarking that no order as regards the guardianship of her person was necessary,

Held, that the conditional order of appointment as guardian of the property is of no effect. The District Judge was not correct in saying that no order as regards the guardianship of the person was "necessary": A.I.R. 1927 Mad. 36 and A.I R. 1925 Mad. 1085, *Rel. on*; A.I.R. 1925 Mad. 398, *Not foll.* (*Waller and Cornish, JJ.*). TOTAMMA *v.* MARINA VEERRAJU. **A.I.R. 1930 Mad. 19.**

—S. 10—Natural guardian.

———An order appointing a person who is already by law a guardian, is an order without jurisdiction.

Where a person is entitled to the custody of the minor, being a natural guardian, the proper method is to pass an order under S. 12. (*Walsh and Banerji, JJ.*). MT. ULFAT BIBI *v.* BAFUTI. **102 I.C. 103=49 All. 773=25 A.L.J. 585=A.I.R. 1927 All. 581.**

—S. 11—Grounds for appointment.

———Where it was alleged that an alienation of a part of the property of the minors was necessary to

GUARDIANS AND WARDS ACT (1890), S. 11—Notice.

pay off certain debts on which interest was accumulating and that it would be impossible to alienate so long as the applicant did not get a certificate of appointment from the Court,

Held, that this was a fit case in which the application for the appointment of a guardian ought to have been accepted. (*Moti Sagar, J.*). MT. SAHAN *v.* SHADI. **79 I. C. 579= A.I.R. 1923 Lah. 601.**

—S. 11—Notice.

———*Failure to issue—Effect.*

A person who is not made party to the proceedings in a guardianship case but on whom a notice should have been issued under S. 11 of the Guardians and Wards Act as a person interested in the matter of the appointment of a guardian is entitled to move the High Court to interfere in revision. (*Martineau, J.*). BALLU MAL *v.* HARDAWARI MAL. **79 I.C. 451=6 L.L.J. 219= A. I. R. 1924 Lah. 570.**

———*Failure to give—Revision.*

It is open to a person, on whom notice should have been served to come forward and object in revision to the order passed : (18 O.C. 66, *Ref.*). (*Daniels, A. J. C.*). MT. ISLAMAN *v.* MT. MAQBHULAN. **73 I.C. 255=A.I.R. 1924 Oudh 126.**

—S. 12—Applicability.

———*Pendency of guardianship proceedings.*

Section 12 by reason of the wording used as well as by reason of its location in the Statute only applies during the pendency of guardianship proceedings. After guardian is appointed Ss. 24 and 25 do apply ; 40 Bom. 600, *Expl.*; 39 Mad. 608 and 37 All. 515, *Rel. on.* (*Dalip Singh, J.*). INDER SINGH *v.* KARVAR KAUR. **119 I.C. 423= A.I.R. 1929 Lah. 487.**

—S. 12—Guardian, custody of—Removal from.

———Illness of a child in the custody of the adoptive father is no reason to make over the child to the natural father. (*Campbell, J.*). PIARE LAL *v.* UDAI RAM. **A.I.R. 1923 Lah. 376.**

—S. 12—Injunction.

———*Marriage—Restraint of.*

In proceedings under the Guardians and Wards Act the Court has jurisdiction to issue an injunction restraining the marriage of a ward. The powers of the Court in the matter of protection of the person and property of the minors embrace a wide field and the Court has jurisdiction to pass all such orders as it considers necessary and proper in the interests of the minors. (*Jai Lal, J.*). MURARI LAL *v.* MT. SARASWATI. **86 I.C. 226= 88 I.C. 576=7 L.L.J. 30= A.I.R. 1925 Lah. 358.**

—S. 12—Receiver.

———*Minor's property—Sale of, for discharge of debts.*

Section 12 empowers the Court to make such order for the protection of the properties of the minor as it thinks fit. The discretion which is conferred upon the Court by this section is a wide one, and there can be no doubt that it has the power to appoint a receiver, and the Receiver when appointed must, having regard to the provisions of S. 141, Civil P. C. be deemed to have all powers of a Receiver under the Code. Those powers would include the power to sell where the adoption of such a course is deemed to be necessary for the protection of the interests of the minor. An order, therefore, directing the Receiver to sell certain property of the minor in order to pay off the debts due from the minor's estate, is not *ultra vires* of S. 12 as it is a

GUARDIANS AND WARDS ACT (1890), S. 13—Procedure.

matter of the discretion of the Court. (*Graham and Mitter, JJ.*). JYOTI PRASAD LALA *v.* PEARILAL LALA. **51 C.L.J. 38=34 C.W.N. 192= A.I.R. 1930 Cal. 384.**

———*Power to appoint—Appeal.*

As an application under S. 12, Guardians and Wards Act, is a proceeding in Court of civil jurisdiction, it is competent to the District Judge to appoint a receiver in such a proceeding under Civil P. C., O. 40, R. 1, and an order passed thereunder is appealable as provided under O. 43, R. 1, Cl. (s) : 36 Bom. 20 and A. I. R. 1925 Lah 489, *Foll.*; A.I R. 1924 All. 682, *Expl.* (*Kinkhede, A. J. C.*). GODULEBAI *v.* JANABAI. **116 I.C. 642= A.I.R. 1929 Nag. 119.**

———*Order appointing—Appeal.*

A Judge before whom an application for the appointment of a guardian is pending has power to appoint a Receiver but that order is to be under the Code of Civil Procedure, and not the Guardians and Wards Act.

Such an order, therefore, does not come under S. 12 of the Guardians and Wards Act but under O. 40, R. 1 of the Code and is therefore appealable under Cl. (s) of R. 1 of O. 43. (*Abdul Raoof J.*). MT. CHANDRA WATI *v.* JAGAN NATH SINGH RAM LAL. **90 I.C. 611=7 L.L.J. 281= 26 P.L.R. 576=A.I.R. 1925 Lah. 489.**

—S. 13—Procedure.

———*Not summary.*

The procedure under S. 13, Guardians and Wards Act, is not intended to be summary, and a Court should not reject an application for the appointment of a guardian of a minor without any enquiry at all: 63 P.L.R. 1917, *Foll.* (*Abdul Raoof, J.*). SAJJAM SINGH *v.* MT. GUJRI. **105 I.C. 616= 26 P.L.R. 164=A.I.R. 1928 Lah. 108.**

———The procedure under S. 13 is not intended to be summary : 17 Bom. 560, *Ref.* (*Scott-Smith, J.*). MT. ZAINAB BIBI *v.* ABDUL KARIM. **89 I.C. 865=A.I.R. 1926 Lah. 117.**

———*Opportunity to produce evidence.*

Where there was nothing on the record to show either that the applicant was given a full hearing or that he was given any opportunity of producing evidence to show that the alleged will was not genuine, and where there was nothing on record to support the statement in the written pleas of the relatives that the applicant was at the time litigating against minor,

Held, that the case must be sent back to the lower Court for further enquiry, and that the applicant must be given an opportunity of giving evidence in support of his application. (*Campbell, J.*). YUSUF ALI MAMOOMJI *v.* ALLIBHOY. **87 I. C. 646=26 P. L. R. 255= A. I. R. 1925 Lah. 567.**

———*Not summary.*

The proceedings under the Act are not summary and an order of appointment if passed without holding any enquiry and hearing any evidence as required, by S 13 of the Act, or calling upon the parties to say whether they had any evidence to give or not, is not a reasonable one and is liable to be set aside: 17 Bom. 560, *Foll.*; A.I.R. 1922 All. 338, *Dist.* (*Kin-Khede, A.J.C.*). SHEOSHANKAR *v.* KHUPCHAND **83 I. C. 320=A.I.R. 1925 Nag. 233.**

———*Failure to consider whether appointment was for minor's welfare.*

Where the order, appointing minor's father, as guardian was passed without any inquiry at all into the allegations made against him in her-

GUARDIANS AND WARDS ACT (1890), S. 15— Several minors.

minor's mother in-law's petition and in the application for appointment as guardian by a cousin of minor's husband, who charged him with mis-appropriation,

Held, in appointing father as the guardian the Court ignored the procedure laid down by the Guardians and Wards Act in Ss. 11 and 13 and failed to consider whether the guardian was by character and capacity a fit person and whether his appointment was for the welfare of the minor. His procedure was thus materially irregular. (*Kotval, A. J. C.*). GOPAL RAO *v.* SHRAVAN.

68 I. C. 291=A. I. R. 1923 Nag. 36.

—S. 15—Several minors.

———*Several minors—Separate guardians for persons—Single common guardian for property.*

Where property is not large and the Court has appointed separate guardians of persons of the minors, and the appointment of as many guardians of property as that of persons would lead to waste, property may be left in the hands of one of such guardians. (*Mukerji and Bennet, JJ.*). MUNAWWAR KHAN *v.* TASALLI KHAN.

A.I.R. 1930 All. 255.

—S. 15—Supporting minor.

———The Court, when it appoints a person as the guardian of a minor's person should put the person appointed as guardian in a position to support the minor. (*Mukerji and Bennet, JJ.*). MUNAWWAR KHAN *v.* TASALLI KHAN. **A.I.R. 1930 All. 255.**

—S. 17—Adopted minor.

———*Adoptive relations to be preferred.*

In considering the guardianship of a minor who is an adopted son, the first consideration must be with regard to the interest and the welfare of the minor, and, after that the Court has to see how far the intentions of the adoptive father can be best carried out. Nothing should be done the effect of which will be to frustrate the wishes of the adoptive parents, by eventually leading the boy to disregard the traditions of the family of his adoption. So long as any member of the adoptive family fit to be appointed guardian is forthcoming, the Court should not appoint the natural father of the minor as his guardian. So in a competition between the adoptive paternal grandmother and the natural father of the adopted boy the paternal grandmother should be preferred: 15 C.W.N. 558, *Dist.* (*Adami and Sen, JJ.*). MONOMOHINI DASI *v.* HARI PRASAD.

94 I.C. 808=4 Pat. 109= A. I. R. 1925 Pat. 444.

—S. 17—Arbitration.

———*Reference to—Competency of.*

The intention of the legislature is that the question as to who is the most suitable person for the appointment is to be decided by the Court and for these reasons a District Court cannot in law refer the selection of a guardian to arbitration. Besides the law allows a reference to arbitration only where all the parties interested agree, while in a guardianship application the party most interested is the minor and he cannot agree to a reference: A.I.R. 1924 Mad. 484, *Rel. on.* (1892-96) 2 U.B.R. 407, *Held not good law.* (*Darwood and Mya Bu, JJ.*). MA NGWE NYUN *v.* MA THYWE.

112 I.C. 451=6 Rang. 563= A.I.R. 1928 Rang. 137.

—S. 17—Directions of law.

———Where the law definitely lays down that an appointment of a certain guardian cannot be made, it is not proper for the Court to disregard the law even in the interests of the minor. (*Pullan, J.*). ANSAR AHMAD *v.* SAMIDAN.

106 I.C. 822=5 O.W.N. 87= A.I.R. 1928 Oudh 220.

—S. 17—Eligibility for appointment.

———*Charitable society.*

In considering the appointment of guardian of the minor's property any one having an interest adverse to that of the minor cannot be appointed such guardian, and for the proper management of the property the character, the capacity and the fitness of the individual to be appointed has to be taken into consideration. It is for this reason that an individual only is to be appointed by the Court as guardian and not a charitable Society whose office-bearers are liable to change. (*Mukerji and Guha, JJ.*). SM. ASALATA ROY *v.* SOCIETY FOR P. C. I.

51 C. L. J. 272= A. I. R. 1930 Cal. 397.

———*Married sister.*

A married sister of a minor applied for being appointed as a guardian. The application was opposed by "the Society for the Protection of Children in India." The sister was the only person who could be entrusted with the care of the boy and there was no definite evidence of ill-treatment of the minor against her. The minor was above 14 years of age and showed a decided preference for his sister. The other relations of the minor did not come forward to act as the guardian of the minor either in respect of his person or of his property, and there was no opposition offered by any of these relations to the appointment of sister as guardian of the minor,

Held, that in the interests of the minor the sister should be appointed as the guardian of the person of the minor; the Society as a philanthrophic and charitable institution, willing to do good to unprotected children may be allowed to visit the minor, at his house, and take all measures necessary or expedient to protect the minor from harm, whether moral or physical, in co-operation with the guardian: 2 C. L. R. 583, *Dist.* (*Mukerji and Guha, JJ.*). SM. ASALAT ROY *v.* SOCIETY FOR P. C. I.

51 C.L.J. 272=A.I.R. 1930 Cal. 397.

———*Appointment of guardian by Court—Principles applicable.*

Under the Guardians and Wards Act a Court in appointing a guardian or declaring a guardian of the minor is guided first by the provisions of S. 17 of the Act and secondly by what appears to be the welfare of the minor consistently with the law to which the minor is subject. By placing the provisions of the section above the law to which the minor is subject the Act makes it open to the Court to consider other matters as well as the personal law even if they are opposed to that law. Thus the Court may consider the opinion of the minor, whatever it may be if he is old enough to form an intelligent preference and in considering what is for the welfare of the minor the Court must have regard to his age, sex and religion and any existing or previous relations of the proposed guardian with the minor or his property. (*Pullan, J.*). NADIR MIRZA *v.* MUNNI BEGAM. **7 O. W. N. 950=A.I.R. 1930 Oudh 471.**

———Generally speaking a Court of justice is loath to take sides in a case between rival religions, and where a male child has been born and brought up in the faith of his father, he should not be handed over to his mother who has left that faith, and has thereby stepped outside the family in which

GUARDIANS AND WARDS ACT (1890), S. 17—Eligibility for appointment.

she was married, with certainty that the boy will be induced to leave the religion of his father for the new religion of the mother.

Where a child is born to a Shia Mahomedan and has been brought up in that faith by the father till his death, and has not lived for two years with his mother, she should not be allowed to come forward on the father's death and take away from the custody of his paternal grandfather the son, whom she had herself left with his father from the religion and surroundings in which he has so far been brought up. (*Pullan, J.*). NADIR MIRZA *v.* MUNNI BEGAM. **7 O.W.N. 950= A.I.R. 1930 Oudh 471.**

———*Adverse interests.*

The uncle of the minor applied for being appointed the guardian of his minor nephew in place of his mother and grandmother acting jointly. His application was granted by the District Judge in spite of the decision of his predecessor that the interests of the uncle were adverse to those of the minor. The reasons why the uncle's petition was granted were that after the appointment of the mother and the grandmother serious disputes arose between them, and the uncle.

Held, in appeal that the uncle could not be appointed guardian in view of the decision that his interests were adverse to those of the minor and his subsequent conduct. (*Jai Lal, J.*). ATAR KAUR *v.* SODHI SINGH. **98 I.C. 809=8 L.L.J. 201.**

———*Father as guardian.*

Where there was a maintenance order against the father, amount under which was long delayed and partly not paid and where the ward, a boy of 14, wanted to learn tailoring while the father wanted to put him to school.

Held, the father should not be appointed a guardian especially when he had re-married and divorced the ward's mother. (*Campbell, J.*). MT. MUKABAR *v.* KARIM BAKHSH. **75 I.C. 496= A.I.R. 1923 Lah. 283.**

———Where specific charges are made against a person which may make it necessary to call upon him to account to the estate of a minor, it is advisable not to appoint as guardian, any person on terms of friendship with such person. Nor is it advisable to appoint a person who does not understand the business of the estate. (*Kotval, A.J.C.*). MT. RAJRANI *v.* BHAGWANDAS. **69 I.C. 596= A.I.R. 1922 Nag. 232.**

—S. 17—Husband.

———*Minor wife repudiating marriage—Shia Law.*

The fact that the Court could not set aside an effective marriage would not debar the Court from deciding that no effective marriage had taken place.

Where the minor is a Shia girl who has been married to a Sunni, and who, on attaining the age of majority, has repudiated the marriage and served her husband with a notice of repudiation, it is not in the interest of the girl that she should be required to live with her husband until the matter is decided by a competent Court. (*Ashworth, J.*). MT. UMMATUL FATIMA *v.* ALI AKBAR. **95 I.C. 271=13 O.L.J. 735=3 O.W.N. 195= A.I.R. 1926 Oudh 521.**

—S. 17—Joint Hindu family.

———*Jurisdiction of Court with regard to.*

The jurisdiction of the Court of Chancery with regard to the persons and estates of infants, which descended to the Supreme Court of Calcutta and so to the High Court at Calcutta and so to the Allahabad High Court by virtue of Cl. (12), Letters Patent exists. But the High Court is reluctant to exercise the same in the case of a joint Hindu family as it is sanctioning a wholly new practice: 17 All. 529 and 2 A.L.J. 81, *Foll.*; 16 Bom. 634; 19 Bom. 96 and 25 Bom. 353, *Ref.* (*Boys and Iqbal Ahmed, JJ.*). *In the matter of* GOVIND PRASAD. **112 I.C. 873=50 All 709=26 A.L.J. 595= A.I.R. 1928 All. 709.**

GUARDIANS AND WARDS ACT (1890), S. 17—Personal law.

—S. 17—Minor's wish.

———*Inquiry from minor personally.*

Court is not bound to ascertain from the minor in person her wishes as to her guardianship and the proposal for her marriage, and therefore omission to do so is not a failure to exercise jurisdiction, under S. 115. C.P.C. (*Oldfield and Devadoss, JJ.*). KONTHALATHAMMAL *v.* THANGASWAMI PILLAI. **74 I.C. 896=46 Mad. 873=18 M.L.W. 256= 33 M.L.T. 80=1923 M.W.N. 902= A.I.R. 1924 Mad. 327=45 M.L.J. 481.**

—S. 17—Mother.

———*Immorality—Wasting minor's property.*

Where the minor's mother had in the past been immoral and had spent the minor's money in wandering about the country to get away from her village for her delivery of an illegitimate child, and it was found that she had been mismanaging and wasting, the minor's estate,

Held, the Court was clearly right in not entrusting the further custody of her minor son's property to her (*Prideaux, A.J.C.*). MT. TULSAI *v.* MT. TULSAI. **75 I.C. 592=A.I.R. 1924 Nag. 141.**

———*Preferential claim.*

Where the mother is herself willing to be appointed guardian and it is not found that she has unfitted herself by her character and capacity or by her previous relations with the minor's property, to be the guardian of that property, or that her appointment will not be justified in the interest of the minor, she should be appointed guardian of the property of the minors. (*Kotval, A.J.C.*). MT. LAXMIBAI *v.* ABDUL QADIR. **68 I.C. 474=A.I.R. 1923 Nag. 129.**

—S. 17—Near relation.

———*Minor's welfare—Sole consideration.*

In appointing a guardian for the property of a minor, the Court has to decide first whether the appointment of a guardian is necessary and, having decided that it is, it has to select from among those who are willing to act, the person who is most likely to manage the property best, and the decision of both points depends solely, as is laid down in Ss. 7 and 17, on what is for the minor's welfare. Nearness of kin comes into consideration only because a person nearly related to the minor is likely to look after his interests better and more keenly than a more distant relative. The wishes of the persons connected most nearly with the minor that a certain person should be appointed to look after his property can only be taken into consideration as evidence that that person will probably be the best manager of it. (*Hallifax and Kinkhede, A. J. Cs.*). MT. SHANTABAI *v.* GUNWANT RAO. **109 I.C. 383= A.I.R. 1928 Nag. 209.**

—S. 17—Personal law.

———*Whether can be disregarded.*

The major married sister of a minor Muhammadan girl and the sister's husband applied for the removal of the guardian of the minor and for the appointment of either or both of them as the guardian. The lower Court, holding that the sister

GUARDIANS AND WARDS ACT (1890), S. 17—'Relation.'

could not be guardian according to Muhammadan Law as, her husband was not related to the minor within the prohibited degrees, did not consider at all the fitness or otherwise of the guardian sought to be removed.

Held, that though the Court should act consistently with the personal law of the minors, yet in the present case, if it were impossible to discover any suitable guardian in case of the present guardian being unfit, the powers of the Court would not be circumscribed by the tenets of the Muhammadan Law. (*Dalal, J. C.*). GUNNA *v.* DARGAHI. **85 I.C. 624=28 O.C. 172= A.I.R. 1925 Oudh 623.**

—S. 17—'Relation.'

———In S. 17 (2) 'relation' does not mean relationship. (*Adami and Sen, JJ.*). MONOMOHINI DASI *v.* HARI PRASAD. **94 I.C. 808=4 Pat. 109= A.I.R. 1925 Pat. 444.**

—S. 17—Welfare of minor.

———*Considerations of.*

The circumstances that the mother of the minor girl has been forced to leave the house of the person claiming guardianship, that there has been litigation between them, that the person claiming guardianship is the legal heir of the minor girl and that the minor girl wishes to remain with the person who helped her mother and for whom she has life-long affection, make it desirable that girl should remain in the custody of the person with whom she has so long stayed. (*Mears, C.J. and Bennet, J.*). SAYIDUDDIN *v.* ABDUL BARI. **A.I.R. 1929 All. 857.**

———*Ties of affection—Religion.*

In considering the matter from the point of view of the welfare of the minor the Court should with advantage look to the circumstances which may possibly stand in the way of the child being properly looked after. The first and paramount consideration of the Court is the welfare of the child which is not to be measured by money only or by physical comfort only but is to be taken in its widest sense. The moral and religious welfare of the child must be considered, as well as its physical well being, nor are the ties of affection to be dis regarded though they are not conclusive. (*Mukerji and Graham, JJ.*). V. J. WALTER *v.* M. J. WALTER. **111 I. C. 543=55 Cal. 730= A.I.R. 1928 Cal. 600.**

———Court passing an order appointing a guardian of a minor should not solely base his order upon who is entitled to be guardian under personal law of the minor, but the Court has also to consider the welfare of the minor. (*Scott-Smith, J.*). MT. ZAINAB BIBI *v.* ABDUL KARIM. **89 I. C. 865= A.I.R. 1926 Lah. 117.**

———*Ties of affection—Religion.*

The word welfare must be taken in its widest sense. The moral and the religious welfare must be considered as well as the child's physical well-being and due regard must be had to the ties of affection. (*Venkatasubba Rao, J.*). SARASWATHI AMMAL *v.* DANAKOTI AMMAL. **85 I.C. 840= 1924 M.W.N. 870=20 M L.W. 902= 48 Mad 299=26 Cr. L. J. 616= A.I.R. 1924 Mad. 873= 47 M.L.J. 614.**

———*Presumptive heir of minor not suitable.*

In case of claims of distant relations there is no question of preference other than what arises from a consideration of the minor's welfare which is made the paramount consideration under S. 17 (1) and (2). The presumptive heir to the property of a minor is not a suitable person to be appointed guardian of his person, as such a person stands to gain by the minor's death. (*Spencer and Venkatasubba Rao, JJ.*). NARASAYYA *v.* VENKATAPPA. **71 I.C. 298=17 M.L.W. 92=1923 M.W.N. 12= A.I.R. 1923 Mad. 359=44 M.L.J. 62.**

GUARDIANS AND WARDS ACT (1890), S. 19—Appointment of father.

———*Adoptive parents.*

The main question for the Court in matters of guardianship is the welfare of the child and the Court need not assign the personal guardianship of the child to the person, who in other respects has the best title to be the guardian.

If the residence of a minor with the adoptive parents was a part of the consideration for their adoption of a son, they are the proper guardians unless serious ill-treatment or incompetency on their part is proved (*Ashworth, J.C.*). MT. GANGA JOTI *v.* DIP NARAIN. **68 I.C. 553= 9 O.L.J. 325=A.I.R. 1922 Oudh 129.**

—S. 17—Young step-mother.

———It is not an inflexible rule of law that a pardanashin lady should not be appointed guardian of the property and person of a minor. But each case must obviously depend upon its circumstances.

A died leaving behind him considerable property, his minor children, his widow and a cousin brother. The widow was young and inexperienced and ill-treated her step-children, the minors. She could not manage the property satisfactorily. On the other hand, the cousin of the deceased was on good terms with the deceased, who in his last days had entrusted the management of his property to him.

Held, that there was necessity for the appointment of a guardian and that the cousin of the deceased is a suitable person to be so appointed in preference to the step-mother: 42 Cal. 953; 62 P.L.R. 1913; 60 P.W.R. 1913 and 17 C. L. J. 405, *Dist.* (*Bhide, J.*). CHANDRAWATI *v.* JAGAN NATH SINGH. **111 I.C. 208=A.I.R. 1928 Lah. 941.**

—S. 19—Appointment of father.

———What is meant by S. 19 is that where the father of the minor is living and is not incompetent to be the guardian of the person of the minor, no other person shall be appointed as guardian of the person of such minor. It does not restrict the right of the father though he is the natural guardian under the personal law of the minor, to apply to be appointed guardian under the Act. Such appointment may confer on him higher rights than what he possesses as the natural guardian and in dealing with the outer world the certificate granted by the Judge confers a greater importance on his powers than what he possesses as the natural guardian: A.I.R. 1922 Bom. 405, *Diss. from.* (*Suhrawardy and Graham, JJ.*). KAMINI MAYI DEBI *v.* BHUSAN CHANDRA GHOSE. **97 I.C. 692= 44 C.L.J. 40=A.I.R. 1926 Cal. 1193.**

———*Order directing child to be returned to father.*

The prohibition in S. 19 cannot be held to apply only to persons other than the husband in Cl. (*a*) and father in Cl. (*b*) So a father cannot apply to be appointed guardian of his minor child. But there is no objection to an order directing the return of the child to the father if the case is otherwise a fit one for such order. (*Ramesam and Jackson, JJ.*). LAKSHAMA REDDI *v.* ALLAVIRA REDDI. **86 I. C. 957=23 M.L.W. 213= A.I.R. 1925 Mad. 1085.**

———*Father can be declared guardian.*

Section 19 means that if a third party applies he shall not be appointed or declared a guardian of the

GUARDIANS AND WARDS ACT (1890), S. 19—Appointment of father.

person of a minor whose father is living and is not unfit. If the father is the applicant, the section has no application.

Per *Jackson, J.*—Under S. 19, the minor's father cannot be declared guardian. (*Venkatasubba Rao and Jackson, JJ.*). RAGHVAIYA *v.* M. LAKSHMIAH.
86 I.C. 640=21 M.L.W. 244=
A.I.R. 1925 Mad. 398=48 M.L.J. 179.

———*Proceedings under S.* 25.

The father cannot be appointed guardian by proceedings under the Guardians and Wards Act, but as a nturalguardian he can take proceedings under S. 25 of the Act: A.I.R. 1925 Oudh 282; 40 Bom 600; A.I.R. 1925 Oudh 257, *Ref.* (*Wazir Hasan, A.J.C.*). S. AHMAD AGHA *v.* ZOHRA BEGAM. **87 I.C. 1024=**
12 O.L.J. 441=2 O. W. N. 242=
A. I. R. 1925 Oudh 421.

———*Obiter*—A father cannot be appointed guardian of the person of a minor under the Act. He is the natural guardian of the son. (*Dalal, J. C.*). MT. CHANDRA KUAR *v.* CHOTEY LAL.
80 I. C. 330= A. I.R. 1925 Oudh 282.

———A father cannot be appointed a guardian because he is the natural lawful guardian and nothing can take that from him. (*Walsh, Ag. C.J. and Neave, J.*). SUKHDEO RAI *v.* RAM CHANDER.
83 I C. 24=5 L.R.A. Civ. 417=
22 A. L. J. 680=46 All. 706=
A.I.R. 1924 All. 622.

———A father cannot be appointed guardian under the Guardians and WardsAct. The Court is not authorized to appoint or declare a guardian of the person of a minor whose father is living, unless that father is unfit to be guardian. An application by the father himself is not intended to be excepted from the provisions of this section. (*Brown, A.J. C.*). RAMJAN KHAN *v.* MARIAN BIBI.
72 I.C. 200=4 U.B.R. 146=
A.I.R. 1923 Rang. 120.

———*Custody of minor son — Application under S.* 25.

An application under the Guardians and Wards Act made by the father to be appointed guardian of the person of his minor son living with his mother and to have his custody, presumably, under S. 19, is not competent; he. being the natural guardian, can apply under S. 25 for the minor's return to his custody. (*Macleod, C. J. and Shah, J.*). BAI TARA *v.* MOHANLAL LALLUBHAI. **68 I. C. 518=**
24 Bom.L.R. 779=A. I. R. 1922 Bom. 405.

—S. 19—Appointment of Husband.

———*Application under S.* 25.

Where a husband applies to be declared as the guardian of person of his wife for custody of her person, no declaration of guardianship can be made under S. 19, even though the Court holds that the husband is not unfit to be the guardian of his wife. The proper course for the applicant, in such case, is to make an application under S. 25, A.I.R. 1922 Bom. 405; A.I.R. 1926 Bom. 228; A.I.R. 1914 P. C. 41, *Ref.* (*Kemp, Ag. C. J. and Murphy, J.*). MANIBAI HEMRAJ *v.* MAGANLAL VITHALDAS. **32 Bom. L. R. 386=**
A.I.R. 1930 Bom. 239.

———Section 19 (a) prohibits the Court from appointing a guardian of the person of a minor girl who is married and whose husband is not, in the opinion of the Court, unfit to be the guardian of her person. (*Martineau, J.*). BALLU MAL *v.* HARDAWARI MAL. **79 I.C. 451=6 L L.J. 219=**
A.I.R. 1924 Lah. 570.

GUARDIANS AND WARDS ACT (1890), S. 19—Father as guardian.

—S. 19—Delegation of power by father.

———*Father entrusting the custody of his minor son to a friend by agreement—Such arrangement does not amount to adoption among Muhammadans—Father can revoke the agreement and apply for guardianship.*

Father is the natural guardian; he cannot divest himself of that duty, or substitute another in his place. His duty is in the nature of a sacred trust. He may in the exercise of his discretion delegate his authority to another, such as a tutor or a schoolmaster or a friend and entrust the education and custody of his children to that other on such terms as he seems fit, but such delegation is revocable.

There is no such thing as adoption among Muhammadans and an arrangement of this kind is clearly revocable. (*Walsh and Pullan, JJ.*). NAZIR KHAN *v.* GANESH. **96 I.C. 617=**
A.I.R. 1926 All. 687.

—S. 19—Father as guardian.

———*Father has inalienable right to the custody of his child.*

A father is not only the natural guardian but has an inalienable right over his child unless there are overwhelming circumstances to the contrary: *Re Thain, Thain* v. *Taylor*, (1926) Ch. 676, *Foll.* (*Walsh, Ag. C. J. and Banerji, J.*). ABDUL AZIZ KHAN *v.* NANHE KHAN. **101 I.C. 529=**
49 All. 332=25 A.L.J. 248=
A.I.R. 1927 All. 458.

———Father applied to be appointed guardian of his minor son for the purpose of withdrawing certain deposit from a bank in the name of the minor. The money was deposited in the name of grandfather of the minor and the minor and was payable to either or survivor. Maternal uncle of the minor contested the application on the ground thatth deposit receipt was entered in his name,

Held, that *prima facie* as the receipt was payabl to either or survivor on the death of the grandfather, the legal interest would pass to the minor, but at any rate it was obviously for the welfare of the minor that he should not be compelled to bring a suit as regards this deposit receipt and it should be left to the parties to establish their title to this receipt in a civil suit. It is not necessary to decide to whom this deposit receipt really belonged.

Held, further that the father should be appointed guardian after furnishing necessary security. (*Dalip Singh, J.*). MIRI MAL *v.* KANSHI PRASAD.
93 I.C. 328=27 P.L.R. 158.

———*Father can't be appointed guardian of minor's person.*

The first right to the guardianship and the custody of a minor boy is in the father, he being his natural guardian.

The S. 19 (b) of the Guardians and Wards Act deprives a Court of jurisdiction under the Act to appoint or declare a father of minor to be the guardian of his person. (*Shadi Lal, C.J. and Le Rossignol, JJ.*). MT. TAJ BEGUM *v.* GULAM RASUL. **83 I.C 308=6 L.L.J. 597=26 P.L.R. 12=**
A.I.R. 1925 Lah. 250.

———Where there was a maintenance order against the father, amount under which was long delayed and partly not paid and where the ward, a boy of 14 wanted to learn tailoring while the father wanted to put him to school.

Held, the father should not be appointed a guardian especially when he had re-married and divorced the ward's mother. (*Campbell, J.*). MT. MUKABAR *v.* KARIM BAKSH. **75 I. C. 496=**
A. I. R. 1923 Lah. 283.

GUARDIANS AND WARDS ACT (1890), S. 19—Joint Hindu family.

———The father is exclusively entitled to be the guardian. The words of S. 19 so far from being subject to the provisions of S. 17 expressly override them. No other view of the meaning of S. 19 is possible : 38 M. 807 (P.C.), *Ref.* (*Batten, J.C. and Hallifax, A.J.C.*). DHAN KUMARI DEBI *v.* THAKUR MAHENDRA SINGH. **71 I.C. 443= 19 N.L.R. 45=6 N.L.J. 111=A.I.R. 1923 Nag. 199.**

—S. 19—Joint Hindu family.

———No guardian in respect of the minor's interest in the property of an undivided Hindu *Mitakshara* family should be appointed : 25 All. 407, *Rel. on.* (*Lindsay and Sulaiman, JJ.*). RATTAN CHAND *v.* RAMKISHAN MURARJI.

114 I.C 743=26 A.L.J. 777= A. I. R. 1928 All. 447.

———*High Court—General jurisdiction of.*

Where the father applied to be appointed a guardian of a minor member of a joint *Mitakshara* family.

Held, under its general jurisdiction and apart from the Guardians and Wards Act, the High Court had power to appoint a guardian of the property of a minor who was a member of a joint Hindu family and where the minor's property was an undivided share in the family property. (*Greaves, J.*). HARI NARAIN DAS (AN INFANT), *In re.* **74 I.C. 244=50 Cal. 141= A.I.R. 1923 Cal. 409.**

—S. 19—Mother and father.

———The principle underlying Cl. (*b*) of S. 19, applies to a mother as well as to a father, though with less force. (*Baker and Hallifax, A.J.Cs.*). MT. SUMITRI BAI *v.* MT. SUBHADRA BAI.

75 I.C. 564=A.I.R. 1924 Nag. 178.

—S. 19—Removal of father.

———Although in general, parents are entrusted with the custody and education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education in literature and morals and religion and they will be treated with kindness and affection. But whenever the presumption is removed, whenever (for example) it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children; or he is in constant habit of drunkenness and blasphemy or low and gross debauchery; or he professes atheistical or irreligious principles ; or that his domestic associations are such as tend to the corruption and contamination of his children ; or that he otherwise acts in a manner injurious to the morals or interests of his children ; in every such case the Court will interfere and deprive him of the custody of his children, and appoint a suitable person to act as guardian and take care of them and to superintend their education. (*Mukerji and Graham, JJ.*). V. J. WALTER *v.* M. J. WALTER.

111 I.C. 543=55 Cal. 730=A I.R. 1928 Cal. 600.

———Without a finding that the father is unfit, the law forbids the appointment or declaration of any other person to be guardian. In such cases the welfare of the minors is the main consideration. (*Coldstream, J.*). FAKHRUDDIN *v.* MT. BIRO.

95 I.C. 558=27 P.L.R. 330=A.I.R. 1926 Lah. 393.

———When the child is in the actual custody of the father, the custody cannot be disturbed in appeal from an illegal order, under S. 25 granting custody of the child to the father. (*Dalal, J.C.*). MT. CHANDRA KUAR *v.* CHOTEY LAL. **80 I.C. 330= A.I.R. 1925 Oudh 282.**

GUARDIANS AND WARDS ACT (1890), S. 24—Conditions in certificate.

———Any friend of a minor may approach the Court in the case of the minor being ill-treated and invoke the protection of the Court on behalf of the minor. But it is another question altogether if an outsider invokes the protection of the Court for a minor who is in the lawful custody of her father, unless the applicant can satisfy the Court that it is for the welfare of the minor that an order should be made against the father. Where a stranger, the spiritual head of the community made an application to deprive the father of the custody and the natural guardianship of the minor girl, on the ground that she was about to be married at the early age of four which would expose her to the risk of premature widowhood, and that the father was about to sacrifice his daughter's interests by resorting to the practice of *Sata* marriages with a view to secure a bride for himself,

Held, general considerations of that character, which are not opposed to the practice of the community to which the parties belong, cannot be ordinarily accepted as a sufficient ground for depriving the father of such rights as he has to look after the welfare of his minor children. (*Macleod, C. J. and Shah, J.*). KESHAV LAL MAGANLAL TRIVEDI *v.* AMBALAL VENIRAM. **64 I.C. 576= 46 Bom. 415=23 Bom. L.R. 1225= A.I.R. 1922 Bom. 278.**

—S. 20—Setting up adverse title.

———A person in a fiduciary position cannot, without taking his discharge and giving up possession, set up as against the *cestui que* trust his paramount title or the paramount title of a third person. This rule is of universal application and is without any exception whatever. *Attorney-General* v. *Munro*, 64 E. R. 73, *Ref.* (*Das and Ross, JJ*). SHAIKH ABDUL RAHIM *v.* MT. BARIRA. **61 I.C. 807= 2 Pat. L.T. 556=6 P.L.J. 273= A.I.R. 1921 Pat. 166.**

—S. 22—Allowance after removal.

———The District Judge's order granting special allowance to a guardian on his removal, for services rendered to the estate, is not appealable nor open to revision. Section 22 of the Guardians and Wards Act empowers a District Judge to grant a special allowance to the guardian. (*Wazir Hasan, A. J. C.*). SURAJ NARAYAN SINGH *v.* BISHAMBHAR NATH BHAN. **78 I.C. 138=A.I.R. 1925 Oudh 260.**

—S. 23—Sale of property.

———*Setting aside.*

Where the Collector as guardian obtained the sanction of the Commissioner, his superior officer, to the sale of his ward's property and when his action was challenged in the High Court, an application to remove him was dismissed and the sale was confirmed by the Court, it is quite impossible for the minor after attaining majority to attempt to set aside the transaction. (*Macleod, C. J. and Coyajee, J.*). ABHBRAJ UMARKHAN MALEK *v.* DOLATSINGJI DESAI. **96 I.C. 17= 28 Bom. L.R. 628.**

—S. 24—Conditions in certificate.

———*Ward, marriage of—Leave of Court, condition as to.*

A person who accepts to act as a certificated guardian impliedly undertakes to have custody of an infant entrusted on terms imposed on him by the Court. So long as he retains such custody and has not restored the custody of the infant, he cannot assert any rights which he may have unde the ordinary law and is bound to carry out th orders of the Court. If one of the condition

GUARDIANS AND WARDS ACT (1890), S. 24—Marriage of minor.

mentioned in the certificate issued to guardian is that he shall not marry the infant without the leave of the Court, he is bound by that condition. (*Rupchand Bilaram and DeSouza, A.J.Cs.*) PREMJI KANJI *v.* MT. JEEVIBAI. **108 I C. 668= 23 S.L.R. 75= A.I.R. 1928 Sind 129.**

—S. 24—Marriage of minor.

———Where the Court sanctioned the marriage of a minor boy aged 12 to a girl aged 10 and the grounds alleged were that the boy who was himself very rich was likely to get a very rich father-in-law, that the boy was grown up and desired his marriage and it was also said that because the Sarda Act which would take effect soon was likely to postpone the marriage for a long time it was better to have the marriage celebrated, so that the boy might avoid the temptations of a dissolute life.

Held, that the welfare of the minor was the only test in such a case and that the grounds set out would not be a justification for sanctioning the marriage of such a young boy.

Held, also that it was not in the province of the Judge to set at naught the principle underlying the Sarda Act or to teach others to flout it. (*Venkatasubba Rao and Madhavan Nair, JJ.*). VENKATARAJU *v.* SUBBARAO. **1930 M.W.N. 57.**

———*Sanction of Court.*

The guardian for marriage of the infant, who may have negotiated for the marriage, must apply to the District Judge for his sanction. Notice of the application should be given to the infant, to the guardian of person if he happens to be different from the guardian for marriage, and also to such relations of the minor as the Judge may deem necessary. He will then consider the objections and suggestions, if any and then determine whether the proposal of the guardian for marriage is for the true welfare of the minor or whether the marriage is unsuitable by reason of incongruity of age, inequality of rank and fortune or any like reason. If, on the materials before the District Judge, he is satisfied that the marriage is not unsuitable, he will sanction it : 42 Cal. 351, *Rel. on.* (*Rupchand Bilaram and DeSouza, A. J. Cs.*). PREMJI KANJI *v.* MT. JEEWIBAI. **108 I.C. 668=23 S.L.R. 75= A.I.R. 1928 Sind 129.**

———*Injunction.*

Where on the day on which an application for the removal of a guardian was dismissed, the Court on an oral application, made an order granting a permanent injunction restraining certain four persons, without notice to the persons concerned, from taking steps towards the minor's marriage against the wishes of the guardian sought to be removed.

Held, that the order was without jurisdiction and must be set aside in revision. (*Oldfield and Devadoss, JJ.*). KONTHALATHAMMAL *v.* THANGASWAMI PILLAI. **74 I.C. 836=46 Mad. 873= 18 M.L.W. 256=33 M. L. T. 80= 1923 M.W.N. 902=A.I.R. 1924 Mad. 327= 45 M.L.J. 431.**

———Sanction by the Court to the marriage of the minor on the application of the certificated guardian of the minor should not be refused simply on the opposition of a relative without dealing with the guardian's proposal on the merits. (*Macleod, C. J. and Shah, J.*). GANU GOPAL SONAR *v.* DATTATRAYA LAXMAN POTDAR. **75 I.C. 128= 24 Bom. L.R. 845=A. I. R. 1922 Bom. 335.**

GUARDIANS AND WARDS ACT (1890), S. 25—Father's application for custody.

—S. 25—Certificate of guardianship.

———*Obiter*—A certificate of guardianship is a preliminary necessity for obtaining custody of an infant. (*Dalal, J.C.*). MT. CHANDRA KUAR *v.* CHOTEY LAL. **80 I.C. 330= A. I. R. 1925 Oudh 282.**

—S. 25—Constructive custody of guardian.

———Even where the minor has never been in the custody of the guardian, in order to make the Act workable, a fiction must be imported into S. 25, whereby it is deemed that the child has been constructively in the guardian's custody and has left it. (*Waller and Cornish, JJ.*). TOTAMMA *v.* MARINA VEERAJU. **A.I.R. 1930 Mad. 19.**

———Where the child was in the custody of the applicant's (father) father-in-law, and the applicant sought to obtain custody of the child,

Held, that the section applies on the footing that although the lawful guardian did not have previously actual physical custody it should be deemed that the minor at the time of leaving or removal was constructively in that guardian's custody and therefore he could enforce his rights under the section. (*Venkatasubba Rao and Jackson, JJ*). RAGHAVAYYA *v.* LAKSHMIAH. **86 I. C. 640= 21 M.L.W. 244=A.I.R. 1925 Mad. 398= 48 M L.J. 179.**

—S. 25—Divorced mother.

———A woman who has been divorced and has married a second husband, is not a person better suited to have the custody of the minor child than the father, however unsuitable the father may be, and is not a person who ought to be heard to say that the father is unsuitable. She loses the right to assert a claim against the father for the child. (*Walsh and Banerji, JJ.*). MT. ULFAT BIBI *v.* BAFATI. **102 I.C. 103=49 All. 773= 25 A.L.J. 585=A.I.R. 1927 All. 581.**

—S. 25—Exercise of powers.

———In order to take action under S. 25 it is immaterial whether the minors are removed forcibly or whether they left the guardian's custody of their own accord. (*Tek Chand, J.*). AMIR KHAN *v.* TALEB MAHOMED. **100 I. C. 807= A. I. R. 1927 Lah. 266.**

—S. 25—Father.

———When the child is in the actual custody of the father, the custody cannot be disturbed in appeal from an illegal order under S. 25 granting custody of the child to the father. (*Dalal, J. C.*). MT. CHANDRA KUAR *v.* CHOTEY LAL. **80 I. C. 330=A.I.R. 1925 Oudh 282.**

—S. 25—Father, right of, to proceed under section.

———The father cannot be appointed guardian by proceedings under the Guardians and Wards Act, but as a natural guardian he can take proceedings under S. 25 of the Act: A.I.R. 1925 Oudh 282, 40 Bom. 600; A.I.R. 1925 Oudh 257, *Ref.* (*Wazir Hasan, A.J.C.*). S. AHMED AGHA *v.* ZOPRA BEGAM. **87 I. C. 1024=12 O.L.J. 448=2 O.W.N. 242= A.I.R. 1925 Oudh 421.**

—S. 25—Father's application for custody.

———*Muhammadan law.*

Though, according to the Muhammadan Law, the mother is the guardian of her minor son below 7 years of age, and so an application by the father for the custody of a child aged less than 7 at the time of the application would be incompetent, nevertheless, if during the course of the proceedings, the infant has attained 7 years of age, it is open to the father to continue the application.

GUARDIANS AND WARDS ACT (1890), S. 25—Father's application for custody.

The only remedy of a father for the custody of his minor son is by an application under S. 25: 42 M. 647; 38 M. 807 (P. C.), *Rel. on.* The words "removed from his custody" should receive a liberal construction as including removal from constructive custody. A refusal to deliver a minor to his natural guardian when asked to do so by the latter amounts in effect to removal from his custody. (*Rupchand Bilaram and Wild, A. J. Cs.*). ALUM KHATOON *v.* ABDULLA GUL MAHOMED.
124 I.C. 381 (Sind).

——*Immoral father.*

An immoral father has not the same right to the custody of his children as a moral man: A. I. R. 1924 All. 622, *Not appr.* (*Madhavan Nair and Thiruvenkatachariar, JJ.*). ATCHAYYA *v.* KOSARAJU NARAHARI. **120 I. C. 747= A. I. R. 1929 Mad. 81.**

——Where the father is content to allow another relation to take over and bear the burden of the maintenance and the education of his children for many years, and where during this period he is leading an immoral life, to take these children from the environment in which they were living and place them in their father's house would amount to little more than an act of gross cruelty, and the father should not be allowed to revoke the authority which was given to the relation to have the custody of his children: A.I.R. 1914 P.C. 41, *Rel. on*; A.I.R. 1924 All. 622, *Diss. from.* (*Findlay, J.C.*). BALDEO PRASAD *v.* DHAMARAM.
103 I.C. 361=A.I.R. 1927 Nag. 314.

——*Obiter.*—A father cannot apply under the provisions of S. 25 of the Act for the custody of his infant son. His remedy is by way of suit. (*Dalal, J.C.*). MT. CHANDRA KUAR *v.* CHOTEY LAL.
80 I.C. 330=A.I.R. 1925 Oudh 282.

——Neither the fact that the child has never been actually in the custody of the father nor the fact that the father has never been appointed guardian of the child by an order of the Court prevents the application of S. 25. An order appointing a father guardian of his child under the Guardians and Wards Act would be wholly *ultra vires.* (*Wazir Hasan, A.J.C.*). CHHOTE LAL v. CHANDRA KUNWAR. **80 I.C. 71=11 O.L.J. 537= A.I.R. 1925 Oudh 257.**

——The decision of the question whether it would be for thewelfare of the child to return to the custody of its guardian depends entirely on the circumstances of each case. When the guardian of the person of a ward applies for the custody of the ward, he is only asking the Court to help him to discharge the duty cast on him by law with reference to his ward and it is for those who oppose such an application to make out that the welfare of the ward will be better served by its being kept out of the custody of its guardian and retained in the custody of the person against whom the application is made. This onus is especially heavy when the guardian is the father of the child.

A child of four years was brought up from its birth by its maternal grand-parents. The father applied to recover custody of the child's person. The maternal grandfather opposed the application on the grounds that (1) the application was made through spite and was not *bona fide*, inasmuch as the father was led to make it because of the grandfather's threatening to sue him for partition of the child's property which the father was wasting; (2) that the father had ill-treated the child's mother before her death and had married a second wife; and (3) that as the child was brought up from its birth by its maternal grandmother, it would be cruel to remove him from her,

Held, that none of these grounds, even if true, would be sufficient to deprive the father of the custody of his child. Even considering the matter entirely from the point of view of the welfare of the minor, it could not be to the minor's welfare to estrange him from his father at this tender age: A. I. R. 1914 P. C. 41; 28 M. L. J. 442; A. I. R. 1924 Mad. 45; A. I. R. 1924 All. 622; 29 M. L. J. 442 and 29 All. 210, *Rel. on*; 22 M. L. J. 247, *Dist.* (*Madhavan Nair and Thiruvenkatachariar, JJ.*). ATCHAYYA *v.* KASARAJU NARAHARI.
120 I.C. 747=A.I.R. 1929 Mad. 81.

——What a Court has to look to on applications under Habeas Corpus is the interest of the child as being paramount.

A father made an application for a writ of Habeas Corpus directing that the custody of his son aged about 7 or 8 should be delivered to him. There was nobody in his house to look after the child of such tender age, he himself being a driver of motor car,

Held, that the High Court should not interfere and the proper course for the father would be to set the Court in motion locally under S. 25, Guardians and Wards Act. (*Coutts-Trotter, C.J., Madhavan Nair and Jackson, JJ.*). SHAIK MOIDIN *v.* KUNHADEVI. **2 M. Cr. C. 58= A.I.R. 1929 Mad. 33 (F.B.).**

——A natural and a legal guardian is not ordinarily entitled to divest himself of the responsibility imposed upon him by law and to transfer it to another person, and if he has transferred such liability to another person, there is nothing to debar him to revoke such transfer unless the Court is satisfied that by his conduct he has debarred himself from revoking such authority and such conduct must have a direct effect for the welfare of the minor: A.I.R. 1926 All. 687, *Appl.* (*Jai Lal, J.*). WAZIRKHAN *v.* ABDUL HAMID KHAN.
112 I.C. 693=A.I.R. 1928 Lah. 806.

——The prohibition in S. 19 cannot be held to apply only to persons other than the husband in Cl. (*a*) and father in Cl. (*b*). So a father cannot apply to be appointed guardian of his minor child. But there is no objection to an order directing the return of the child to the father if the case is otherwise a fit one for such order. (*Ramesam and Jackson, JJ.*). (VIYYURU) LAKSHAMA REDDY *v.* ALLA VIRA REDDI. **86 I.C. 957=23 M L.W. 213= A.I.R. 1925 Mad. 1085.**

——The father cannot be appointed guardian by proceedings under the Guardians and Wards Act, but as a natural guardian he can take proceedings under S. 25 of the Act: A.I.R. 1925 Oudh 282; 40 Bom. 600; A.I.R. 1925 Oudh 257, *Ref.* (*Wazir Hassan, A.J.C.*). S. AHMAD AGHA *alias* CHHOTEY SAHEB *v.* THE PERSON OF MT. ZOHRA BEGAM.
87 I.C. 1024=12 O.L.J. 441= 2 O.W.N. 242=A.I.R. 1925 Oudh 421.

——*Considerations to weigh with the Court.*

A father cannot be appointed guardian under the Guardians and Wards Act He can delegate the performance of the daily duties of looking after the child and for that purpose place the child under the custody of some one else. If he does so, it then becomes the question under S. 25 for the Court to decide when he applies for the restoration of the custody, whether it is for the welfare of the minor,

GUARDIANS AND WARDS ACT (1890), S. 25—Father's application for custody.

Where an application is made for the restoration of the custody of the child by the father the Court should see what is right over the child, rather than try to see what the character of the father is. Thus a quarrel with the mother of the boy or distrusting the mother's moral character are not sufficient to deprive him of the custody of the child. Nor the fact that he left the infant child (girl) of his in the charge of his wife's family relatives. (*Walsh, Ag. C.J. and Neave, J.*). SUKHDEO RAI *v.* RAM CHANDER. **83 I. C. 24=5 L.R.A. Civ. 417=22 A.L.J. 680=46 All. 706=A. I. R. 1924 All. 622.**

———Where the minor aged 4 years was in the custody of the mother, and the father and the mother were on bad terms and the father applied for removal of the minor from mother's custody and for appointment of himself or some other fit person as guardian,

Held, the petition should be treated as one under S. 25 and there was no reason why the petition should not be granted. (*Oldfield and Venkatasubba Rao, JJ.*). SATYANARAYANA VARAPRASADA RAO *v.* VENKATA LAKSHMI NARASAYAMMA. **73 I.C. 948=18 M.L.W. 173=1923 M.W.N. 668=A. I. R. 1924 Mad. 45.**

———In an application by a father to obtain custody of his minor son, the only question to be considered is whether it will be in the interests and welfare of the minor to return to the custody of the father : 38 Mad. 807, *Rel. on.* (*Macleod, C.J. and Shah, J.*). BAI TARA *v.* MOHANLAL LALLUBHAI. **68 I. C. 518=24 Bom. L.R. 779=A. I. R. 1922 Bom. 405.**

—S. 25—Guiding principles.

———An order under Cl. (1) of S. 25 cannot be made but "for the welfare of the minor" and in considering "what will be for the welfare of the minor" regard must be had to the age, sex and religion of the minor as laid down in Cl. (2), S. 17 of the Act : 12 All. 213, *Foll.* (*Zafar Ali, J.*). MT. LACHMI BAI *v.* DIWANCHAND. **107 I. C. 739 (Lah.).**

———Where a person has been duly appointed guardian of the person and property of a minor and no valid reason has been shown to change the guardianship of the minor, the order for minor's return should not be disturbed. (*Tek Chand, J.*). SANT SINGH *v.* LALCHAND. **106 I.C. 834 (Lah.).**

—S. 25—Habeas corpus.

———On an application by the *de jure* guardian for *habeas corpus* in respect of a child detained against its will the dominant question is what conduces to the interests and welfare of the infant and the Court must dispose of the application with reference to it. The moral, the religious and the physical welfare and the ties of affection as also the opinion of the child if it is capable of forming an intelligent opinion are to be taken into consideration. The opinion of the child is an important element and the degree of the child's mental development must to a certain extent weigh with the Court. The age of the infant is also an important factor. There is no inflexible rule in England that a boy over 14 and a girl over 16 will have the final voice and that the wishes of the infant have to be given effect to. Even if such a rule exists it is too artificial to be applicable in India. (*Venkatasubba Rao, J.*). SARASWATHI AMMAL *v.* DHANAKOTI AMMAL. **85 I.C. 840=1924 M.W.N. 870=20 M.L.W. 902=48 Mad. 299=26 Cr. L.J. 616=A.I.R. 1924 Mad. 873=47 M. L. J. 614.**

GUARDIANS AND WARDS ACT (1890), S. 27—Appointment of guardian as guardian ad litem.

—S. 25—Husband and wife.

———Where all the requirements of S. 25 are satisfied, the Court has jurisdiction to make an order; the Court cannot refuse to exercise jurisdiction because the husband, who has applied under S. 25 for the custody of his minor wife, has an alternative remedy, in that he can bring a regular suit : A. I. R. 1925 Oudh 282 and 40 Bom. 600, *Dist.* (*Barlee, A.J.C.*). KHETSI PACHAN MINDU *v.* DELA MEGHA MINDU. **121 I. C. 175=A.I.R. 1930 Sind 135.**

—S. 25—Interpretation.

———The expression "guardian" used in S. 25 was not confined to statutory guardians but includes the lawful guardian, such as the father, and the "custody" referred to in S. 25 includes both constructive as well as actual custody : 21 O. C. 194, *Foll.* (*Walsh and Banerji, JJ.*). MT. ULFAT BIBI *v.* BAFATI. **102 I. C. 103=49 All. 773=25 A.L.J. 585=A. I. R. 1927 All. 581.**

—S. 25—Jurisdiction.

———An application under S. 25 must be made to the Court where the minor ordinarily resides. (*Rutledge, C. J.*). MAUNG BA LHEN *v.* MA THAN KIN. **118 I.C. 415=A.I.R. 1929 Rang. 129.**

—S. 25—Prejudice to ward.

———Whether or not the ward has been prejudiced by the guardian's choice in applying for her custody under S. 25 is an irrelevant consideration where the Court has jurisdiction to make an order under S. 25 if it thinks it will be for the welfare of the ward to return to the custody of her guardian. (*Barlee, A.J.C.*). KHETSI PACHAN MINDU *v.* DELA MEGHA MINDU. **121 I.C. 175=A.I.R. 1930 Sind 135.**

—S. 25—Refusal of relief under section.

———The reason that the guardian is too weak to keep the minors is wholly insufficient to refuse relief under S. 25. It is the duty of the Courts to protect the weak against the high-handed acts of the strong and this duty has to be performed with greater vigilance when the aggrieved party is a duly constituted guardian appointed by the Court itself, and the victims are minors under its charge. (*Tek Chand, J.*). AMIR KHAN *v.* SALEH MAHOMED. **100 I. C. 807=A.I.R. 1927 Lah. 266.**

—S 25—Removal from custody.

———*Meaning.*

The refusal by a person to deliver back the child to its natural guardian when asked to do so by the latter, amounts in effect to a removal from his custody and he can, therefore, apply under S. 25 of the Act. (*Madhavan Nair and Thiruvenkatachariar, JJ.*). ATCHAYYA *v.* KOSARAJU NARAHARI. **120 I.C. 747=A.I.R. 1929 Mad. 81.**

—S. 26—Residence abroad.

———While, leave for permanent residence outside the jurisdiction of the Court may be granted for good and sufficient grounds and under sufficient safeguards, leave for the permanent residence of the child abroad and out of the Court's jurisdiction is not permitted except where it is manifestly advantageous to the child as regards health and the like. (*Mukerji and Graham, JJ.*). V. J. WALTER *v.* M. J. WALTER. **111 I. C. 543=55 Cal. 730=A. I. R. 1928 Cal. 600.**

—S. 27—Appointment of guardian as guardian ad litem.

———*Duty of guardian.*

Where the proposed guardian has been served with notice and objects to appear as such on behalf of the ward, the Court ought to appoint some other proper person to act as guardian.

GUARDIANS AND WARDS ACT (1890), S. 27—Appointment of guardian as guardian ad litem.

The Code of 1882 contains no provision similar to that found in O. 32, R. 4 (3) of the Code of 1908. In the absence of any such provision, where a person has voluntarily applied to be appointed guardian of the person and property of a minor under the provisions of the Guardians and Wards Act, he is bound to deal with the ward's property as if it were his own and to do everything which is reasonable and proper for the protection and benefit of the property entrusted to him. This obligation in fact arises under S. 27 of the Guardians and Wards Act. If therefore the Guardian has been served with notice of his appointment as guardian *ad litem* in a suit against his ward and chooses to take no steps to object to his appointment, the Court may well presume that he consents thereto, and the mere fact that he does not enter appearance or defend the action can afford no presumption that he repudiates liability. 30 I.A. 182; 30 Cal. 1021, *Foll.* The Court after satisfying itself of the fact of minority is bound to appoint a proper person to act on behalf of the minor in the conduct of the case, but, a defect in following the rules referred to in S. 443 is not necessarily fatal to the proceedings: 34 C.L.J. 302; 30 I.A. 182. (F.B.) 18 C. L. J. 18; 20 C.L.J. 469, *Dist.* (*Dawson Miller, C.J. and Foster, J.*). THAKUR TAJESHWAR DUTT *v.* LAKHAN PRASAD SINGH. **83 I.C. 290=2 Pat. 296=4 P.L.T. 127=1 Pat. L.R. 59=1923 P.H.C.C. 88=A.I. R. 1923 Pat. 231.**

—S. 28—Powers and duties.

———Once a person, natural guardian or a stranger is appointed guardian of a minor by order of the Court passed in accordance with the provisions of the Act as contained in Ss. 28 to 31, he is clothed with all the obligations imposed by that Act in dealing with the ward's property. It is not in his power to throw off those obligations by the exercise of his own volition and pose as a natural guardian and act in that status : 36 Mad. 295 (P.C.), *Rel. on.* Nor can an alienation by him be upheld, if it is made without the sanction of Court, on the ground that it was entered into as natural guardian and was for the benefit of the minor. (*Wazir Hasan and Neave, A.J.Cs.*). RAMESHWAR BAKSH SINGH *v.* MT. RIDH KUER. **87 I. C. 238=A.I.R. 1925 Oudh 633.**

—S. 28—Sale.

———A sale by a certificated guardian in contravention of Ss. 28 and 29 is voidable and not void. (*Das and Fazl Ali, JJ.*). GOBARDHAN LAL *v.* SHEO NARAYAN. **117 I.C. 161=8 Pat. 226=A.I.R. 1929 Pat. 202.**

—S. 29—Compliance.

———Civil P. C., O. 21, R. 83—Case coming under both provisions—Compliance under S. 29 is not rendered unnecessary : 23 Bom. 287 ; 31 All. 378, *Foll.* (*Mukerji and Cuming, JJ.*). VIJENDRA MOHAN SARMA *v.* MANORAMA DASI. **70 I.C. 990=49 Cal. 911=36 C.L.J. 326=28 C.W.N. 57=A.I.R. 1922 Cal. 150.**

—S. 29—Compromise.

———*Civil P. C., O. 32, R. 7—Guardian* ad litem.

The provisions of S. 29 of the Guardians and Wards Act and O. 32, R. 7, C. P. C. are two distinct provisions for the purpose of safeguarding a minor's interests under different contingencies. It is erroneous to set aside under S. 29, Guardians and Wards Act a compromise entered into by a guardian of minor appointed for the purposes of litigation, on the ground that no permission of the District Judge for the compromise had been obtained : 8 C. L. J. 266 and 35 C. L. J. 203, *Rel. on.* (*Fforde and Johnstone, JJ.*) CHET RAM *v.* BHIM SAIN. **122 I.C. 103=31 P.L.R. 131=A.I.R. 1930 Lah. 250.**

———*Court guardian.*

A Court guardian granted a lease of the minor's properties for a term of 7 years without obtaining the sanction of the Judge under S. 29 of the Act; but the lease was in accordance with a compromise entered into with the sanction of the Court,

Held, as the sanction of the compromise by the Court under O. 32, R. 7, C.P. Code, signified that the compromise was for the benefit of the minor, which is also what S. 29 of the Guardians and Wards Act signifies, the lease was valid. (*Stephen and Mullick, JJ.*). ABDUR RASHID *v.* SHEIKH KHANDKAR. **68 I.C. 997=35 C.L.J. 206.**

—S. 29—Conditions regarding alienation.

———*Conditions precedent and conditions subsequent.*

A distinction must be drawn between a condition precedent and a condition subsequent imposed on the guardian of a minor to transfer the minor's property. Non-compliance with a condition precedent will vitiate a transfer made by the guardian. But the same cannot be the effect of non-compliance with a condition subsequent unless there is something in the order granting permission to transfer the minor's property casting an obligation on the transferee of that property to do some act subsequent to the execution of the deed of transfer in his favour. The only duty cast upon the transferee by law is that he must satisfy himself that the order sanctioning the transfer has been strictly complied with by the guardian up to the time of the execution of the deed of transfer, and that no conditions precedent imposed by the order have been violated. If the conditions precedent have been complied with by the transferee in conformity with the permission granted by the District Judge, a good title will pass to the transferee, and the failure of the guardian to comply with the subsequent conditions cannot divest the title already vested in the transferee by the transfer: 26 C.W.N. 218; 3 A.L.J. 30, *Rel. on*; A.I.R. 1924 All. 474, *Dist.* (*Iqbal Ahmed and Kendall, JJ.*). SUBHAN ALI *v.* CHITTO. **102 I.C. 804=25 A.L.J. 725=A. I. R. 1927 All. 631.**

———*Non-compliance.*

Where the District Judge acting under the Guardian and Wards Act empowers the guardian to sell a property of the minors for an alleged debt of theirs and further directs him to put in the bonds after these have been satisfied and so endorsed by the creditor it does not follow that non-compliance with the latter direction vitiates the sale if actually carried out and the vendee has all along been in possession of the purchased property. Where the same property is held partly by adult co-sharers and partly by minors the very fact that the minor's share was sold for a price a little over that for which the shares of adult co-owners was sold goes to indicate the *bona fides* of the sales of the shares of the minors. (*Chitty and Richardson, JJ.*). DYAM KHAN *v.* SARAT CHANDRA DE. **95 I.C. 421=26 C. W. N. 218.**

—S. 29—Contract to sell.

———*Specific performance.*

Specific performance will not be granted where *de facto* guardian has entered into a contract with a third party for the sale of the minor's property. To direct the contract to be carried into effect a

GUARDIANS AND WARDS ACT (1890), S. 29— Duty of Court.

against the minors is to sanction a plain breach of trust on the part of *de facto* guardian: 45 C. 878, *Foll.* (*Das and Foster, JJ.*). ABDUL HAQ *v.* MOHAMMAD YEHIA KHAN. **78 I.C. 483= 4 P.L.T. 553= 2 Pat. L.R. Civ.181 = A.I.R. 1924 Pat. 81.**

—S. 29—Duty of Court.

———*Sanction of Court—Effect.*

It is the duty of the Court to which an application is made under S. 29 of the Act for sanction of the sale of a minor's property, to satisfy itself by enquiry that the transaction is necessary and is for the minor's benefit and a creditor is entitled to rely on an order of sanction as evidence that the Court has satisfied itself on this point and that the transaction is a proper one: A.I.R. 1922 Mad. 135, *Rel. on*; 11 Cal. 379 at 383, *Foll.* (*Daniels and Neave, JJ.*). BUDDHOO (ALIAS) GULAB DAS *v.* SHEO CHARAN, BHAGWAN DAS. **82 I.C. 328=22 A.L.J. 851= 5 L. R. A. Civ. 726=47 All. 8= A.I.R. 1924 All. 875.**

———*Sanction of Court—Effect.*

The Guardians and Wards Act throws the entire responsibility for granting permission to the guardian to do any of the acts mentioned in S 29 upon the Civil Court and therefore a due enquiry by the Civil Court must take place before the permission can be granted by it to the guardian to do any of those acts. Where therefore an order has been made authorising the guardian to raise a loan on the security of the infant's estate the lender of the money is entitled to trust that order, and he is not bound to inquire as to the expediency or necessity of the loan for the benefit of the infant's estate. If any fraud or underhand dealing is brought home to him that would be a different matter; but, apart from any charge of that kind, he is entitled to rest upon the order : 5 Cal. 363 and 11 Cal. 379 (P.C.), *Foll.*; A.I.R. 1922 Mad. 135, *Expl.*; 6 M.I.A. 393 (P.C.), *Ref.*

The view that the order of the District Judge affects no more than the question of *onus* of proof is not acceptable. (*Das and Allanson, JJ.*). MAHABIR DAS *v.* JAMUNA PRASAD. **112 I.C. 438=8 Pat. 48=9 P.L.T. 553= A. I. R. 1928 Pat. 543.**

—S. 29—Loans.

———*Minor's marriage.*

Where guardian is not required by the conditions of her appointment to take the leave of the Court for arranging a marriage of her ward and she celebrates the marriage and incurs a loan by charging the minor's property, she is entitled to have permission of the Court for arranging to re-pay the loan. (*Campbell, J.*). MT. NIHALI BAI *v.* THE CROWN. **97 I.C. 823=27 P.L.R. 292= A.I.R. 1926 Lah. 438.**

—S. 29—Loans in personal capacity.

———When certain items of consideration for a mortgage by the guardian of a minor with sanction of the Court under S. 29 represented loans previously advanced to the guardian on his own responsibility, but the Court sanctioned the mortgage with full knowledge of that fact, the mortgage is valid even as regards those items (*Venkatasubba Rao and Reilly, JJ.*). RAMAN *v.* TIRUGNANASAMBANDAM PILLAI. **99 I.C. 660=50 Mad. 217= 25 M.L.W. 25= A.I.R. 1927 Mad. 233= 51 M.L.J. 869.**

—S. 29—Mortgage and sale.

———*Power of private sale given to mortgagee—Validity.*

The permission to mortgage will not imply a permission to sell unless it is expressly conferred.

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And even when permission to sell is expressly conferred it is enacted by S. 31 of the Act that the Court may in its discretion attach to the permission any reasonable condition such as that the sale shall not be complete without the sanction of the Court or such other conditions as are enumerated in Cl. (3) of that section. Absolute power of sale without the intervention of the Court conferred on the mortgagee is invalid and of no effect so far as it affects the shares of the minors whose guardian has been appointed under S. 29 : 11 Cal. 379, *Foll.* (*DeSouza, A.J.C.*). ABDUL RAHIM *v.* ABDUL HUSSEIN. **106 I.C. 872= 22 S.L.R. 243=A.I.R. 1928 Sind 101.**

———There is no distinction of principle between a sale and a mortgage as to the granting of sanction. (*Venkatasubba Rao and Reilly, JJ.*). RAMAN *v.* TIRUGNANASAMBANDAM. **99 I.C. 660= 50 Mad. 217=25 M.L.W. 25= A.I.R. 1927 Mad. 233=51 M.L J. 869.**

—S. 29—Order of sanction.

———*Validity.*

Even where the Judge sanctioning an alienation does not recite the necessity specifically in his order of sanction, if the record shows that the affidavits or the petitions before him set out the necessity clearly and the says "sanction granted" or words to this effect, it can be presumed that he adopted the necessities and reasons and the sanction is valid. (*Venkatasubba Rao and Reilly, JJ.*). RAMAN *v.* TIRUGNANASAMBANDAM. **99 I.C. 660=50 Mad. 217=25 M.L.W. 25= A.I.R. 1927 Mad. 233=51 M.L.J. 869.**

—S. 29—Powers and duties of certificated guardian.

———*Speculative business—Starting of.*

The position of a certificated guardian is analogous to that of a trustee. The powers of a certificated guardian in respect of starting new and speculative business are not wider than those of a karta. He has no power to start an entirely new business of a risky character unless compelled by necessity and for protection and benefit of the family : A.I.R 1922 P.C. 237 and 20 C.W.N. 500, *Rel. on.* (*Sulaiman and Boys, JJ.*). RAM DIN *v.* MANSA RAM. **1929 A. L. J. 1140=51 All. 1027= A.I.R. 1929 All. 890.**

———*Building houses.*

The defendant who held the appointment of a guardian during the minority of the plaintiff by the will of the latter's adopted mother built two houses on the plaintiff's land with money taken out of the minor's funds and the rest was borrowed on the security of this very property. The plaintiff on attaining majority brought the suit against the defendant praying for a decree for settlement of accounts and possession of the land after demolition of the house. The trial Court while partly decreeing the plaintiff's suit ordered that the defendant should remain in possession of the houses and the site on which they stand for a period of 45 years and that he should pay a certain ground rent to the plaintiff,

Held, that the order of the trial Court which practically amounts to an enforced sale of the plaintiff's land to the defendant on the latter's paying to the former a small premium, is not equitable and therefore cannot stand. (*Broadway and Agha Haidar, JJ.*). THAKAR DAS *v.* NARAIN. **109 I.C. 165=9 L. L. J. 488= 29 P. L. R. 46=A.I.R. 1928 Lah. 90.**

GUARDIANS AND WARDS ACT (1890), S. 29—Rights of alienee.

—S. 29—Rights of alienee.

———When an order of the Court has been made authorizing the guardian of an infant to raise a loan on the security of the infant's estate, the lender of the money is entitled to trust to that order, and he is not bound to enquire as to the expediency or necessity of the loan for the benefit of the infant's estate, and where an alienation has been made with the sanction of the Court, the alienee can rely upon it and the alienation must be upheld unless the alienee has been a party to a fraud or collusion or has been guilty of any underhand dealing: 11 Cal. 379 (P.C.), *Foll.*; 5 Cal. 363, *Expl.*; A.I.R. 1922 Mad. 135, *Diss. from.* (*Venkatasubba Rao and Reilly, JJ.*). RAMAN *v.* TIRUGNANASAMBANDAM. **99 I.C. 660=50 Mad. 217=25 M.L.W. 25=A.I.R. 1927 Mad. 233=51 M. L. J. 869.**

—S. 29—Transfer, what is.

———*Surrender of ex-proprietary holding—Sanction of Court.*

As an ex-proprietary tenant cannot transfer his ex-proprietary holding, the surrender by him of such holding is not a transfer within the meaning of S. 29 of the Guardians and Wards Act, so as to require the previous permission of the District Judge by a guardian to surrender such a holding of his ward. (*Iqbal Ahmad, J.*). BALWANT SINGH *v.* HARDEEN. **101 I. C. 804=8 L.R.A. Rev. 158=A.I.R. 1927 All. 546.**

—S. 30—Alienation in contravention.

———Alienation of the property of a minor by his guardian in contravention of the directions contained in the order of the Court sanctioning the alienation is not protected by the sanction. (*Mukerjee, J.*). MANGAL KURMI *v.* SHEO SARAN. **98 I.C. 500 (All.).**

———Mortgage in contravention of order of district Judge is voidable by minor. Minor is not also affected by a decree on the mortgage against him with a guardian whose interest is adverse. Sanction for usufructuary mortgage does not include one for simple mortgage. (*Daniels and Dalal, JJ.*). CHIRANJI LAL *v.* SAYED ILIAS ALI. **79 I.C. 556=46 All. 620=22 A.L.J. 493=5 L.R.A. Civ. 360=A.I.R. 1924 All. 751.**

—S. 30—Alienation without sanction.

———Where a person purchased property from a guardian but it appeared that the sanction of the Court had not been obtained and the guardian effected a second sale in favour of another person who sued to recover possession,

Held, that the Court could grant a decree conditional on the purchaser reimbursing the prior purchase as regards the monies he had paid under the sale for the minor's benefit. (*S. K. Ghose, J.*). NAGENDRANATH GHOSE *v.* MOHINI MOHAN BOSE. **34 C.W.N. 948.**

———Minor's property was mortgaged by certificated guardian but without permission from District Judge and was subsequently sold with such permission. The vendees undertook to pay the mortgage but did not pay it. In a suit by mortgagee,

Held, that the vendees were not estopped from challenging validity of the mortgage but as representatives-in-interest of the minor, could only be permitted to get rid of the liability created by the mortgage on condition of making restitution to the extent to which the minor was benefitted by the mortgage money: 8 A. L. J. 754, *Rel. on.* (*Ashworth and Iqbal Ahmad, JJ.*). MAKSUD ALI KHAN *v.* SBEIKH ABDULLAH KHAN. **108 I.C. 728=50 All. 218=25 A.L.J. 1017=A.I.R. 1928 All. 77.**

GUARDIANS AND WARDS ACT (1890), S. 30—Contract without authority.

———A sale without the sanction of the Court by the certificated guardian is not void *in toto* but is only voidable, and if the minor has been benefitted, he cannot avoid the sale without restoring the benefit to the purchasers. (*Mukerjee, J.*). MANGAL KURMI *v.* SHEO SARAN. **98 I C. 500 (All.),**

———Vendee from guardian of a minor, under a sale for which the guardian had not obtained Court's permission obtains a good title to the property till the sale is set aside at the instance of the minor. (*Macleod, C. J. and Coyajee, J.*). NARASINGACHARYA GOPALACHARYA SHURPATI *v.* TULSABAI RAMBHAT DANDAVATI. **87 I.C. 712=27 Bom. L.R. 483=A.I.R. 1925 Bom. 320.**

———It is not open to any person dealing with a certificated guardian to support an unauthorized sale of a minor's property by calling in aid the personal law of the minor. An unauthorised sale by guardian appointed under Act XL of 1858, would be voidable and not void if made after the repeal of that Act. (*Rankin and B.B. Ghose, JJ.*). DAS RAM CHOWDHURY *v.* TIRTHA NATH DAS. **81 I.C. 522=51 Cal. 101=A.I.R. 1924 Cal. 481.**

———A disposal of immovable property by a guardian in contravention of Ss. 28, 29 is voidable at the instance of a tenant also who holds it from guardian. (*Mears, C.J., Walsh and Banerji, JJ.*). JITAN TAMBOLI v. NAMCO. **A.I.R. 1922 All. 45 (F.B.).**

—S. 30—Appeal.

———An appeal does not lie from an order passed under S. 30 of the Act. (*Piggott and Walsh, JJ.*). LACHMI PRASAD v. BALDEO DUBE. **87 I.C. 251=44 All. 458=20 A.L.J. 390=A.I.R. 1923 All. 14.**

—S. 30—Contents of sanction order.

———The object of the legislature was to guarantee an enquiry by the Judge and a determination by him to his own satisfaction that the alienation sanctioned was necessary or advantageous. But where there was no enquiry the order was not a nullity. The legislature contemplated an enquiry by the District Judge into the nature of the proposed transaction before he sanctioned an alienation by a guardian of the estate of his ward. But it does not follow that if sanction has been granted by the District Judge without enquiry, his act is without jurisdiction and that the transaction is invalid. The effect of such omission cannot be more far-reaching in its destructive operation than an alienation by the guardian without the requisite sanction. In that event, S. 30 provides that the alienation is not void but voidable, and in order to avoid it, the plaintiff must face the fundamental question whether the transaction was for his benefit. (*Mookerjee and Rankin, JJ.*). PRAHLAD CHANDRA CHOWDHURY *v.* RAMSARAN CHOWDHURY. **81 I.C. 630=38 C.L J. 213=A.I.R. 1924 Cal. 420.**

—S. 30—Contract without authority.

———*Voidable and not void—Refund of benefit.*

A contract entered into by a certificated guardian without authority is not void but only voidable and the party rescinding the contract must, if he has received any benefit thereunder from the other party to the contract restore such benefits so far as may be : 42 Mad. 36 and A. I. R. 1928 Lah. 250, *Ref.* (*Sulaiman and Boys, JJ.*). RAM DIN *v.* MANSA RAM. **1929 A.L.J. 1140=51 All. 1027=A.I.R. 1929 All. 890.**

GUARDIANS AND WARDS ACT (1890), S. 30—Contravention, what is.

—S. 30—Contravention, what is.

———If the guardian of the minor sold less than what he was authorized to sell that cannot be held to constitute contravention of the permission in any sense of the word. The further fact that the sale deed represents the share transferred thereby as constituted of the plots of land mentioned at the foot of the sale-deed is equally not a contravention of the permission, though the permission may not refer specifically to those plots, provided the plots specifically mentioned in the sale-deed exactly represent, both in quality and quantity, the fractional share purported to be sold. (*Wazir Hasan, Ashworth and Simpson, A.J.Cs.*). RAGHUNATH SINGH *v.* DHONDHI SINGH.

95 I.C. 680=2 O.W.N. 796=A. I. R. 1926 Oudh 169 (F.B.).

—S. 30—Duties of transferee.

———*Compliance with terms of sanction.*

When a minor's certificated guardian transfers the minor's property with the sanction of the District Judge the person intending to take the property must see that the terms imposed upon the transfer by the District Judge are complied with. It is not open to him to say that the conditions were impossible of compliance and therefore he took the minor's property without complying with them. (*Kanhaiya Lal and Mukherji, JJ.*). KISHORI RAMANJI *v.* DULEY RAM.

78 I.C. 226=22 A.L.J. 155=5 L.R.A. Civ. 77=A.I.R. 1924 All. 474.

—S. 30—Pardanashin lady guardian.

———Once a sale is proved to have been effected by a certificated guardian without the permission of the District Judge it becomes voidable without any enquiry as to whether the terms of the transfer were favourable to the minors or not. Where the sale by itself was in favour of the manager of the property of minors, whose guardian was a pardanashin woman and where there was no permission for sale of the property in favour of the manager,

Held, that the sale in his favour was voidable: 1 O. W. N. 775, *Foll.* (*Dalal and Wazir Hasan, A. J. Cs.*). MOHAN LAL *v.* MOHAMMAD ADIT.

89 I. C. 69=12 O.L.J. 453=2 O.W.N. 601=A.I.R. 1926 Oudh 88.

—S. 30—Partner of firm as guardian.

———Where a managing partner of a firm is also appointed guardian of minor partners under the Act, his powers must be exercised in accordance with the provisions of the Act and therefore a mortgage of the minor's properties effected without the sanction of the District Judge can be invalidated at the instance of the minors or the person interested under S. 30. (*B. B. Ghose and Roy, JJ.*). SOLEMA BIBI *v.* HAFEZ MAHOMED.

104 I.C. 833=54 Cal. 687=A.I.R. 1927 Cal. 836.

—S. 31—Alienation without sanction.

———Specific Relief Act, S. 27—Minor's property sold with Court's sanction—Guardian contracting to sell to third person before Court's sanction—Specific performance cannot be granted as against purchaser with Court's sanction. (*Newbould and B. B. Ghose, JJ.*). TARINI KUMAR DUTTA *v.* SIRISH CHANDRA DAS.

85 I.C. 667=A.I.R. 1925 Cal. 1160.

———Once a sale is proved to have been effected by a certificated guardian without the permission of the District Judge it becomes voidable without any enquiry as to whether the terms of the transfer were favourable to the minors or not. Where the sale by itself was in favour of the manager of the property of minors, whose guardian was a pardanashin woman and where there was no permission for sale of the property in favour of the manager,

Held, that the sale in his favour was voidable: 1 O. W. N. 775, *Foll.* (*Dalal and Wazir Hasan, A. J. Cs.*). MOHAN LAL *v.* MOHAMED ADIT.

89 I.C. 69=12 O.L.J. 453=2 O.W.N. 601=A.I.R. 1926 Oudh 88.

GUARDIANS AND WARDS ACT (1890), S. 31—Draft of sale-deed.

—S. 31—Attacking sanction.

———On an application by a guardian to the District Judge for permission to sell the minor's property to pay off certain debt, the Judge passed an ordor simply granting permission to sell a portion of a property to defray a debt of Rs. 6,700. The guardian however effected a sale for Rs. 1,800 and the sale included some debts that were not binding on the minor,

Held, that the order did not conform to the mandatory provisions of S. 31 (2) of the Guardians and Wards Act and that the sale was not binding on the minor.

The sanction granted by a District Judge for the sale of a minor's property has no special sanctity in itself but can be attacked on the ground not only that it was given as a result of fraud but also that it was otherwise improper, and did not satisfy every requirement of S. 31, sub-S. (2) of the Guardians and Wards Act. (*Pullan, A.J.C.*). RAMADHIN SINGH *v.* RAM SUMER SINGH.

80 I. C. 679=27 O. C. 284=A. I. R. 1925 Oudh 237.

—S. 31—Contents of order.

———*Substantial compliance.*

Section 31 (2) is not mandatory in the sense that there must be strict compliance with its terms.

Where an application under S. 31 by the guardian of a minor for sanction, stated why it was for the benefit of the minor, and the Court after inquiry granted the sanction without reciting the necessity or advantage,

Held, that there was substantial compliance with the requirements of the section: 11 C.L.J. 197, *Foll.* (*Dalip Singh, J.*). INDAR SINGH *v.* PEARA SINGH.

103 I. C. 698=A. I. R. 1927 Lah. 665.

———Under S. 31 of the Guardians and Wards Act the order granting permission to sell shall recite the necessity and describe the property with respect to which the act permitted is to be done, and this order shall be recorded, dated and signed by the Judge of the Court with his own hand. "Approved" with the initials of the District Judge on a draft of a sale-deed does not amount to a permission for sale of ward's property by the guardian. (*Dalal and Wazir Hasan, A.J.Cs.*). MOHAN LAL *v.* MOHAMMAD ADIL.

89 I. C. 69=12 O. L. J. 453=2 O. W. N. 601=A. I. R. 1926 Oudh 88.

———The mere omission to recite the necessity in the order is no more than an irregularity and it does not render the sanction altogether illegal: 11 C. L. J. 197, *Foll.* (*Daniels and Neave, JJ.*). BUDDHOO ALIAS GULAB DAS *v.* SHEO CHARAN.

82 I.C. 328=22 A.L.J. 851=5 L.R.A. Civ. 726=47 All. 8=A.I.R. 1924 All. 875.

—S. 31—Draft of sale-deed.

———*Submission to Court for approval.*

The order of permission to sell was as follows:

"Permission to sell is granted. Draft of sale-deed will be filed for approval of the Court,"

GUARDIANS AND WARDS ACT (1890), S. 31—Duty of Court.

Held, (Per *Ashworth* and *Simpson*, *A. J. Cs.*, *Wazir Hasan*, *A. J. C.*, *dissenting.*) The condition was a condition precedent. The failure to submit the draft to the Judge renders the sale invalid.

Per *Wazir Hasan*, *A. J. C.*—The further act contemplated by the Court to be done was not the granting of a second sanction after the approval of the draft but was merely to see and be satisfied that the draft did not contravene any of the two conditions stated in the permission. If the sale fully complied with the terms of the permission the fact that no draft was produced before the Judge for approval is wholly immaterial. (*Wazir Hasan, Ashworth and Simpson, A. J. Cs.*). RAGHUNATH SINGH *v.* DHONDHE SINGH. **95 I.C. 680= 2 O.W.N. 796=A.I.R. 1926 Oudh 169 (F.B.).**

—S. 31—Duty of Court.

———It is the duty of the Court to which an application is made under S. 29 of the Act for sanction of the sale of a minor's property, to satisfy itself by enquiry that the transaction is necessary and is for the minor's benefit and a creditor is entitled to rely on an order of sanction as evidence that the Court has satisfied itself on this point and that the transaction is a proper one: A.I.R. 1922 Mad. 135, *Rel. on*; 11 Cal. 379, *Foll.* (*Daniels and Neave, JJ.*), BUDDHOO (ALIAS) GULAB DAS *v.* SHEO CHARAN. **82 I.C. 328=22 A.L.J. 851=5 L.R.A. Civ. 726= 47 All. 8=A.I.R. 1924 All. 875.**

—S. 31—Effect of sanction.

———A vendee from the guardian of a minor is entitled to rely on the Court's sanction absolutely and is not bound to inquire into the benefit or necessity of the transaction: 11 Cal. 379, *Foll.* (*Dalip Singh, J.*). INDAR SINGH *v.* PEARA SINGH. **103 I.C. 698=A.I.R. 1927 Lah. 665.**

—S. 31—Facts to be considered.

———All that the District Judge has to consider in an application by the certificated guardian for sale of the minor's property is, whether such a sale is necessary or is for the evident advantage of the ward. While granting permission the District Judge should mention that the transaction may take place at a certain figure, the certificated guardian, however, should not be directed to sell to a certain party; the sanction under S. 31 is therefore complete authority to the certificated guardian to sell to any person he likes who is willing to comply with the terms upon which permission to sell is accorded by the District Judge. (*Das and Fazl Ali, JJ.*). GOBARDHAN LAL *v.* SHEO NARAYAN. **117 I.C. 161=8 Pat. 226= A.I.R. 1929 Pat. 202.**

———*Grant.*

In granting permission to the guardian to transfer any property of the minor, it is the duty of the Court to see that the transaction confers the highest benefit to the minor. If on account of the competition between the purchasers, the minor gets a higher value for the property which was intended to be sold it is not the business of the Judge to enquire into the motive which led the rival purchasers to offer higher bids. It is to the advantage of the minor that there should be competition. For the sake of convenience and for the purpose of finding a purchaser who would offer the highest value for the property, Court may direct issue of proclamation of sale and direct the Nazir to sell the property. If the Judge makes an order on the representation of a statutory guardian for sale of the property of his ward for the value suggested by the guardian, he may withdraw that order if it

GUARDIANS AND WARDS ACT (1890), S. 31—Order without enquiry.

is brought to his notice that a higher value can be obtained for the minor's property than the value for which the guardian was going to sell it. It may not be due to the guardian's improvidence; it may be due to his inability to find proper purchasers with his best endeavours to do so, that he may suggest a lower value. (*Newbould and B.B. Ghose, JJ.*). TARINI KUMAR DUTTA *v.* SIRISH CHANDRA DAS. **85 I.C. 667=A.I.R. 1925 Cal. 1160.**

—S. 31—Fraud.

———The sanction of the District Court to an alienation by the guardian of a minor must recite the necessity for the alienation in compliance with S. 31 (2). The sanction given by Courts is only *prima facie* evidence that the sanction is a good one and it is open to the minor to show at any future time that the alienation was fraudulent and invalid and is not binding on him. The sanction of the Court merely shifts the burden on to the plaintiff to show that the alienation was not for necessity and does not bind him. (*Spencer and Ramesam, JJ.*). NALLAKA VENKATASWAMI *v.* RUGAM VIRANNA. **65 I.C. 964=45 Mad. 429= 15 M.L.W. 373=1922 M.W.N. 357=31 M.L.T. 484= A.I.R. 1922 Mad. 135=42 M.L.J. 333.**

—S. 31—Fraudulent Act.

———*Leaving no margin of time for the Judge to enquire.*

Fraud is infinite in variety: sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring: it would be honesty itself if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the Court. Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of justice. Where no margin of time was left for the Judge under S. 31 (2) of the Guardians and Wards Act which might be utilized in making any inquiry into the nature of the proposed sale and its effect on the interests of the minors:

Held, that such deliberate inaction on the part of manager of minor's property with the object of gaining an unfair advantage was an act calculated to deceive and therefore fraudulent: *Reddaway v. Banham*, (1896) A. C. 199, *Foll.* (*Dalal and Wazir Hasan, A.J.Cs.*). MOHAN LAL *v.* MOHAMMAD ADIL. **89 I.C. 69=12 O.L.J. 453= 2 O.W.N. 601=A. I. R. 1926 Oudh 88.**

—S. 31—Marriage expenses.

———An order fixing the amount of marriage expenses of a ward is apparently under S. 31 (3) (*d*) and so not appealable. (*Walsh and Kanhaiya Lal, JJ.*). MT. DURGABAI, *In the matter of.* **92 I.C. 482=48 All. 300=24 A.L.J. 310= A.I.R. 1926 All. 301.**

—S. 31—Non-compliance.

———Non-compliance with the provisions of para. 2 to S. 31 has not the effect of rendering the order of the District Judge null and void; but it is only an irregularity: 11 C.L.J. 197, *Rel. on.* (*Das and Allanson, JJ.*). MAHABIR DAS *v.* JAMUNA PRASAD. **112 I. C. 438=8 Pat. 48=9 P.L.T. 553= A.I.R. 1928 Pat. 543.**

—S. 31—Order without enquiry.

———Where a Judge in a case in which an enquiry is necessary allows through his remissness a transaction to take place to the detriment of the minor the sanction which he has given is not a bar to a re-opening of the transaction. But apart from the

GUARDIANS AND WARDS ACT (1890), S. 31— Order without enquiry.

fact that the law itself does not order an inquiry, absence of inquiry would not vitiate the transaction if the Judge has been able to conclude a good bargain. (*Stuart, C. J. and Raza, J.*). SAJID HUSSAIN *v.* ABDUL RAHIM. **115 I. C. 273= A.I.R. 1929 Oudh 354.**

———Under S. 31 permission to the guardian to sell property shall not be granted by Court except in case of necessity, or for an evident advantage to the ward. This provision of law indicates that the Judge obtains jurisdiction to sanction the sale only when he makes a proper inquiry as to the necessity and advantage of the sale. The want of such an inquiry without which the Judge is prohibited from granting permission to sell property, amounts to a want of jurisdiction in the Judge to proceed with the matter and his order is in consequence a nullity. (*Dalal and Wazir Hasan, A. J. Cs.*). MOHAN LAL *v.* MAHAMMAD ADIT. **89 I. C. 69= 12 O. L. J. 453=2 O. W. N. 601= A. I. R. 1926 Oudh 88.**

—S. 31—Procedure.

———The violation of the procedure prescribed by S. 31 (2) for recording the order granting the permission cannot be made the ground of brushing aside the finality of the order as enacted by S. 48. The only condition in which the finality prescribed by S. 48 can be avoided is to establish that the order granting the permission was a nullity.

An order passed by a Court in violation of such rules of procedure, however mandatory, as relate merely to the form of the order cannot be treated as a nullity. The omission to follow such rules of procedure can amount to no more than a mere irregularity or a material irregularity in the circumstances of a particular case. On the other hand, an order passed by a Court in violation of such rules of procedure, the observance of which only invests the Court with jurisdiction to pass the order, is a nullity : 25 Bom. 337 (P.C.) and 42 Cal. 72 (P.C.), *Foll.* (*Wazir Hasan and Neave, A.J.Cs.*). RAMESHWAR BAKSH SINGH *v.* MT. RIDH KUER. **87 I.C. 238= A.I.R. 1925 Oudh 633.**

—S. 31—Subsequent sanction.

———*Effect.*

A certificated guardian can enter into a contract with an intending purchaser, but such a contract is subject to sanction being accorded to the proposed transaction and that, when the sanction has been accorded, the contract becomes a completed contract by virtue of that sanction. After the sanction is actually accorded, it is not necessary for the certificated guardian to solemnly enter upon another contract with the proposed purchaser: A.I.R. 1924 Pat. 81 and 29 All. 213, *Expl.* and *Dist.* (*Das and Fazl Ali, JJ.*). GOBARDHAN LAL *v.* SHEO NARAYAN SAHU. **117 I.C. 161=8 Pat. 226= A.I.R. 1929 Pat. 202.**

—S. 33—Applicability.

———*Institution of suit on minor's behalf.*

Where there was a dispute between the sons and a minor daughter of a deceased Mahomedan regarding the division of property and where the minor daughter's guardian in the Court of the District Judge, with the consent of the District Judge, entered into certain arbitration proceedings in order to settle the disputes, and where an award was passed, but in the meantime the girl was married and the husband who was appointed guardian of his wife presented a petition to the District Judge asking for the Court's permission to institute a suit on behalf of his wife for the purpose of having the award and the decree which had been passed, set aside on the ground of fraud and collusion but it was dismissed ;

Held, that the order dismissing the application was not one under S. 43, and was not appealable, but was one apparently in proceeding taken under S. 33, and that it must be taken that the Court was of opinion that the suit which the guardian proposed to file was a suit which should not be brought and so the order would not prevent the guardian from bringing the suit, if he was so advised but in bringing the suit he would act at his own risk and would not be entitled to the indemnity which was conferred upon guardians acting with advice of the Court under sub-S. 3, S. 33. (*Lindsay and Ashworth, JJ.*). MT. TASKIN FATMA *v.* MD. MUNIM BAKSH. **109 I.C. 56=50 All. 535=26 A.L.J. 290= A.I.R. 1928 All. 259.**

—S. 34—Accounts.

———The whole tenor of the Guardian and Wards Act shows that the District Judge has jurisdiction to examine the accounts ; and, if that is so, it is clearly within the jurisdiction of the District Judge to call upon the guardian to pay into Court any sum that he may find due upon a true account of the affairs of the minor : A. I. R. 1924 All. 593 and A. I. R. 1925 Pat. 477, *Foll.*; 25 C. L. J. 149 and A. I. R. 1926 Mad. 478, *Dist.* (*Kulwant Sahay and Macpherson, JJ.*). MD. FARID-UDDIN AHMAD *v.* AHMAD ABDUL WAHAB. **107 I.C. 152= 7 Pat. 144=9 P.L.T. 383= A. I. R. 1928 Pat. 255.**

—S. 34—Appeal and revision.

———An order under S. 34 (*d*) which is final under S. 48 directing the guardian of a ward to pay a certain sum of money as balance due from him is not appealable, but it would be open to examination by the High Court on the revision side. (*Broadway, J.*). RAM JAS *v.* CHANI. **79 I.C. 178= 4 L. L. J. 272= A. I. R. 1923 Lah. 89.**

—S. 34—Attachment of guardian's property.

———The Court has no power to attach the property of the guardian or his surety for the purpose of realising the balance. Section 35 of the Act provides the remedy for the realisation of the amount due from the guardian. Ample powers are also given under S. 45 of the Act to the District Judge. (*Abdul Raoof, J.*). RADHAKISHAN *v.* KHUSI RAM. **77 I.C. 478= A.I.R. 1923 Lah. 506.**

—S. 34—Auditing of accounts.

———Section 43 read with S. 34 of the Act impliedly provides for expenditure over getting the accounts audited by the Examiner of Local Accounts and the new enactment S. 34-A added by Act 17 of 1929 has been made, with the object of making express provision in that regard. (*Macpherson and Fazl Ali, JJ.*). MT. LAKHANDEI KUER, *In re.* **11 P.L.T. 349= A. I. R. 1930 Pat. 384.**

—S. 34—Balance due.

———*H* was appointed the guardian of property of certain minors in an appeal and was ordered to put in accounts, *M* being appointed commissioner to check them. Later on *K*, guardian of person of minor applied for removal of *H*. After the report was put in by *M* the Court passed an order removing *H*, holding that he was liable to pay a certain sum to the minors and directing *H* to deposit the amount in the Court,

Held, that the order directing *H* to pay the balance due could not be held as part of the order removing *H* from guardianship. The words "balance due" in S. 34 (d) meant the balance

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shown by the guardian to be due from him in the accounts and the Courts had no jurisdiction to pass an order directing payment: 21 C. W. N. 688, *Foll.*; A.I.R. 1924 All. 593 and A.I.R. 1926 Mad. 478, *Disc.* (*Dalip Singh, J.*). HUKIM RAY *v* MT. KHANDI BAI. **122 I.C. 107=31 P.L.R. 453=A. I. R. 1930 Lah. 420.**

———There is nothing in S. 34 to warrant the suggestion that the expression "balance due from him on those accounts" is necessarily intended to empower the Court to compel the guardian to pay into the Court, not the sum which he admits to be due at the foot of the account exhibited by him, but the sum which the Court finds on an enquiry held by it to be due. (*Rupchand and Barlee, A.J.Cs.*). HOONDOMAL CHHADALDAS CHUGH *v.* NAZIR, J.C.'S COURT, SIND. **121 I.C. 168=A.I.R. 1930 Sind 43.**

—S. 34—Death of ward.

———The words "any cause" in S. 41 (3), Guardians and Wards Act are not restricted to the causes mentioned in sub-Ss. (1) and (2) of S. 41.

Just as the death of the guardian puts an end to his guardianship, so does the death of the ward himself. The death of the ward does not put an end to the jurisdiction of the Court over the guardian, and the property can be recovered from the latter without having recourse to a regular suit: (1918) M.W.N. 440; A.I.R. 1925 Sind 269 and 33 Bom. 419, *Foll.*; 42 All. 1, *Not foll.* (*Shadi Lal, C.J. and Broadway, J.*). SHIV CHARAN LAL *v.* BHAWANI SHANKER. **110 I.C. 776=10 Lah. 127=30 P. L. R. 680=A.I.R. 1928 Lah. 495.**

—S. 34—Failure to furnish security.

———Where a person is appointed as guardian of the person or property of a minor under the Guardians and Wards Act on condition of his furnishing security, and fails to furnish the security, there is no appointment of a guardian within the meaning of S. 3 of the Majority Act and such minor becomes major when he completes his 18th year. Such a conditional order is invalid under the Act.

Per *Sadasiva Ayyar, J.*—30 M. L. J. 508, *Foll.*; 40 Mad. 775, *Overruled.* (*Coutts-Trotter, C. J., Krishnan and Beasley, JJ.*). NATHA VENKATESA PERUMAL, *In re.* **99 I.C. 213=49 Mad. 809=24 M.L.W. 707=A.I.R. 1927 Mad. 36=51 M.L.J. 726 (F.B.).**

—S. 34—Interpretation.

———"Account" used in connection with S. 34 (*c*) and (*d*) must mean a just and true account. Where the amount is a liquidated sum and clearly earmarked for a purpose the Court can amend the accounts by striking out the objectionable amount or it may reject the account on the ground that it is an untrue account of the guardian's liability and direct the guardian to submit a fresh account within limited time. But it is the duty of the Court to decide what is the balance due and the guardian's version is not final: 21 C.W.N. 688, *Dist.* (*Walsh, Ag. C.J. and Neave, J.*). SITA RAM *v.* MT. GOVINDI. **80 I.C. 592=46 All. 458=22 A.L.J. 585=A.I.R. 1924 All. 593.**

—S. 34—Procedure.

———The procedure laid down in S. 145, C.P. Code is not applicable to the case of a surety under the Guardians and Wards Act. Section 145 deals with something more than a mere mode of trial in a pending proceeding, and confers a substantive right of making a person, who is not a party to a pending suit to be made party to it and to be

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amenable to the jurisdiction of the Court in execution proceedings. It cannot be therefore extended to apply to enforcement of surety bonds given in favour of the Court in proceedings other than suits. (*Kennedy, J. C. and Rupchand Bilaram, A.J.C.*). KHUSHIRAM TEJBHANDAS *v.* JHALIBAI. **89 I.C. 342=19 S.L.R. 390=A.I.R. 1926 Sind 35.**

—S. 34—Re-payment.

———Clause (*d*) does not empower the Court to direct the guardian to pay into Court more than the amount shown to be due in the accounts exhibited by him. What is contemplated is not a decision of substantive rights of the parties. The words "on those accounts" point to the same conclusion. 67 I.C. 309, *Dis.* 25 C.L.J. 149, *Foll.* The juxtaposition of three Ss. 34, 35 and 36 seems to indicate that when the measure of the guardian's liability is put in issue, the proper course seems to apply to the Court under S. 35 or S. 36 and then file a regular suit against the guardian: A.I.R. 1924 All. 593, *Diss.* An order against a guardian regarding liability not admitted by him may be treated as one under S. 43 and treated as appealable.

Where the guardian mixed his ward's moneys with his own but the moneys had throughout not been lent out on interest,

Held, direction to pay 12 per cent. simple and not compound interest will meet the ends of justice. (*Venkatasubba Rao and Madhavan Nair, JJ.*). HARI KRISHNA CHETTIAR *v.* GOVINDARAJULU NAICKER. **98 I.C. 332=23 M.L.W. 420=1926 M.W.N. 359=A.I.R. 1926 Mad. 478=50 M.L.J. 273.**

—S. 34—Scope.

———An order appointing a person guardian of the property of a minor, conditional on his furnishing security, is not void *ab initio*. Section 7 of the Act, which empowers the Court to make an order appointing a guardian of the person or property of the minor is comprehensive in its terms and does not lay down, expressly or by necessary implication, that the Court cannot impose a condition of this kind, in cases where it thinks fit to do so.

Section 34 (a) is not exhaustive as to the powers of the Court to demand security. It obviously confers on the Court powers which are additional and not exclusive. It deals with the obligations of a guardian of property, who has already been appointed as such, and empowers the Court to require him to furnish security if and when, subsequent to his appointment, it becomes necessary to do so. It does not in any manner control or qualify S. 7 under which the Court has full power to make the appointment on such terms and subject to such conditions as it, in its discretion, considers conducive to the welfare of the minor: 30 M.L.J. 508, *Disc.*; 40 Mad. 775, *Foll.*: A.I.R. 1927 Mad. 36 (F.B.), *Diss. from*; 24 I.C. 202, *Ref.* (*Shadi Lal, C.J., Broadway and Tek Chand, JJ.*). SHAM DAS *v.* UMER DIN. **A.I.R. 1930 Lah. 497 (F.B.).**

———*Orders under, should relate to cash in hand only.*

It is only that cash which the guardian would have had, if he had followed the Court's directions as regards investment, that the Court can under S. 34 compel him to produce. It is immaterial whether the guardian invests in approved securities as per Court's order or in unapproved securities in contravention of Court's order. (*Wallace and Madhavan Nair, JJ.*). RAMANJULU REDDY *v.* RANGIAH REDDIAR. **94 I. C. 79=A.I.R. 1926 Mad. 825.**

GUARDIANS AND WARDS ACT (1890), S. 34—Scrutiny of guradian's account.

—S. 34—Scrutiny of guardian's acount.

———An application by a minor after attaining majority for scrutiny of the accounts submitted by the discharged guardian does not lie under S. 34, Guardians and Wards Act: A.I.R. 1926 Mad. 977, *Foll.*; 5 C.W.N. 207 and A.I.R. 1924 All. 593, *Not foll.*; 16 M.L.J. 285 and A.I.R. 1926 Mad. 478, *Ref.* (*Odgers, J.*). TIRUVENGADDATHA AIYANGAR *v.* TIRUVENGADATHAR AIYANGAR. **100 I.C. 600=38 M. L. T. 115=26 M. L. W. 44=A.I.R. 1927 Mad. 1136.**

—S. 35—Applicability.

———Section 35 is perfectly general and can apply to a case where the ward was a minor or to a case where the ward has ceased to be a minor. The section is intended to cover both the cases. There is nothing in S. 35 making it inapplicable to the case of a ward attaining majority and applying for an assignment of the bond: 42 Mad. 302 and A.I.R. 1926 Mad. 977, *Diss. from.* (*Ramesam and Jackson, JJ.*). GOPALAKRISHNASWAMI *v.* SRINIVASA. **109 I. C. 894=51 Mad. 683=28 M.L.W. 71=1928 M.W.N. 423=A.I.R. 1928 Mad. 545=54 M.L.J. 671.**

—S. 35—Discretion of Court.

———The words "as trustee for the ward" in S. 35 do not prevent the Court's ordering an assignment in favour of the transferee of a ward who has attained majority. The exercise of the jurisdiction to assign is undoubtedly discretionary: 30 Pom. 164, *Ref.* (*Panckridge, J.*). PREOTAMA DEVI *v.* CHANDRA KUMAR GHOSH. **A. I. R. 1930 Cal. 594.**

—S. 35—Duty of Court.

———*Separate suit, directing ward to institute.*

If, on a perusal of the accounts, a Court has reason to think that at least in respect of some moneys received in respect of the property of the ward they have not been duly accounted for; it is reasonable to hold that there is ground for being satisfied that the engagement has not been kept up, and though, to be satisfied that the engagement of the bond has not been kept up, the Court has to make some kind of *prima facie* enquiry, the ward should not be referred to a regular suit for the purpose of satisfying the Court that the engagement has not been kept up. (*Ramesam and Jackson, JJ.*). GOPAL KRISHNASWAMI *v.* SRINIVAS AYYANGAR. **109 I.C. 894=1928 M.W N. 423=28 M L W. 71=51 Mad. 683=A. I. R. 1928 Mad. 545=54 M.L.J. 671.**

—S. 35—Suit.

———The remedies by suit contemplated by Ss. 35 and 36 are not inconsistent with the remedies provided for by S. 45. (*Walsh, Ag. C. J. and Neaves, J.*). SITARAM *v.* MT. GOVINDI. **80 I.C. 592=46 All. 438=22 A.L.J. 585=A.I.R. 1924 All. 593.**

—S. 37—Neglect.

———*Not taking steps to obtain possession of minor's property.*

A certificated guardian who has accepted the position of a trustee by virtue of an order passed by a Court of law will not be heard to say that he did not do his duty but let the properties remain under the management of somebody else. If he does not take any steps to reduce into possession the properties of the minor, then there is undoubtedly wilful default and neglect on his part and the Court will be entitled to pass a decree for account on the footing of wilful default and neglect, although such a case is not made out in the plaint. (*Das and Ross, JJ.*). SHAIKH ABDUR RAHIM *v.* MT. BARIRA. **61 I.C. 807=2 P.L.T. 556=6 P.L.J. 273=A.I.R. 1921 Pat. 166.**

—S. 39—Appeal.

———*Order under S. 39—Order removing guardian under the section is alone appealable.*

With reference to an order under S. 39 of the Guardians and Wards Act, the only appeal permissible is one against an order removing a guardian under that section. (*Wazir Hasan, A. J. C.*). SURAJ NARAYAN SINGH *v.* BISHAMBHARNATH BHAN. **78 I.C. 138=A.I.R. 1925 Oudh 260.**

—S. 39—Applicability.

———*Testamentary guardian.*

The provisions of the Act apply to guardians appointed by Will and action can be taken in regard to them under Ss. 39, 41 (3) and 45, but before taking action under S. 45 the Court should make an enquiry in order to ascertain whether such guardians had any property of the minors in their possession and control which they were withholding and for which they were accountable. (*Shadi Lal, C. J. and Broadway, J.*). DAMODAR DAS *v.* MT. JATTI. **103 I.C. 470=8 Lah. 306=9 L. L. J. 231=28 P.L.R. 367=A.I.R. 1927 Lah. 344.**

—S. 39—Ex parte appointment.

———The proper remedy, in a case where the objector applies to revise a previous *ex parte* order appointing one guardian and makes certain allegations against the latter, is under S. 39: 20 C.L.J.213, *Dist.* (*Suhrawardy and Graham, JJ.*). KAMINI MAYI DEBI *v.* BHUSAN CHANDRA GHOSE. **97 I.C. 692=44 C.L.J. 40=A.I.R. 1926 Cal. 1193.**

—S. 39—Failure to give security.

———One *S* was appointed guardian of the person and property of the three minors and in the same order he was directed to give ten thousand rupees security. This he never did and he intimated definitely that he could not do so. The District Judge thereupon passed an order, recited the fact that no security had been given and said that anybody who wished to be appointed guardian could now apply,

Held, that the order of District Judge is tantamount to an order of removal under S. 39, on the ground that the guardian had continuously failed to perform the duties of his trust and had contumaciously disregarded the order of the Court. (*Harrison, J.*). MT. KHUSAL DEVI *v.* SUKH DIAL. **71 I.C. 572=21 P. W.R. 1923=A.I.R. 1924 Lah. 313.**

—S. 39—Failure to keep accounts.

———It cannot be said that a failure to keep accounts of trust property is not a failure to perform a very important duty of the trust and the illiteracy which is a bar to the performance of such duty can be looked upon as an incapacity under S. 39. Though it may be usual for guardians to fail to keep account and a District Judge acting in the exercise of his discretion may pardon the fault, still he has discretion in the matter and he will only exercise it when there has been no breach of trust or no serious misconduct. (*Rupchand and Barlee, A J.Cs.*). FAIAZ MAHOMED *v.* MAHOMED BACHAL. **117 I. C. 782=A.I.R. 1930 Sind 14.**

—S. 39—Grounds.

———*Successive applications on same grounds—Maintainability — Second marriage of guardian mother.*

The duly appointed guardian of the person of a minor is not to be called upon to resist successive

GUARDIANS AND WARDS ACT (1890), S. 39—Guardian outside jurisdiction.

applications for his or her removal based upon the same set of facts each time. There is however no question of *res judicata*. The fact that the second husband of the guardian mother comes to reside in the house where the minor and the guardian live is no ground for removal of the guardian. (*Piggott and Walsh, JJ.*). BHAGWAN DAS *v.* MANGALIA.
71 I.C. 416=45 All. 196=20 A.L.J. 959=A.I.R. 1922 All. 540.

—S. 39—Guardian outside jurisdiction.
———In view of S. 39 it is perhaps intended by the legislature that a Court will not appoint as guardian any one who resides outside its jurisdiction. (*Mukerji and Guha, JJ.*). SM. ASALATA ROY *v.* SOCIETY FOR P. C. I.
51 C.L.J. 272=A.I.R. 1930 Cal. 397.

———The Act does not say that the Court must remove a guardian who ceases to reside within the local limits of the jurisdiction of the Court and there is nothing in the act preventing the appointment of a person ordinarily residing outside the limits of the Court's jurisdiction as guardian: 36 All. 280, *Doubted.* (*Prideaux, A. J. C.*). MT. AHILYABAI *v.* MT. VITHABAI. **75 I.C. 595=A.I.R. 1925 Nag. 224.**

—S. 39—Incompetent guardian.
———*Custody of minors.*
If the guardian is incompetent or is otherwise an improper person to be allowed to continue as such, proper proceedings must be taken under S. 39 for his removal and the appointment of another guardian. But until this is done, it is the duty of the Court to render all assistance to the guardian in the discharge of his duties and to see that the minors remain in his custody. (*Tek Chand, J.*). AMIR KHAN *v.* TALEB MAHOMED. **100 I.C. 807=A.I.R. 1927 Lah. 266.**

—S. 39—Notice.
———Before removing a guardian, he should be given notice setting out for which of the causes mentioned in S. 39, it is proposed to remove him: 20 C. L. J. 291, *Rel. on.* (*Macnair, Offg. J. C.*). MT. YAMUNABAI *v.* DIST. JUDGE, CHHINDWARA. **116 I.C. 669=A.I.R. 1929 Nag. 176.**

—S. 39—Removal of guardian.
———*Duty of Court to provide for management of minor's estate.*
When the Court removes a person from guardianship it is its duty to pass the necessary orders for the adequate protection of the minor's estate, especially when it is in a bad state of management. (*Mukerji and Guha, JJ.*). KIRANSASI GHOSE *v.* PANCHANAN GHOSE. **34 C.W.N. 986.**

—S. 41—Appeal.
———No appeal lies from an order under S. 41 (3). (*Addison, J.*). MUHAMMAD AKBAR *v.* MT. HUSSEIN BIBI. **96 I. C. 173 (Lah.).**

—S. 41—Death of minor.
———*Disputed succession—Court* functus officio.
Though S. 41 might apply to cases of the death of a minor, still it is applicable only to simple cases where there can be no doubt whatever about the succession to the minor and about the items of property which belong to the minor or the accounts relating to the management of the estate. When, however, there is a dispute relating to succession, or the likelihood even of a dispute as to succession, the Court has no powers under the Guardians and Wards Act to seek to determine the succession to a deceased minor and thereupon make any orders for granting delivery of possession of property.

GUARDIANS AND WARDS ACT (1890), S. 41—Legal representative of guardian.

A Court acting under the Guardians and Wards Act is really *functus officio*, when the minor dies. Any disputes or rights with regard to the property of the minor should be litigated in the ordinary tribunals of the country: 1918 M. W. N. 440, *Doubted.* (*Srinivasa Ayyangar, J.*). TULASIDAS GOVINDJEE *v.* MADHAVADASS LALJI.
92 I. C. 570=22 M.L.W. 642=1926 M.W.N. 68=A. I. R. 1926 Mad. 148.

———After the death of a ward the person who had been a guardian does not continue to be guardian. Section 41 must be read so far as possible to give effect to what may be supposed to be the reasonable intentions of the Legislature. When a ward dies the Court should generally direct the guardian to deliver the property into Court or to deliver the property to some person producing an heirship certificate. In very rare cases the latter precaution might be dispensed with but in that case the Court should otherwise guarantee the interests of possible claimants. A list of contingencies on the happening of which the powers of the guardian cease is not necessarily exhaustive and even if it is exhaustive it is arguable that Cl. (c) applies. Order for accumulative and progressive fine is, if not without jurisdiction, yet, is inappropriate. The fine is not to be levied except in the case of recusancy which is something more than disobedience and if it is intended to use those powers, as a general rule, it is better to fix some date on which the guardian is to comply with the orders of the Court or demonstrate why he is unable to do so. (*Kennedy, J.C. and Percival, A.J.C.*). FATEHCHAND *v.* PARBATIBAI. **92 I. C. 196=18 S.L.R. 85=A.I.R. 1925 Sind 269.**

—S. 41—Delivery of possession.
———Until Court has passed an order for the removal of the guardian it has no power to call upon him to deliver the property in his possession.
The power of compelling the guardian to deliver possession of the property can only be exercised in the interest of the minor. These summary powers are meant for his protection. They cannot be invoked by a person claiming adversely to the minor. The remedy for such adverse claimants lies in a regular suit. (*Mittra, A.J.C.*). MT. SITABAI *v.* SHANKAR. **18 N.L.R. 184=A.I.R. 1922 Nag. 266.**

—S. 41—Investigation into accounts.
———When the Court orders a guardian under S. 41 (3) to deliver accounts and property in his possession, it can also direct an investigation into the acconnts: 5 C.W.N. 207, *Dist.* (*Waller, J.*). RAMA RAO *v.* RANGASWAMI RAO. **92 I.C. 98=A.I.R. 1926 Mad. 419.**

—S. 41—Legal representative of guardian.
———The very fact that this provision applies not only to the ex-guardian but to the legal representative of a deceased guardian makes it clear that the only obligation imposed on a guardian or the legal representative of a deceased guardian, as the case may be, is to hand over any such property as is in his possession or control and not such property as has disappeared or has passed out of his possession or control and likewise to hand over such accounts as are in his possession irrespective of such accounts being correct or not: A.I.R. 1924 All. 563, *Not appr.* (*Rupchand, A.J.C. and Barlee, Ag. A.J.C.*). HOONDAMAL CHHADALDAS CHUGH *v.* NAZIR, J. C.'S COURT, SIND. **121 I.C. 168=A.I.R. 1930 Sind 43.**

———A suit will lie against the guardian's son and a surety, to render account in the absence of an

GUARDIANS AND WARDS ACT (1890), S. 41—Liabilities on discharge.

order of discharge of the guardian. (*Martineau, J.*). JAGAT SINGH *v.* SUNDAR SINGH. **67 I.C. 935= 3 L. L.J. 364.**

—S. 41—Liabilities on discharge.

———Liabilities of even a discharged guardian do continue after his discharge as regards any fraud which may subsequently be discovered and an order for restoration of any property of the ward that remains in his possession can be executed in proceedings under the Guardians and Wards Act. (*Sulaiman and Daniels, JJ.*). MUHAMMAD ABDUL RALI *v.* KHODAIJA BIBI. **88 I.C. 165= 6 L.R.A. Civ. 455=23 A.L.J. 428= A. I. R. 1925 All. 457.**

—S. 41—Powers of Court.

———*Accounts.*

If the Court is satisfied on a perusal of the accounts submitted by the guardian at the time of his discharge and on hearing the parties, that the accounts are correct, it may make a declaration of his discharge, but it is not bound to do so, nor is it bound to certify that the accounts are correct. The minor may bring a separate suit for the purpose: 5 C.W.N. 207; 21 C.W.N. 688 and 29 C.L.J. 44, *Foll.*; A.I.R. 1924 All. 593, *Dissented from* and A. I. R. 1926 Mad. 419, *Not foll.* (*Phillips and Madhavan Nair, JJ.*). SUBBARAMI *v.* PATTABHIRAM. **97 I. C. 578=50 Mad. 80= 1926 M.W.N. 695=24 M. L. W. 525= A.I.R. 1926 Mad. 977=51 M.L.J. 249.**

—S. 43—Amount due by guardian.

———Legislature has neither expressly, nor impliedly given power to the Court to record a definite finding as to the exact amount due by the guardian as a result of an enquiry binding upon the guardian and to compel its payment; and if there is a definite finding by a Court as to the amount which the ex-guardian had to pay as the result of the enquiry, to that extent the finding is not warranted by the provisions of the Act and is without jurisdiction: 21 C.W.N. 688; A.I.R. 1926 Mad. 825 and A.I.R. 1926 Mad. 977, *Appr.*; A.I.R. 1925 Sind 269, *Ref.* (*Rupchand, A.J.C. and Barlee, Ag. J. C.*). HOONDOMAL CHHADALDAS CHUGH *v.* NAZIR, J. C.'S COURT, SIND. **121 I. C. 168=A.I.R. 1930 Sind 43.**

—S. 43—Contempt of Court.

———In the case of a minor, for whom a personal guardian has been appointed and who undertook not to marry the minor without the Court's permission, the marriage or connivance at marriage with the ward of the Court without the consent of the Court is contempt of the Court liable to be severely punished. These powers of the District Judge are, however, limited to the actual guardian in respect of whom the order is made and cannot be exercised against those indirectly committing the breach: 42 Cal. 351, *Rel. on*; 22 Bom. 509 and 22 Bom. L.R. 399, *Ref.* (*Madgavkar, J.*). BAI MANI *v.* BHAILAL CHUNILAL. **31 Bom. L. R. 1120= A. I. R. 1929 Bom. 417.**

—S. 43—Disobedience of orders.

———Clause 4 limits the exercise of powers mentioned therein to a disobedience of orders passed under Cls. 1 and 2. (*Rupchand Bilaram and Lobo, A.J.Cs.*). NARAINDAS AILDAS *v.* MT. JHALIBAI. **103 I.C. 493=A.I.R. 1927 Sind 262.**

—S. 43—Duty of Court.

———*State being guardian of minors the District Court must see that the minor is trained in the same manner as if he had been under his natural father or guardian.*

GUARDIANS AND WARDS ACT (1890), S. 43—Marriage of minor.

The state from the earliest times is supposed to be the guardian of the infants and the earliest regulations gave effect to this principle and made provisions for the custody of the minors and when the state assumes direct custody of the infant it undertakes to bring up the boy as his natural father or guardian would have done, that is in the traditions of the family to which after becoming major he has to revert. The state has made provisions for the care of infants by statutory provisions such as Court of Wards Act and the Guardians and Wards Act. The District Judge under the latter Act exercises the functions and becomes the protector and guardian of the infants by exercising the power to appoint guardians of the persons and properties of the infants. Therefore no Court should grudge the trouble and worry on assuming charge of the estate of the minor, that would necessarily occur so long as an infant has not attained majority. (*Jwala Prasad and Kulwant Sahay, JJ.*). MANMOHINI DASI *v.* HARI PRASAD BOSE. **81 I.C. 1045= 5 P.L.T. 415=2 P. L. R. 200= A.I.R. 1924 Pat. 755.**

—S. 43—Interpretation.

———"Regulating the conduct or proceedings of a guardian" cannot be interpreted as an order holding that prior to the date of such order guardian had caused loss to the estate which he should make good. A.I.R. 1926 Mad. 478, *Not Appr.* (*Rupchand, A. J. C. and Barlee, Ag. J. C.*). HOONDOMAL CHHADALDAS CHUGH *v.* NAZIR, J. C.'S COURT, SIND. **121 I.C. 168=A.I.R. 1930 Sind 43.**

—S. 43—Marriage of minor.

———*Appellate Court, powers of.*

One of the duties of a guardian of a minor girl is to provide a suitable bridegroom. Whatever he does in relation to that is either conduct or proceedings within the meaning of S. 43. Where a Court authorises the guardian to celebrate the marriage of the girl, his act is a regulation of conduct or proceeding on the part of the guardian. The appellate Court has therefore the right to hear appeal from such an order under the provisions of S. 47 (1) read with S. 43. (*Mears, C. J. and Sen, J.*). REOTI LAL *v.* SHIAM LAL. **121 I.C. 690= 1930 A.L.J. 152=52 All. 74= A.I.R. 1930 All. 66.**

———It is well settled that under its delegated powers from the Sovereign as *parens patriae* of infants it is competent for the Court to restrain by an injunction an unsuitable marriage of an infant whether he or she be a ward of Court or not and that this rule equally applies to Hindus and Mahomedans. Where the Court has not assumed superintendence of the person of an infant it is *prima facie* necessary that the Court should be moved to prevent such an unsuitable marriage. But different considerations apply where the Court has, as a matter of fact, assumed superintendence of the infant and in pursuance thereof has transferred its duties to a person of its own choice called the certificated guardian and has charged him with the custody of the infant on behalf of the Court. In that case it is incumbent upon the Court to take all necessary precautions to prevent the person so entrusted from doing any act which is likely to result in irremediable injury to the ward. And there can be no greater injury to an infant than that he or she should be tied down to an unsuitable partner in life. This is the more so in the

GUARDIANS AND WARDS ACT (1890), S. 43—Scope of power.

case of an infant whose law declares his marriage as indissoluble except by death. In England it is the uniform practice to require a guardian appointed by the Court to give a recognizance that the infant shall not marry without the leave of the Court. And in any case where there is the least suspicion that a marriage is likely to take place without the Court's sanction it issues an injunction not only to prevent such marriage but to prevent communication between the ward and the admirer and removes the infant from the custody of the guardian if he is suspected of connivance. There is no reason why the same rule should not prevail here. (*Rupchand Bilaram and De Souza, A. J. Cs.*). PREMJI KANJI *v.* JEEWIBAI. **108 I.C. 668=23 S.L.R. 75= A.I.R. 1928 Sind 129.**

—S. 43—Scope of power.

———*Guardian appointed or declared by Court.*

Under S. 43 (1) it is only the conduct or proceedings of a guardian *appointed or declared by Court* which can be called in question. When the minor was in the custody of a person who was not a guardian appointed by the Court, and thereafter a guardian was appointed the former cannot be called upon to deliver jewels on the person of the minor during the custody of the former person: 36 M.L.J. 189, *Dist.* (*Odgers, J.*). KUPPAMMAL *v.* MUNIAPPA CHETTI. **82 I.C.488=1924 M.W.N. 892= A. I. R. 1924 Mad. 902=47 M.L.J. 655.**

—S. 45—Accounts.

———The Court has no authority under S. 45 to demand payment from the guardian of any more than the balance shown due by the guardian's accounts as put in.

Such order cannot also be made when no enquiry, is made, even assuming that the guardian's accounts are false, as to what the income and the expenditure for each year actually is. (*Dalip Singh, J.*). HARNAM SINGH *v.* GURDIAL SINGH. **A.I.R. 1930 Lah. 558.**

—S. 45—Applicability.

———*Contumacious disobedience of Court's orders—Legal representative of guardian.*

Section 45 is intended to punish wilful disobedience by the guardian of an order issued to him by the Court which it is within his power to comply with if he is so minded. Clause (*c*) places failure by the legal representative of a deceased guardian to deliver any property or account in his possession on the same footing as failure by the guardian himself to do the same. This clause therefore refers only to wilful non-compliance with what is within the competence of the person ordered to do which he has contumaciously declined to do and nothing more. (*Rupchand, A. J. C. and Barlee, Ag J. C.*). MOONDOMAL CHHADALDAS CHUGH *v.* NAZIR, J. C.'S COURT, SIND. **121 I. C. 168=A.I.R. 1930 Sind 43.**

—S. 45—Ex parte order.

———Where the Court purporting to act under S. 45 imposed a fine upon a person for having failed to comply with its previous order to produce a minor girl in his custody and the order imposing the fine was made *ex parte* without giving him an opportunity to show cause against it, the order imposing the fine is not tenable. (*Bhide, J.*). SANT SINGH *v.* LALCHAND. **114 I.C. 333= A.I.R. 1929 Lah. 630.**

—S. 45—Failure to pay balance.

———Failure of a guardian to exhibit true accounts or to pay the balance found due on such accounts would make him liable to the penalties mentioned in S. 45. (*Walsh, Ag. C. J. and Neave, J.*). SITA RAM *v.* MT. GOVINDI. **80 I.C. 592= 46 All. 458=22 A.L.J. 585= A.I.R. 1924 All. 593.**

GUARDIANS AND WARDS ACT (1890), S. 45—Order without enquiry.

—S. 45—Fine, imposition of.

———*Legality.*

A guardian put in a petition to the Court to the effect that he had collected some money belonging to the minor, which should be deposited at a proper rate of interest and that he would be responsible for it. The Court ordered that he should put the money in fixed deposit in a bank on a certain date on which the guardian appeared and stated that he had not brought the money as the mother of the minor did not wish it to be deposited in a bank but wished that it should be lent out at a higher rate of interest with the help of the minor who had reached the age of 18 years. Thereupon the Court at once fined the guardian Rs. 50 for not having carried out its orders and it further directed that he would be fined Rs. 10 a day until he deposited the money,

Held, that the Court had no power under S. 45 (1) (b), Guardians and Wards Act, to impose the fine in question. That section only authorizes a Court to impose a fine on a guardian if the guardian fails to pay into Court on a requisition under S. 34 (d) of the Act, the balance due on the account exhibited by him in compliance with a requisition under S.34 (c) and not for failure to deposit other moneys: 25 C. L. J. 149, *Foll.* (*Addison, J.*). GARIB CHAND *v.* EMPEROR. **108 I.C. 739= A.I.R. 1928 Lah. 538.**

—S. 45—Liability of surety.

———*Procedure for enforcing.*

The proper remedy for the Court to proceed against the sureties on the surety bond executed by the guardian and the sureties is to assign the bond to enable the assignee to sue on the bond and not by issuing execution, on the strength of S. 141, C. P. Code: A.I.R. 1926 Sind 35, *Foll.* (*Rupchand Bilaram and Lobo, A.J.Cs.*). NARAINDAS AILDAS *v.* MT. JHALIBAI. **103 I.C. 493= A. I. R. 1927 Sind 262.**

—S. 45—Minor not in custody of guardian.

———Where a guardian of a minor is appointed but the minor is in custody of a third person, no direction can be made under S. 12 (1) of the Act. The proper course is to direct the third person to compel the minor to return to the custody of her guardian in obedience to an order under S. 25 (1). In the absence of such an order an order imposing a fine on the third person is not correct. (*B.B. Ghose and Bose, JJ.*). KINU SUNDARI DEVI *v.* NARENDRA NATH. **111 I.C. 134=A.I.R. 1929 Cal. 27.**

—S. 45—Order without enquiry.

———In order to enable the Court to impose the fine it must be shown that the sum for the non-payment of which the fine has been imposed was actually due from the guardian, and if the guardian represents that the sum is not due, no fine can be imposed unless it is ascertained as to whether the sum which he has been ordered to pay is really due from him.

On a previous occasion accounts were examined and certain amount was stated in the Dt. Judge's order to be due from the guardian, to the minor. The guardian continued as such for some time after. Then she was succeeded by another who in turn was succeeded by a third. To the intermediate guardian, the original guardian had paid a portion of the amount stated to be due from her.

GUARDIANS AND WARDS ACT (1890), S. 45—Powers of High Court.

When the guardian for the time being applied to realise the balance, the original guardian wanted to examine witnesses to show that the amount stated to be due from her included certain items which were actually realised not by her but by her successor in the office of guardianship. Her objection was overruled and eventually on her non-payment, she was fined,

Held, that the order, being one without any enquiry as regards the amount actually payable by the guardian, was improper. (*Mullick and Kulwant Sahay, JJ.*). MT. ABBASI BEGUM *v.* MT. YAQUTI BEGUM. **93 I. C. 628=4 Pat. 264=7 P.L.T. 473=A.I.R. 1925 Pat. 477.**

—S. 45—Powers of High Court.

———*Order passed without enquiry.*

Where the guardian of a minor was removed from the guardianship and was ordered by the Court to deliver possession to the new guardian of a certain house which was not included in the list of the minor's properties filed by him (the old guardian), and to which a third person laid claim and where he (the old guardian) was fined for disobedience of the order,

Held, Per *Sulaiman, J.*—In appeal against the order of fine it was open to the High Court to revise the previous order for delivery of possession if it found that it had been passed without any enquiry as to the title to the house,

Held, further that the District Judge could not in the proceedings under the Guardians and Wards Act compel the former guardian to hand over to the new guardian the house over which he never obtained possession as guardian of the minor and which he never admitted to belong to the minor.

Per *Daniels, J.*—Though the order for delivery of possession was not directly before the High Court and could not therefore be revised, the High Court was not precluded from taking notice of the fact that the order had been passed without any evidence on the record to show that the appellant was in possession on behalf of the minor. (*Sulaiman and Daniels, JJ.*). FAKIR MUHAMMAD *v.* BRIJ NARAIN. **88 I.C. 444=23 A.L.J. 736=6 L.R. A. Civ. 377=A.I.R. 1925 All. 785.**

—S. 45—Suit.

———The remedies by suit contemplated by Ss. 35 and 36 are not inconsistent with the remedies provided for by S. 45. (*Walsh, Ag. C. J. and Neave, J.*). SITA RAM *v.* MT. GOVINDI. **80 I.C. 592=46 All. 458=22 A.L.J. 585=A.I.R 1924 All. 593.**

—S. 46—Letter by Collector.

———*Whether evidence.*

It is only when the Court calls upon the Collector for a report under S. 46 of the Act, that it is open to the Court to treat the report as evidence. A letter by Collector to Dt. Judge asking for cancellation of an order of appointment of guardian by latter, is not to be treated as evidence. (*Shah, Ag. C. J. and Crump, J.*). NAGAWA GURLINGAYA *v.* COLLECTOR OF BELGAUM. **77 I.C. 702=25 Bom. L. R. 1232=A.I.R. 1924 Bom. 157.**

—S. 47—Appeal.

———*High Court—Inherent power.*

The High Court, apart from Clause 15 of the Letters Patent, has inherent jurisdiction to hear an appeal in a matter affecting a ward of Court. (*Beamont, C. J. and Madgavkar, J.*). JLABHAI *v.* JERBHAI. **32 Bom. L.R. 1301.**

GUARDIANS AND WARDS ACT (1890), S. 47—Refusal to remove guardian.

———The words 'removing a guardian' in S. 47 Cl. (g) are not descriptive of the section but of the order against which the appeal is provided for. (*Wazir Hasan, A. J. C.*). SURAJ NARAYAN SINGH *v.* BISHAN BHARNATH BHAN. **78 I.C. 138=A.I.R. 1925 Oudh 260.**

—S. 47—Consequential order.

———Where the District Judge passed an *ex parte* order for production of the minor, and the person ordered, instead of producing the minor, applied for cancellation of the *ex parte* order, and the District Judge refused to cancel the order on the ground of disobedience of the *ex parte* order,

Held, that no appeal lay against the latter order as it was a consequential order. (*Findlay, O. J. C.*). MT. AKABAI *v.* NARAYAN. **92 I.C. 36=A.I.R. 1926 Nag. 251.**

—S. 47—Limitation and procedure.

———Though it is true that in an appeal filed under S. 47, Guardians and Wards Act, the Act appears to be silent both as regards the procedure to be followed in respect of appeals and the period of limitation for the same, still as the general provisions of the Civil Procedure Code as regards procedure are applicable to cases under the Guardians and Wards Act, the procedure in respect of appeals under S. 47, Guardians and Wards Act must be taken to be governed by the provisions of the Civil Procedure Code, and the period of limitation in respect of the appeal under S. 47, Guardians and Wards Act, would therefore seem to be 90 days from the date of the order under appeal: 7 P. R. 1898 and 43 Mad. 51, *Foll.* (*Bhide, J.*). MT. PANA BIBI *v.* MAHLA. **110 I.C. 374=A.I.R. 1928 Lah. 488.**

—S. 47—Order fixing maintenance.

———No appeal lies from an order on a guardianship application fixing the amount to be paid by the guardian of the property for the maintenance and education of the ward: 28 M. L. J. 96, *Ref.* (*Prideaux, A.J.C.*). MT. TULSAI *v.* MT. TULSAI. **75 I.C. 592=A.I.R. 1924 Nag. 141.**

—S. 47—Order to deposit money—Appeal—Revision.

———An order under S. 34 (d) directing a guardian to deposit into Court the money due to the minor is not appealable, but where there is a mistake apparent on the face of the record, the High Court may interfere in revision and correct it. (*Abdul Raoof, J.*). RADHA KISHEN *v.* KHUSHI RAM. **67 I.C. 309=83 P. L. R. 1922=A. I. R. 1921 Lah. 377.**

—S. 47—Refusal to act under S. 45.

———No appeal lies against an order refusing to take action under S. 45. (*Walsh, Ag. C. J. and Neave, J.*). SITA RAM *v.* MT. GOVINDI. **80 I.C. 592=46 All. 458=22 A. L. J. 585=A.I.R. 1924 All. 593.**

—S. 47—Refusal to remove guardian.

———A refusal to remove a guardian is not appealable under S. 47: 19 Cal. 487; 23 Cal. 201; 30 Bom. 667; 20 All. 433, *Foll.* (*Oldfield and Devadoss, JJ.*). KONTHALATHAMMAL *v.* THANGASWAMI PILLAI. **74 I.C. 896=46 Mad. 873=18 M.L.W. 256=33 M.L.T. 80=1923 M.W.N. 902=A.I.R. 1924 Mad. 327=45 M.L.J. 481.**

GUARDIANS AND WARDS ACT (1890), S. 47—Refusal to remove guardian.

———*Testamentary guardian.*

Where on an application to remove a testamentary guardian the order referred to non-applicant as the testamentary guardian, affirmed her fitness for the appointment and found against the conduct alleged, as disqualifying her for it,

Held, that all that was relevant to the prayer for her removal and did not amount to the making of a declaration, which was not made in terms, which neither party had asked for and which the lower Court was not conscious that it was considering.

The power to appoint a testamentary guardian and to make a will, were as regards any demonstrable or legitimate origin and until the Hindu Wills Act in 1870, on the same footing.

A Hindu can appoint a guardian of the person and property of his child by will when the property willed is his separate property.

There is nothing in law or reason or equity to prevent there being two guardians, one for person and another for the property. The Guardians and Wards Act expressly permits the appointment of more guardians than one—*vide* S. 15, Cls. (4) and (5). Where it is not permissible to appoint a guardian for the property of a minor, a guardian for the person alone can be appointed by testament: 19 Bom. 309, *Foll.*

Case-law reviewed and texts and history traced.

Per *Devadoss, J.*—It is the inherent right of a father to have the custody of his minor children and that right is transmissible by will or testament and there is nothing in the Hindu Law to prevent such transmission.

A father has power to appoint by will a guardian or the person of his minor children whether there be joint family property or not; and that right does not depend upon the father being able to devise by will any property to his children for whom he appoints a guardian. (*Oldfield and Devadoss, JJ.*). KONTHALATHAMMAL *v.* THANGASWAMI PILLAI.

74 I.C. 896=46 Mad. 873=18 M.L.W. 256=33 M.L.T. 80=1923 M.W.N. 902=A.I.R. 1924 Mad. 327=45 M.L.J. 481.

—S. 48—Declaration of majority.

———After a minor was declared to have attained majority by Court, the Court again entertained an application for correcting the age.

Held, that the Court had no right to interfere in the matter as it was *functus officio*. (*Stuart, C.J. and Raza, J.*). SAJID HUSAIN *v.* ABDUL RAHIM.

115 I.C. 273=A.I.R. 1929 Oudh 354.

—S. 48—Discharge.

———*Accounts—Liability for.*

An order under S. 48 discharging the guardian from further acting as the guardian to the person and properties of the minor does not imply a discharge from liability for accounting to the minor. Such a discharge must expressly be ordered under S. 41 (4): 15 C.L.J. 57, *Rel. on.* (*Das and Ross, JJ.*). SHAIK ABDUL RAHIM *v.* MT. BARIDRA.

61 I.C. 807=2 P.L.T. 556=6 P.L.J. 273=A. I. R. 1921 Pat. 166.

—S. 48—Finality of orders.

———Save, in cases where orders under the Guardians and Wards Act can be assailed either by way of an appeal under S. 47 of the Act or by way of an application for revision under S. 115 of the C.P. Code, under S. 48 of the Guardians and Wards Act, they are final. (*Wazir Hasan, A.J.C.*). SURAJ NARAYAN SINGH *v.* BISHAMBHAR NATH BHAN.

78 I.C. 138=A.I.R. 1925 Oudh 260.

—S. 48—Manner of sale.

———*Jurisdiction, want of.*

When the Court orders particular procedure to be followed to effect the sale of a minor's property that order is final although made without jurisdiction. (*Newbould and B.B. Ghose, JJ.*). TARINI KUMAR DUTTA *v.* SRISH CHANDRA DAS.

85 I.C. 667=A.I.R. 1925 Cal. 1160.

—S. 48—Procedure.

———*Rules relating to form and those creating jurisdiction—Distinction.*

The violation of the procedure prescribed by S.31 (2) for recording the order granting the permission cannot be made the ground of brushing aside the finality of the order as enacted by S. 48. The only condition in which the finality prescribed by S. 48 can be avoided is to establish that the order granting the permission was a nullity.

An order passed by a Court in violation of such rules of procedure, however mandatory, as relate merely to the form of the order cannot be treated as a nullity. The omission to follow such rules of procedure can amount to no more than a mere irregularity or a material irregularity in the circumstances of a particular case. On the other hand, an order passed by a Court in violation of such rules of procedure the observance of which only invests the Court with jurisdiction to pass the order, is a nullity: 25 Bom. 337 (P.C.) and 42 Cal. 72 (P.C.), *Foll.* (*Wazir Hasan and Neave, A.J.Cs.*). RAMESHWAR BAKHSH SINGH *v.* MT. RIDH KUER.

87 I.C. 238=A.I.R. 1925 Oudh 633.

—S. 48—Review.

———Where the District Judge granted permission to guardian of a minor to sell the minor's property for Rs. 37,500, but before the sale-deed was drawn up offers by other intending purchasers were made to the extent of Rs 46,000,

Held, the District Judge could review his own order and cancel his previous permission: 29 All. 213; 31 Bom. 590; (1915) P.R. 424, *Foll.* (*Baker, J.C. and Prideaux, A.J.C.*). SONBA *v.* NARAYAN.

79 I.C. 471=A. I. R. 1924 Nag. 269.

———An order made by a Court appointing guardian of a minor under the Guardians and Wards Act is not open to review. (*Scott-Smith, J.*). MT. SHARFAN *v.* MT. BHOLI. **4 L. L.J. 274=A. I. R. 1922 Lah. 395.**

—S. 48—Revision.

———*Order fixing expenses of ward's marriage.*

A Court has jurisdiction to fix the amount of marriage expenses of a ward, and since the question is one of fact being purely a question of amount, no revision lies under S. 48: A.I.R. 1926 All. 301, *Foll.* (*Ghulam Mohiuddin, A. J. C.*). MT. JAMNABAI *v.* GOPAL DAS. **109 I.C. 671=A.I.R. 1928 Nag. 291.**

———*Expenses of ward's marriage.*

Revision does not lie in a matter which is purely a question of discretion in the lower Court, *e. g.*, a question of amount to be sanctioned for the marriage of the ward. (*Walsh and Kanhaiya Lal, JJ.*). MT. DURGABAI, *In the matter of.*

92 I.C. 482=48 All. 300=24 A.L.J. 310=A.I.R. 1926 All. 301.

GUDABA OR GADABA.

See GRANT INAM.

GUILTY, Plea of—*See* CR. P. CODE, S. 271.

GUMASTHA.

See (1) CONTRACT ACT.
(2) PRINCIPAL AND AGENT.

GUZARAT TALUKDARS' ACT (Bom. 6 of 1888).

—S. 2 (1) (a)—Mulgameti.

———*Amendment Act* (*II of* 1905), *S.* 2 (1)—'*Mulgameti*' *meaning of—Kathis of Salangpur—Bombay R. Code—Law how far affected.*

Per *Marten, J.*—A Mulgameti is one who is, or is descended from, a former ruler and owner of the village and still retains by re-grant or otherwise some part of the lands or interest therein of such former ruler and owner, but not necessarily any of his governing rights. A Gameti would have sovereign or quasi-sovereign rights, but to constitute a Mulgameti some retention of such sovereign or quasi-sovereign rights is not essential. If the Gameti retains or is re-granted some of his former lands or interest therein although all his former governing rights pass to others, he is still a Mulgameti. The Kathis though they are Mulgametis, do not hold land directly from Government, and consequently are Talukdars within the meaning of the 1888 Act as amended by the 1905 Act.

Per *Pratt, J.*—A Talukdari estate is an estate which connoted rulership in pre-British times but which is now a landlord estate to which some seignorial or subordinate rights may or may not be still attested. (*Marten and Pratt, JJ.*). DOLATSINGJI JASWANTSINGJI *v.* OGHAD VIRA.
82 I.C. 867=25 Bom. L.R. 726=
A.I.R. 1924 Bom. 72.

—S. 16—Finality of decision.

———The decision of the District Court under S. 16 of the Act does not bar a regular suit on the principle of *res judicata*: 30 Bom. 220, *Appr.* (*Macleod, C. J., Pratt and Crump, JJ.*). AMARSANGJI DUNGARJI JHAL *v.* DEEPSANGJI RAVABHAI JHALA.
87 I.C. 588=49 Bom. 442=
27 Bom. L.R. 345=
A.I.R. 1925 Bom. 241 (F.B.).

—S. 16—Second appeal.

———*Scope.*

No second appeal lies to the High Court from a decision of the District Judge under S. 16 of the Act: 16 Bom. 408, *Overruled.* (*Macleod, C.J., Pratt and Crump, JJ.*). AMARSANGJI DUNGARJI JHALA *v.* DEEPSANJI RAVABHAI JHALA.
87 I.C. 588=49 Bom. 442=27 Bom. L.R. 345=
A.I.R. 1925 Bom. 241 (F.B.).

—S. 29-B—Notice.

———*Mortgagor having knowledge.*

Although the plaintiff mortgagor who is desirous to redeem, has knowledge of the original mortgage-deed, those who are desirous of claiming under that deed are bound to give notice in writing of their claim after the notification under S. 29-B was issued. Otherwise their claims could not be considered: 19 Bom. L. R. 855; 34 Bom. 142, *Foll.* (*Macleod, C.J. and Coyajee, J.*). TALUKDHARI SETTLEMENT OFFICER *v.* AKUJI ABHRAM.
68 I.C. 487=24 Bom. L. R. 762=46 Bom. 993=
A.I.R. 1922 Bom. 350

HABITUAL OFFENDER.

———*Sub-mortgagee—Rights of.*

Where the mortgagee of talukdari rights and the sub-mortgagees to whom the mortgagee's rights were mortgaged by the mortgagee's heirs failed to notify their claim when the talukdari settlement officer called upon creditors to notify their claims and where therefore the sub-mortgagees, the plaintiffs, who were ejected, sued to recover possession on the ground that it was not their duty to notify their claim,

Held, In spite of the provisions of S. 29-B one of the representatives of the original mortgagee who was a minor was entitled to claim against the talukdar and therefore plaintiffs were entitled to sue in spite of their failure to notify their claim. As long as the mortgagee's rights were in existence the plaintiffs could sue the mortgagee for all those rights which the mortgagee would be entitled to claim against the mortgagor and they were entitled to remain in possession as long as the mortgagee who was their mortgagor could claim his mortgage rights against the Talukdar. (*Macleod, C.J. and Shah, J.*). HARANBHAI JIVABHAI *v.* COLLECTOR OF KAIRA.
64 I.C. 225=46 Bom. 239=
23 Bom. L.R. 1046=A.I.R. 1922 Bom. 200.

—S. 31—Mortgage.

———*Talukdari land—Mortgage of, is void.*

Where mortgaged land was entered by the Talati in Register of Inam Vanta lands a few months before the suit as vanta land but no village account of long standing was forthcoming to prove that it was vanta land and not Talukdari and the mortgagor was a Talukdar, and his estate was taken over for management by Talukdari Settlement Officer under that Act:

Held, the mortgaged land was Talukdari land and the mortgage on the death of the Talukdar was void. (*Macleod, C.J. and Coyajee, J.*). SHANKAR LAL TAPIDAS v. BAJIKHAN AKTYARKHAN.
69 I.C. 102=24 Bom. L.R. 709=
A.I.R. 1922 Bom. 342.

—S. 33—Powers of Talukdari officer.

———The powers under S. 33 of a Government officer in the temporary management of a talukdar's estate to manage the revenue for recovery of arrears of revenue are the same as the Collector has as regards an unalienated village: 18 Bom. L.R. 323, *Appl.* (*Macleod, C. J. and Coyajee, J.*). JINABHAI *v.* COLLECTOR.
94 I.C. 752=
28 Bom. L.R. 416=A.I.R. 1926 Bom. 325.

HABEAS CORPUS.

See CRIMINAL P. C., S. 491.

HABEAS CORPUS ACT (1862, 25 & 26 Vict., Ch. 20).

—Scope.

———By the Habeas Corpus Act, the powers of the King's Bench are limited to England and such places outside England which have no local Court competent to exercise the power. (*Schwabe, C. J., Oldfield and Coutts-Trotter, JJ.*) GOVINDAN NAIR *v.* EMPEROR.
68 I.C. 838=45 Mad. 922=
16 M.L.W. 349=31 M.L.T. 304=
23 Cr. L.J. 614=A.I.R. 1922 Mad. 499=
43 M.L.J. 396 (F.B.).

HABITUAL OFFENDER.

See (1) CRIMINAL P. C., SS. 106 to 112.
(2) CRIMINAL TRIAL.
(3) PENAL CODE.

HACKNEY CARRIAGE ACT (1879), S. 6—Absence of number.

HACKNEY CARRIAGE ACT (14 of 1879).

—S. 6—Absence of number.

———*Carriage being re-painted.*

Where in answer to the charge that the number had not been painted in a prominent place on the carriage, the proprietor of a hackney carriage explained that the carriage had been re-painted and was awaiting for the number and where as a matter of a fact five days after the challan the carriage was actually re-inspected and passed correct and where the lamps of the carriage bore the number,

Held, that the owner's explanation was correct and that no offence was committed. (*Wazir Hasan, A.J.C.*). KING EMPEROR *v.* JOHN CASSEL.
88 I.C. 594=2 O.W.N. 443=26 Cr.L.J. 1170=A.I.R. 1925 Oudh 447.

HANDWRITING.

See (1) EVIDENCE.
(2) EVIDENCE ACT, SS. 47, 67, 68 & 73.

HEARSAY EVIDENCE.

See (1) EVIDENCE.
(2) EVIDENCE ACT.

HEIR, BEQUEST TO.

See WILL.

HEIRS.

See HINDU LAW—SUCCESSION.

HEREDITARY ALLOWANCE.

See HEREDITARY OFFICE.

HEREDITARY OFFICE.

See (1) BOMBAY HEREDITARY OFFICES ACT.
(2) HINDU LAW, RELIGIOUS OFFICE.
(3) MAHOMEDAN LAW, RELIGIOUS OFFICE.
(4) MADRAS HEREDITARY VILLAGE OFFICES ACT (III OF 1895).
(5) T. P. ACT, S. 6.

HERMIT.

See HINDU LAW—SUCCESSION.

HIBA-BIL-EWAZ.

See MAHOMEDAN LAW—GIFT.

HIDDEN TREASURE.

See TREASURE TROVE ACT.

HIGH COURT.

See also (1) CR. P. CODE, SS. 4, 266, 554, ETC.
(2) GOVERNMENT OF INDIA ACT.
(3) JURISDICTION.
(4) PRIVY COUNCIL.

—Equity.

———It is part of the function of the High Court in dealing with cases to look below the surface and make deductions from the probabilities. (*Duckworth and Pratt, JJ.*). MG. PO LUN *v.* MA E MAI.
74 I. C. 47=1 Bur. L. J. 111=A. I. R. 1923 Rang. 57.

HIGHWAY—Closing of thoroughfare.

—Judge on other service.

———A Judge who does not resign his appointment does not cease to be Judge of the High Court during his temporary absence on other service. (*Spencer and Devadoss, JJ.*). MEYAPPA CHETTIAR *v.* CHIDAMBARAM CHETTIAR. **83 I. C. 91=1924 M.W.N. 692=21 M.L.W. 12=A. I. R. 1925 Mad. 58=47 M.L.J. 397.**

—Rent Controller.

———*High Court has powers of superintendence.*

High Court has power of superintendence and revisional jurisdiction as regards the Controller. The Controller, in discharging his duty under S. 15 and the President of the Tribunal in discharging his duties under S. 18 act as Courts of Justice. Whether they are Civil Courts within the meaning of any particular enactment is another question, but they are both Civil Courts in the general sense; they are authorized to decide judicially, and by judicial methods only, between persons seeking their civil rights. Such functions as they perform under Ss. 15 and 18 are neither administrative nor ministerial. (*Rankin, J.*). ALLEN BROS. & CO. *v.* BANDO & CO. **70 I. C. 371=49 Cal. 931=26 C. W. N. 845=A.I.R. 1923 Cal. 169.**

—Rules framed by Government.

———The High Court will not interfere with rules and conditions framed by Government under express provisions of law unless they are in conflict with some legal principles. (*Chaudhuri and Cuming, JJ.*). NAGENDRALAL DAS *v.* MUNICIPAL COMMISSIONER OF CHITTAGONG. **59 I. C. 340=47 Cal. 426=27 C.W.N. 240.**

HIGH COURT RULES.

See UNDER VARIOUS HIGH COURTS.
(1) ALLAHABAD, (2) BOMBAY, (3) CALCUTTA, (4) LAHORE, (5) MADRAS, (6) PATNA AND (7) RANGOON.

HIGH COURTS (INDIAN) ACT (1861, 24 & 25 Vict., Ch. 104).

—S. 15—List of touts.

———*Order of District Magistrate including name in.*

High Court can entertain in exercise of general powers of superintendence an application in revision from an order of District Magistrate including the name of a person in a list of touts under S. 36, Legal Practitioners Act: 21 All. 181 and A.I.R. 1928 All. 334, *Rel. on.* (*Sulaiman and Niamatullah, JJ.*). KAPOOR CHAND JAIN *v.* EMPEROR. **1930 A.L.J. 961=A.I.R. 1930 All. 641.**

HIGHWAY.

—Blind alley.

———*Ownership—Adjacent houses.*

In the case of a blind alley the Court may presume that the ownership vests in the owners of the adjacent houses, but that presumption is not a presumption of law but an inference of fact: A.I.R. 1925 Bom. 27, *Cons.* (*Dalip Singh, J.*). SHIMBU DAYAL *v.* GAJJU MUL. **108 I.C. 610=A.I.R. 1928 Lah. 709.**

—Closing of thoroughfare.

———*Special damage.*

The presumption that when a public thoroughfare is closed, the members of the public in

HIGHWAY—Dedication.

general suffer an equal inconvenience is rebuttable and can be rebutted by evidence that plaintiff has suffered special inconvenience so as to entitle him to sue for removal of the obstruction. (*Ashworth, J.*). BHEWANI GHULAM *v.* SITLAPRASAD. **93 I.C. 453=A.I.R. 1926 Oudh 343.**

—Dedication.

———*Presumption from long user.*

Where so far as living memory goes, a passage has been proved to have been used as a public cart road, the correct inference to be drawn is that it has been so used from time immemorial as a public highway, and dedication should be presumed from long user: A.I.R. 1920 P. C. 43, *Rel. on.* (*Marten, C.J. and Murphy, J.*). ARDESHIR JIVANJI *v.* AIMAI KUVARJI. **117 I.C. 513=53 Bom. 187=31 Bom. L.R. 97=A.I.R. 1929 Bom. 94.**

———*Lost grant, presumption of.*

The existence of a prior dedication with regard to an ancient public way takes very much the nature of what is called a lost grant. It is entirely different in its legal attributes and in its origin from a private way or easement which may be acquired by prescription following upon continuous user. The public cannot acquire a public way by prescription, and where a public way is found and no traces are forthcoming of its origin the law presumes a dedication or a lost grant by the owner to whom the land belonged and who alone could dedicate it. (*Wats, Ag.C.J. and Ryves, J.*). MD. RAZA KHAN *v.* MD. ASKARI KHAN. **85 I.C. 304=46 All. 470=22 A.L.J. 729=6 L.R.A. Civ. 67=A.I.R. 1924 All. 599.**

———*Origin of roads.*

From a long continued user of way by the public, an inference of dedication to the public can be drawn. In villages as well as in small towns in Oudh there is no doubt that the origin of highways may be traced to the fact that land used as highway was either nobody's or everybody's land. (*Wazir Hasan, A.J.C.*). RAI BAJRANG BAHADUR *v.* BABU BADRI NATH. **70 I.C. 74=9 O. L. J. 497=A.I.R. 1923 Oudh 26.**

—English law of.

———*Applicability.*

It is very doubtful whether it would be right to bodily import the whole of the English law as to highways into cases relating to highways in India. (*Wazir Hasan, A.J.C.*). BAJRANG BAHADUR SINGH *v.* BADRI NATH BHARGAWA. **70 I.C. 74=9 O.L.J. 497=A.I.R. 1923 Oudh 26.**

———*Applicability.*

It is sometimes dangerous to attempt to ascertain the law in India by the discussion of English cases. But in a matter where, legislation like the Municipalities Act, following closely upon English Local Government legislation, has left the matter at large, without following it up by modifying the general law on a topic such as public ways and highways the Courts in India are really enjoined to apply the English principles. (*Walsh, Ag. C.J. and Ryves, J.*). MD. RAZA KHAN *v.* MD. ASKARI KHAN. **85 I.C. 304=46 All. 470=22 A.L.J. 729=6 L.R.A. Civ. 67=A.I.R. 1924 All. 599.**

—Interdiction.

———*Equal right of all sections of the public.*

When the streets are public streets vested in a Municipality all members of the public have equal

HIGHWAY—Private right.

rights and one section of the community has no right to interdict another section of the community from the lawful use of the public streets: 30 Mad. 185 (P.C.); A.I.R. 1925 P.C. 36 and A.I.R. 1926 Mad. 830, *Foll.* (*Waller and Madhavan Nair, JJ.*). SUNDARESWARA SROUTHIGAL *v.* EMPEROR. **102 I.C. 481=50 Mad. 673=8 A.I. Cr. R. 194=25 M.L.W. 667=38 M.L.T. 307=1927 M.W.N. 279=28 Cr. L.J. 545=A.I.R. 1927 Mad. 938=52 M.L.J. 602.**

—Music.

———Where a Hindu temple existed in a locality for a long time and the community had exercised the right to play music in it and also on the adjacent public street for a considerable length of time and subsequently the Mahomedans deliberately built their mosque cheek by jowl with the Hindu temple and sued the Hindus for a declaration restraining them from disturbing their worship.

Held, that the Hindus had the right to conduct processions with music so long as they did not interfere with the ordinary use of the street by the public and subject to the lawful directions by the Magistrates. That the right of the Mahomedans to stop the playing of music depends on the circumstances of each case and that they cannot claim to curtail the Hindus' right of service and music which has been customary long before the mosque was built: A.I.R. 1925 P.C. 36, *Foll.*; 2 Mad. 140, *Expl.* and 6 Mad. 203 (F.B.), *Ref.* (*Wallace and Ananthakrishna Ayyar, JJ.*). JAFFAR HUSAIN KHAN *v.* KRISHNAN SERVAI. **1930 M.W.N. 520=31 M.L.W. 845=A. I. R. 1930 Mad. 701=58 M.L.J. 703.**

———Public have right to conduct religious processions with music through a public street: A.I.R. 1925 P.C. 36, *Rel. on*; 42 Bom. 438, *held no longer good law.* (*Kotval, A.J.C.*). ABDUL AZIZ *v.* DEO RAO. **104 I.C. 213=A.I.R. 1927 Nag. 339.**

—Nuisance.

———*Encroachment*—Bona fide *claim—Duty of Magistrate.*

Encroachment upon a public road is an obstruction to the public path, and it is a nuisance in itself under S. 268 of the Penal Code. No length of user can justify an encroachment upon a public way. The question of a sufficient width of the road being left in support of the encroachment, for public use is no ground for allowing the encroachment or obstruction to continue. It is the duty of the Magistrate to come to a finding, whether the claim of the person complained of, to such encroachment, is *bona fide* or not, and question of possession is relevant for this purpose. (*Jwala Prasad, J.*). JAGROSHAN BHARTHI *v.* MADAN PANDE. **105 I.C. 238=6 Pat. 428=8 P.L.T. 452=8 A.I. Cr. R. 306=28 Cr. L. J. 910=A. I. R. 1927 Pat. 265.**

—Private right.

———*Access to public road from private property.*

A right of immediate access from private property to public highway is recognised in law as a private right distinct from the rights of the owner of that property to use the highway itself as one of the public. Although the plaintiffs must show

HIGHWAY—Religious procession.

particular damage it is clear that a private right of this kind has been recognised as being particular damage in the case of individual members who had enjoyed access to the highway from adjoining property. (*Mears, C. J. and Piggott, J.*). HANUMAN PRASAD *v.* RAGHUNATH PRASAD AIR 82 I. C. 659= 46 All. 573=22 A.L.J. 568=5 L. R. A. Civ. 393= A.I.R. 1924 All. 715.

—Religious procession.

———*Suit for declaration of right.*

There is a right to conduct a religious procession with its appropriate observances along a highway. Persons of whatever sect are entitled to conduct religious processions through public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace; and a suit lies for the declaration of such right. But claim by one sect, for the exclusive use of the highway for their worship is untenable: 2 Bom. 457, *overruled*.

The distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English Law and ought not to applied in India. (*Lord Dunedin.*) MANZUR HASSAN *v.* MUHAMMAD ZAMAN. 86 I.C. 236= 3 Pat. L.R. 300=23 A.L.J. 179=6 L.R.P.C. 34= 27 Bom. L.R. 170=21 M.L.W. 239= 6 P.L.T. 115=52 I.A. 61=29 C.W.N. 486= 2 O.W.N. 53=47 All. 151=A.I.R. 1925 P.C. 36= 48 M.L.J. 23 (P.C.).

———Persons of whatever sect, are entitled to conduct religious processions through public streets so that they do not interfere with the ordinary use of such streets, by the public and subject to such direction as the Magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of public peace: A.I.R. 1925 P.C. 36 and 5 Mad. 309, *Foll.* (*Simpson, A.J.C.*). DILLI *v.* KING EMPEROR. 89 I. C. 269= 2 O. W. N. 589=26 Cr. L. J. 1325= A.I.R. 1925 Oudh 656.

———*Blocking passage.*

Religious processions are lawful and legal and come within a proper user of the public highway and are always subject to the control of the District Magistrate and Police Officers. But primarily the purpose for which a highway is dedicated is that of passage. Any extensions thereof must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage. Hence a religious procession is not entitled, by frequent stops in a public street for the purpose of performing some religious rites, to block the passage in an unreasonable manner. (*Tudball and Sulaiman, JJ.*). MUHAMMAD ZAMAN *v.* MANZUR HASAN. 63 I. C. 984=43 All. 692= 19 A.L.J. 740=A. I. R. 1921 All. 146.

—Right of public.

———Any member of the public has got the right to use a public street in any lawful manner and a declaration can be granted if he is prevented from so doing without proof of any special damage: A.I.R. 1925 P.C. 36, *Foll.* (*Krishnan and Odgers, JJ.*). MALLIAH *v.* GANGANNA. 94 I.C. 226= A. I. R. 1926 Mad. 830.

HINDU DISPOSITION OF PROPERTY ACT (1916), S. 2—Retrospective effect.

—Special damage.

———*Village pathway.*

Infringement of a village pathway which is not a public pathway, in which the plaintiffs have a right along with the villagers, does not require proof of special damage to give rise to a cause of action: 23 C. W. N. 91 and 26 C. W. N. 587, *Foll.*; 25 C.W.N. 95, *Dist.* (*Chakravarti, J.*). SURESH-CHANDRA DUTTA *v.* JAMINI KANHATA. 96 I. C. 711=A. I. R. 1926 Cal. 1159.

———*Village pathway.*

The plaintiffs asked for declaration of a village pathway used by all the people of the village for certain specified purposes. The defendants contended that the alleged pathway was not a public highway but was a permissive foot track,

Held, that the suit was for the enforcement of a village pathway and no question of special damage arose in the case: 15 Cal. 460, *Foll.*

It is only in the case of a public highway that the question of special damage arises; where the case is one of a village pathway, there is no question of special damage: 23 C.W. N. 91, *Ref.* (*Mookerjee and Rankin, JJ.*). HARISH CHANDRA SAHA *v.* HARISH CHANDRA CHUCKERBUTTY. 80 I. C. 195=39 C. L. J. 347= A.I.R. 1923 Cal. 622.

———In an action for the removal of an obstruction of a public road, the mere fact that the plaintiffs would have to go a longer way round or that the road would be impassable for carts is not a finding that the plaintiff would suffer injury or damage peculiar to himself in any way different from the damage that would be suffered by other people who had hitherto used this road. The object of the rule requiring proof of special damage is that but for such a rule the defendants might be harassed by separate suits from every individual member of the public whose right of way has been obstructed. Special damage does not mean serious damage but means damage of a special nature, that is, damage affecting the plaintiff individually or damage peculiar to himself, his trade or calling. (*Newbould and Panton, JJ.*). BATIRAM KOLITA *v.* SIBRAM DAS. 61 I.C. 405=25 C.W.N. 96= A.I.R. 1921 Cal. 271.

———*Village pathway.*

A suit for a declaration that a pathway is a village pathway and for an injunction on the defendant to remove certain obstruction can proceed without proof of special damage: 23 C. W. N. 91. *Foll.* (*Panton, J.*). HARISH CHANDRA *v.* PRAN NATH. 69 I.C. 910=26 C.W.N. 587= A.I.R. 1921 Cal. 405.

HINDU DISPOSITION OF PROPERTY ACT (15 of 1916).

—S. 2—Retrospective effect.

———The Act contains no words making it in any way retrospective in its operation, and therefore S. 2 only covers the case of a disposition made after the commencement of the Act. (*Fawcett and Madgavkar, JJ.*). ATMARAM *v.* NAZIR, DISTRICT COURT. 94 I.C. 704=28 Bom. L.R. 431= A.I.R. 1926 Bom. 381.

HINDU LAW

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Author [redacted]
Accession No. [redacted]
Call No. [redacted]

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HINDU LAW—Adoption—Affiliation.

HINDU LAW—
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Affiliation.
Agreement.
Authority.
Burden of proof.
Capacity to take.
Ceremonies.
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—Adoption—Affiliation.

———*Affiliation deed declaring a boy as a son—Deed making no reference to executant's death—Document not styled as will—It does not make the son an adopted son.*

An affiliation deed executed by the last male holder and which was relied upon to validate the adoption contained : "Further you, becoming a son to me, will be such an owner of all my properties as a son is." There was no reference to executant's death and the document was not styled as a will.

Held, that the clause cannot amount to a gift or transfer of all deceased's properties. At best, it contemplates that the alleged adopted son should be associated with him as a joint owner on the footing that both are members of a joint family. In the absence of an adoption, they cannot be members of a joint family, but may become tenants-in-common, *i.e.*, the document might be a gift of an undivided half of the properties if there are appropriate words indicating gift : 12 L. W. 660, *Dist.* (*Coutts-Trotter, C. J. and Ramesam, J.*). SURAPPA *v.* SUNDARAMMA. **107 I. C. 141= A.I.R. 1928 Mad. 176.**

—Adoption—Agreement.

———*Kumaraswamy Sastri, J.—Adoptee a major—Agreement to pay widow's debts is legal—Agreement to give a share of property instead of paying debts—Legality of—(Odgers, J).—Adoption made with the sole desire of dividing the inheritance with the adopted son is invalid—(Odgers and Jackson, JJ.). Settlement with adopted son preserving half estate to widow is against Hindu Law. A. I. R. 1927 P. C. 139, Foll.*

Kumaraswami Sastri, J.—If the adopted son is at the time of adoption a major capable of contracting, there is nothing illegal in the widow requiring the adopted son to pay her debts. If the adopted son, instead of undertaking the burden, thinks that it is in his interests to get an unburdened share of the estate and makes the widow to pay her debts out of any share allotted to her, the adoption would not be invalid as being made from a corrupt motive. The case may be different if the widow had not debts to pay or if the proportion of the estate granted to her was so disproportionate to the debts that the Court can on the evidence treat it as a device pure and simple by the widow under the guise of an adoption to get a large share of her husband's estate to herself: A.I.R. 1927 P. C. 139, *Rel. on.*

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Odgers, J.—As in the case of a surrender by a widow to a reversioner, so in an adoption, the operation must not be a mere device to divide the estate with the reversioner. An adoption is invalid if it is made with a corrupt motive namely, the sole desire of dividing the inheritance with the adopted son. (*Kumaraswami Sastri, Odgers and Jackson, JJ.*). KRISHNAYYA RAO *v.* RAJAH OF PITTAPUR. **116 I.C. 673=51 Mad. 893= 28 M.L.W. 422= A.I.R. 1928 Mad. 994= 55 M.L. J. 894 (F.B.).**

———*Agreement to secure benefit to widow's friends or relatives is not legal.* (*Mears, C. J.*)—*If adoptee is major, such agreement is binding* (*Sulaiman, J.*).

Mears, C.J.—A Hindu widow when making an adoption can impose stipulations which are reasonable and proper for her own protection; agreements for maintenance, and at times management of the property are deemed as valid. But a widow cannot be permitted to benefit her own relatives and friends and bargain for money or property to be made over to them as a condition of the adoption. She is not entitled in law to propose any arrangement in favour of her relatives which could diminish the value of the ancestral estate.

Per *Sulaiman, J.*—Even if the adopting widow has no power to impose conditions on her would-be adopted son, the adopted son, if of age is not prevented from undertaking a liability on himself for consideration of being adopted. The adopted son would be bound by his agreement not because the widow had power to impose such condition on him before adopting him but because he himself entered into an agreement in lieu of consideration. The defendant is bound not by the authority of the widow but by his own agreement. (*Mears, C.J. and Sulaiman, J.*). MITTAR SAIN *v.* DATA RAM. **90 I.C. 1000= 24 A.L.J. 185= A.I.R. 1926 All. 194.**

———*Agreement to adopt is a good consideration* (*Sulaiman, J.*).

An agreement to adopt a particular man is a good consideration for the adoptee's entering into an agreement in widow's favour or according to her wishes. (*Mears, C.J. and Sulaiman, J.*). MITTAR SAIN *v.* DATA RAM. **90 I.C. 1000= 24 A.L.J. 185= A.I.R. 1926 All. 194.**

———*Stipulations by widow with the adoptee—Validity of.*

Adoption of an adult by a Jain widow—Adopted son, a poor man, getting large property on account of adoption—Agreement by the adoptee as condition precedent to adoption, to give some property to widow's brothers is binding as being supported by good consideration. (*Lindsay, J., dissenting*).

Per *Lindsay, J.*—A Hindu widow, about to make an adoption to her husband cannot stipulate for gifts of her husband's estate to be made to her relations and to strangers by the adopted son after he is taken in adoption. She cannot make the adoption upon the adopted son's agreeing to carry out her directions to make such gifts. To allow an arrangement of this nature to be carried out would be to allow the Hindu widow to do indirectly what the Hindu Law forbids her to do directly ; and no such arrangement can be enforced. Any attempt to bind the adopted son by such conditions must fail; the conditions are void and the son takes the estate free from them. An adoptive father can at the time of adopting a son impose such conditions as he thinks

HINDU LAW—Adoption—Agreement.

fit upon the enjoyment of his property by the adopted son. A widow, however, stands in a very different position. It is legitimate for a widow on such occasions to impose conditions for her own benefit provided they are reasonably designed for her own protection. The widow, although the estate is divested from her by the act of adoption, is nevertheless entitled to maintenance and may for that purpose make provision for the protection of the estate in her own interest. The question in all cases is whether the stipulations are reasonable. If they are unreasonable, such as giving the widow absolute powers of disposition over the property, they should be rejected. In the United Provinces the consent of the husband is essential for an adoption by a widow, and while consent so given would justify the widow in imposing reasonable conditions for the protection of herself and the estate from which she is entitled to draw maintenance, it would not be readily assumed that the husband consented to arrangements made by the widow at the time of adoption whereby extensive portions of his estate could be transferred by way of gift to the members of his wife's family. The invalidity of such conditions cannot be cured by showing that the adopted son, a person of full age, assented to them. The invalidity arises out of the inherent disability of the widow under the Hindu Law to give away portions of her husband's estate and an attempt to impose conditions which would lead indirectly to such alienations being made is absolutely void as being *ultra vires*. Even if it can be deduced from the language of the deeds in the case that all the formalities necessary to the execution of a deed of trust had been carried out, the purpose of the trust being unlawful the trust could not be enforced. (*Lindsay and Mukerji, JJ.*). MITTAR SAIN *v.* DATA RAM. **87 I.C. 724= A.I.R. 1926 All. 7.**

———Agreement between adoptive and natural father whereby adoptive father reserves full powers of disposal over his property is not binding on the adoptee as being opposed to the principles of the Hindu Law of adoption. (*Macleod, C.J. and Coyajee, J.*). PARVATIBAI *v.* VISHVANATH. **92 I.C. 4= 27 Bom. L.R. 1509= A.I.R. 1926 Bom. 90.**

———*Adoption induced by promise of maintenance is valid.*

The adoption of a boy is a religious act and is one which is necessary for the salvation of the soul. If a person is asked to adopt a boy by the promise of sufficient means to maintain himself and the boy, the adoption induced by such promise will not militate against the rules of Hindu Law governing adoptions. (*Devadoss and Waller, JJ.*). SUBBARAJU *v.* NARAYANARAJU. **97 I.C. 232= 24 M.L.W. 716= A.I.R. 1926 Mad. 1093= 51 M.L.J. 366.**

———*Collateral arrangement between adoptor and adoptee's natural father does not make the adoption invalid.*

An adoption cannot be declared invalid by reason of any collateral arrangement of contract entered into between the adopter and the adoptee's natural father, for it would do incalculable harm to the adopted boy if the adoption is to be declared invalid by reason of any arrangement, between persons over whom he had no control. (*Case-law referred to.*) (*Devadoss and Waller, JJ.*). SUBBARAJU *v.* NARAYANARAJU. **97 I.C. 232= 24 M.L.W. 716= A.I.R. 1926 Mad. 1093= 51 M.L.J. 366.**

———*Agreement by natural father with adoptive father entitling latter to dispose of ancestral property*

HINDU LAW—Adoption—Agreement—Ante-adoption.

by deed inter vivos *or will—Agreement made at time of adoption—Adopted son benefitted—Latter is bound by agreement.*

Per *Spencer, Offg. C.J.*—If an adoption and a disposition of his property by the adoptive father form part of one transaction, the adopted son never acquires any interest in the property disposed of and no question can arise as to his guardian's competency to deal with it.

Per *Kumaraswamy Sastri, J.*—Where an adoption is made by a Hindu who at the time of adoption had absolute power of disposal over the property, an agreement between the natural father and the adoptive father as regards alienations which the adoptive father wants to make either by a document *inter vivos* or by will binds the adopted son in all cases where such an agreement would be for his benefit. There is no reason why the rights of the boy to be adopted should be tested with reference to what his position in the family would be after the adoption and to see whether the adoptive father could, after the adoption, have made the alienations which are disputed. The right of a Hindu father to give his son in adoption is not governed by any questions of benfit to the adopted boy. For it is perfectly competent to the natural father to give his boy in adoption to a pauper and thus deprive his son of any interest in the natural father's property. If the adopting father would not make the adoption but for the conditions agreed to by the natural father and if in spite of those conditions the adopted son would be benefitted, there is no reason why the transaction should not be tested like any other agreement entered into by the natural father as guardian of his own son. (*Case-law discussed.*) (*Spencer, Offg. C. J. and Kumaraswami Sastry, J.*). KRISHNAMURTHY AIYAR *v.* KRISHNAMURTHY AIYAR. **85 I.C. 882=1925 M.W.N. 632= A.I.R. 1925 Mad. 932=49 M.L.J. 252.**

—Adoption—Agreement—Ante-adoption.

———*Ante-adoption arrangement giving portion of property absolutely to adoptive mother—Such arrangement is binding on adopted son.*

Where in an ante-adoption agreement made with the consent of the natural father of the minor adopted son, it was arranged that a portion of the adoptive father's property would be given absolutely to the adoptive mother, and the arrangement is fair and reasonable and beneficial to the adopted son, the agreement is binding on the adopted son although it purports to give absolute property to the adoptive mother: A.I.R. 1927 P. C. 139, *Disc.* and *Expl.* (*Ramesam and Venkatasubba Rao, JJ.*). T. RAJU *v.* NAGAMMAL. **113 I. C. 449= 52 Mad. 128=29 M.L.W. 77=1928 M.W.N. 732= A.I.R. 1928 Mad. 1289=56 M.L.J. 41.**

———*Natural father consenting—Validity of—Agreements are valid by custom to the extent of creating life-interest in adopting widow even in whole property.*

But it is quite different when the adoption is antecedent to the date at which the disposition is meant to take effect. The rights which flow from adoption are immediate, and the disposition, if given effect to, is inconsistent with these rights and cannot of itself *vi propria* affect them. In such cases, it is impossible to ascribe any value to the guardianship power of the natural father to bind the son as to property, in which he cannot have an interest until the time when the guardianship has ceased, nor can the case be solved by the doctrine

HINDU LAW — Adoption — Authority — Conditional.

of approbate and reprobate, for the doctrine of approbate and reprobate assumes election and the adopted son has no election. He cannot undo the adoption and be as he was. The same fact destroys the idea of conditional adoption. The adoption cannot be undone : it cannot, therefore, be conditional.

The only ground on which such arrangement can be sanctioned is custom and it seems that custom has sanctioned such arrangements in so far as they regulate the right of the widow as against the adopted son. It seems part of the custom that one *sine qua non* of such arrangement should be the consent of the natural father as showing that the arrangement is for the advantage of the boy, and that the mere postponement of his interest to the widow's interest, even though it should be one extending to a life-interest in the whole property, is not incompatible with his position as son.

As soon however, as the arrangements go beyond that, *i.e.*, either give the widow property absolutely or give the property to strangers, it seems that no custom as to this has been proved to exist and that such arrangements are against the radical view of the Hindu Law. It cannot be laid down as a general proposition that all arrangements, consented to by a natural father, and of benefit to the boy, in the sense that half a loaf being better than no bread, he is better with an adoption with truncated rights than with no adoption at all, are valid: *Opinion* of *Farran, J.*, in 11 Bom. 381, *Not appr.* ; 2 Mad. 91 (P.C.) and 16 Cal. 556 (P.C.), *Expl.* and *Dist.* (*Bombay and Madras cases discussed.*) (*Viscount Dunedin.*) KRISHNAMURTY *v.* KRISHNAMURTY. **101 I.C. 779=50 Mad. 508=29 Bom. L.R. 969=1927 M.W.N. 467=54 I.A. 248=45 C.L.J. 620=31 C.W.N. 910=4 O.W.N. 621=39 M.L.T. 52=26 M.L.W. 186=25 A.L.J. 945=8 P.L.T. 719=A.I.R. 1927 P.C. 139=53 M.L.J. 57 (P.C.).**

—Adoption—Authority.
Conditional.
Consent.
Construction.
Co-widows.
Determination of.
Necessity of.
Presumptions about.
Prohibition.
Proof of.
Setting aside.
Who can give.

—Adoption—Authority—Conditional.

———Hindu authorizing wife to adopt by his will—Will directing that boy in particular family should be adopted in first place—Daughter's son from that family adopted—Adoption is valid under will. (*Sulaiman and Kendall, JJ.*). BRIJ RAJ SARAN SINGH *v.* BASANT SINGH. **118 I.C. 154=A.I.R. 1929 All. 561.**

———The authority given by husband by his will to his widows to adopt was as follows: "If my younger brother should beget sons you should take in adoption any of these children or the children of any other persons if you are desirous of doing so and at a time when you wish to do it." The adoption made by the widows was not of a son of the younger brother.

Held, that it was only in the event of the younger brother having more than one son that the testator intended that his widows may, if they should have no objection, adopt one of his sons. Further, it is only if the widows should be desirous of doing so, it is stated that they should take in adoption one of the sons of the brother. The adoption therefore was valid. (*Srinivasa Aiyangar and Reilly, JJ.*). TIRUVENGATARATNAM *v.* BUTCHAYYA. **113 I.C. 347=52 Mad. 373=28 M.L.W. 727=1928 M.W.N. 53=A.I.R. 1929 Mad. 11=55 M.L.J. 757.**

HINDU LAW—Adoption—Authority—Consent.

———*Particular person named—If there was any obstacle, another was to be adopted—Existence of obstacle or* bona fide *doubt that it existed—Adoption of another is valid.*

Written permission to adopt stated that a step-brother was to be adopted but any other person may be adopted "if there be any obstacle to take him" (the step-brother), "in adoption according to the Shastras". In Dataka Mimansa there is a prohibition against the adoption of a step-brother and certain lawyers who were consulted gave their opinion against the adoption of a step-brother. So another person was adopted,

Held, that it was a valid adoption as there was either a prohibition against the adoption of a step-brother or at least a *bona fide* doubt as to its validity : 21 All. 412 (P.C.) ; (1863) W. R. Spc. No. 121 ; (1868) 12 M.I.A. 397 (P.C.) and 3 Mad. 15, *Ref.* (*Ross and Wort, JJ.*). RAJENDRA PRASAD *v.* GOPAL PRASAD. **108 I.C. 545=7 Pat. 245=9 P.L.T. 123=A.I.R. 1929 Pat. 51.**

—Adoption—Authority—Consent.

———*Mere presence of reversioner is not consent.*

Per *Kumaraswami Sastri* and *Reilly, JJ.*—If the adoption was made on the footing of the consent by the son, the mere presence of the next presumptive reversioner when the authority was given would not make the adoption valid if the consent of the son on the basis of which the adoption was made is not proved or is invalid. (*Coutts Trotter, C.J., Madhavan Nair and Jackson, JJ.*). ANNAPURNAMMA *v.* APPAYYA SASTRY. **119 I.C. 389=52 Mad. 620=29 M.L.W. 858=A.I.R. 1929 Mad. 577=56 M.L.J. 760 (F.B.).**

———*Son's consent is sufficient.*

Per *Full Bench.*—The assent of a son to an adoption by his mother is sufficient assent under Hindu Law to validate the adoption where there is no change in the circumstances and there are no other grounds for the next presumptive reversioner to object to the adoption when actually made. The fact that the son is not alive when the adoption is actually made does not render his consent ineffectual nor can the adoption be vitiated merely because the son has no proprietary interest to lose by the adoption when actually made or because it tends to defeat the reversionary right of other sapindas : 12 M.I.A. 397 (P.C.) ; 26 Mad. 627 ; A.I.R. 1918 P.C. 97 ; 1 Mad. 69 (P.C.) ; 1 Mad. 174 (P.C.) ; 41 Mad. 604 ; A.I.R. 1925 Mad. 67 ; A.I.R. 1926 Mad. 916, *Rel. on* ; A.I.R. 1920 P.C. 4, *Ref.* ; 36 Mad. 145, *Expl.* (*Coutts Trotter, C.J., Madhavan Nair, and Jackson, JJ.*). ANNAPURNAMMA *v.* APPAYYA. **119 I.C. 389=52 Mad. 620=29 M.L.W. 858=A.I.R 1929 Mad. 577=56 M.L.J. 760 (F.B.).**

———*Sapinda—Withholding of consent — Improper motives—What are—When Court can question withholding of consent.*

Kumaraswami Sastri, J.—The Sapinda is not entitled to withhold his consent from corrupt or improper motives. What he has to see is the interest of the family to which adoption is made, and the sapinda whose refusal is not proper can be ignored ; 23 Mad. 486, *Rel. on.*

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The position of the next sapindas whose consent is necessary is that they are, by virtue of the relationship, competent advisers of the widow and proper Judges of the propriety of the act of the widow in making the adoption. Where a sapinda sets up an agreement between his father and the widow's husband which according to him prohibits an adoption even when such a contention has been set up by his father in a previous litigation and negatived and persists in this objection and where he says he is not going to give up his reversionary right to succeed by consenting to the adoption the sapinda cannot be a competent Judge of the propriety of the widow's act or a competent adviser. If the position of the sapindas is that of a domestic forum then the moment one of the Judges takes up the grounds above mentioned as reason for the dissent he ceases to be one who could be a member of the forum and the widow is entitled to look to the consent of other sapindas. The fact that he would lose the estate if an adoption was made and the fact that the boy chosen is a son of his enemy would not render his grounds of objection to give consent proper.

Odgers, J.—The law has set up what may be called a domestic tribunal, namely the sapindas, who are to judge as to the contemplated action of the widow in making the adoption. Their decision or at least their refusal is only to be canvassed if the refusal is obviously improper. A sapinda is entitled to show that if the adoption is not undertaken with any honest or spiritual purpose, it is undertaken out of spite with a view to put him to loss and make a gain for the adopter since he is thereby merely amplifying or explaining his grounds for asserting that there is no honest purpose in the adoption.

Jackson, J.—If a sapinda has for good reason refused his consent, it is not for the Courts to go behind his action, by introducing principles of equity which in other circumstances may prevail in England.

It cannot be said that a sapinda's judgment is vitiated from the outset on account of his personal interest. So long as he has exercised a reasonable judgment, and is not actuated by motives of fraud or corruption, his decision must be respected. (*Kumaraswami Sastri, Odgers and Jackson, JJ.*). KRISHNAYYA RAO *v.* RAJAH OF PITTAPUR.
116 I.C. 673=51 Mad. 893=28 M. L.W. 422=A.I.R. 1928 Mad. 994=55 M.L.J. 894 (F.B.).

———Sapindas of equal degree—No difference exists as regards their capacity to consent to adoption—Adopted son and subsequent natural born son stand on equal footing. (*Kumaraswami Sastri, Odgers and Jackson, JJ.*). KRISHNAYYA RAO *v.* RAJAH OF PITTAPUR. **116 I.C. 673=51 Mad. 893=28 M.L.W. 422=A.I.R. 1928 Mad. 994=55 M.L.J. 894 (F.B).**

———The fact that the son of a reversioner is to be given in adoption for which the reversioner's consent is necessary would not make him incapable of giving consent. (*Kumaraswami Sastri, Odgers and Jackson, JJ.*). KRISHNAYYA RAO *v.* RAJAH OF PITTAPUR. **116 I.C. 673=51 Mad. 893=28 M.L.W. 422=A.I.R. 1928 Mad. 994=55 M.L.J. 894 (F B).**

———*Odgers, J.*—Where there are two sapindas, of whom one consents and the other refuses, you cannot merely disregard the latter and say that as you have one consent that is enough to validate the adoption. (*Kumaraswami Sastri, Odgers and Jackson, JJ.*). KRISHNAYYA RAO *v.* RAJAH OF PITTAPUR. **116 I.C. 673=51 Mad. 893=28 M.L.W. 422=A.I.R. 1928 Mad. 994=55 M.L.J. 894 (F.B.).**

———*Jackson, J.*—If the consent of a substantial majority of the agnates nearest in relationship has been obtained, the Court need not trouble about the motives underlying the adoption. (*Kumaraswami Sastri, Odgers and Jackson, JJ.*), KRISHNAYYA RAO *v.* RAJAH OF PITTAPUR.
116 I.C. 673=51 Mad. 893=28 M.L.W. 422=A.I.R. 1928 Mad. 994=55 M.L.J. 894 (F.B.).

———A daughter-in-law can only adopt with the consent of her father-in law and such consent is operative only during his life-time, as such the consent contained in his will is of no avail : 29 Bom. 410 and A.I.R. 1922 Bom. 321, *Foll.* (*Patkar and Baker, JJ.*). YESHWADABAI VAMAN *v.* RAMCHANDRA SHANKAR. **105 I.C. 351=29 Bom. L. R. 1320=A.I.R. 1927 Bom. 652.**

———Where a widow adopts without express authority from her husband or without consent of the remaining co-parceners the adoption is invalid and gives no rights to the adoptee in the joint family property. (*Fawcett and Madgavkar, JJ.*). BABANNA SANGAPPA *v.* PARAVA NINGHBASAPPA.
100 I.C. 147=50 Bom. 815=28 Bom.L.R. 1446=A.I.R. 1927 Bom. 68.

———*Sapindas—Refusal of consent—Corrupt motives, what are—Motive of widow—Nearest Sapindas even in number—Court to decide the propriety of refusal of consent.*

In the Dravida country a Hindu widow not having her husband's authority may nevertheless, if authorized by the consent of his kinsmen, validly adopt a son to him.

So far as sapindas are concerned, all the nearest ones must be consulted, but if any one of them gives or refuses his consent from corrupt or malicious motives his action may be ignored.

Whatever weight might be attached to the religious benefits flowing from an adoption, the secular rights flowing from it cannot be ignored : A.I.R. 1918 P.C. 97, *Rel. on.*

No doubt, the question is to be decided by the opinion of the majority of the sapindas, but it must be by a majority of the nearest sapindas and there must be such a substantial majority as to justify the conclusion that the adoption is proper and is made in the *bona fide* performance of a religious duty. If the refusal to consent of the dissenting minority is shown to be based upon proper and valid grounds, the mere fact of a majority being in favour of the adoption should not prevail.

In a case where there are only two nearest sapindas, one assenting and one dissenting, no question of majority comes in. If the dissent of the dissenting sapinda is shown to be unreasonable, it may be ignored, and the assent of one alone would be sufficient to validate the adoption. But if, on the other hand, the objection is well founded, the adoption cannot be supported.

The objection that the adoption would deprive the kinsman of his inheritance is a personal one and such an objection is not a valid one : 39 Mad. 77 and 2 L.W. 284, *Rel. on.*

Per *Venkatasubba Rao, J.*—The very essence of the rule of consent is that the sapindas are presumed to be capable of forming an honest judgment, although in the very nature of things they are interested parties. Therefore the consent of a

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sapinda cannot be discounted on the ground that he is the natural father of the boy.

The reason for requiring the consent of the nearest among the sapindas is that it is their reversionary interest that is affected by the adoption (A I.R. 1926 Mad. 881, *Foll*), and as the sapindas' right to be consulted depends upon the measure of their proprietary (or quasi-proprietary) right, it stands to reason that in regard to consenting to an adoption, the position of the *aurasa* son and the adopted son must be alike, their rights to property being equal.

When a man has sons, the latter do not equally with their father fall in the group of the nearest sapindas: A.I.R. 1918 P.C. 97 and A.I R. 1920 P.C. 4, *Expl.*

The refusal to consent, because the reversionary interest of the sapinda will be prejudiced can in no circumstances be justified, nor can the fact that the boy is the son of his longstanding enemy.

If the number of the nearest sapindas is even, the Court will in such cases be called on to decide the propriety or the *bona fides* of the dissent. The assenting kinsmen are not required to justify their assent: for the adoption is a meritorious act and it is presumed that the assent was properly given, but if it is proved in such cases that the dissenting kinsmen were actuated by corrupt or malicious motives their dissent must be disregarded: 2 Mad. 202; 30 Mad. 50 (P.C.) and 26 Mad. 627, *Rel. on.* (*Case-law fully discussed.*) (*Krishnan and Venkatasubba Rao, JJ.*). KRISHNA RAO *v.* RAJA OF PITTAPUR. **102 I.C. 713=A.I.R. 1927 Mad. 733.**

———*Sapinda's consent must be independent of representation that husband had given authority.*

The assent of the sapindas to be a foundation of the adoption must be obtained uninfluenced by any statement of the widow that there was also the husband's authority, if the evidence shows that the widow made such a statement: 2 Mad. 270 and 26 Mad. 627, *Dist.* (*Ramesam and Madhavan Nair, JJ.*). P. VENKANNA *v.* Y. VENKANNA.
102 I.C. 184=A.I.R. 1927 Mad. 706.

———Adoption without consent of deceased husband or co-parcener is invalid: A.I.R. 1926 Bom. 435 (F.B.), *Foll.* (*Fawcett and Madgavkar, JJ.*). GANESH *v.* GURNATH. **98 I.C. 457=28 Bom.L.R. 1188=A.I.R. 1926 Bom. 575.**

———*Consent by father-in-law to widowed daughter-in-law—Death of father-in-law before adoption—Sapindas in existence at the time of adoption not objecting—Adoption is valid.*

Where the consent is given to the widowed daughter-in-law by her father-in-law who happens to be the nearest sapinda then living, his death, before the adoption is made, would not *ipso facto* revoke the consent. Such a consent will come to an end only if circumstances had materially changed after his death.

Where in such a case there had been no change in the circumstances on the date the adoption was made, either by the coming into existence of other nearer sapindas, or by the death of sapindas then alive, or by reason of the estate having vested in third persons; and five sapindas were alive on the date of the adoption and the boy adopted was the son of one of them and his natural father was present at the adoption; another sapinda assisted the widow during the ceremony and a third was present; but the 4th and 5th sapindas were on that date in their houses in the village and did not in any way indicate to the widow that they objected to the adoption.

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Held, that the adoption by the daughter-in-law was valid. In the circumstances of the case the authority of the father-in-law was not at an end on the date of the adoption: 41 Mad. 604, *Foll.*; 36 Mad. 145, *Dist.* (*Odgers and Viswanath Sastri, JJ.*). AMMAMMA *v.* SATYANARAYANA.
96 I.C. 950=43 Mad. 636=24 M.L.W. 150=A.I.R. 1926 Mad. 916=51 M.L.J. 426.

———*In absence of agnates consent of nearest cognates, will suffice.*

There being no agnate relation the consent of the nearest cognate relation who under the law would be the presumptive reversioner is sufficient. When it is said that assent of sapindas is necessary, sapindas include *bhinnagotra* sapindas as well as *sagotra* sapindas. The test of propinquity from the point of view of property is an unfailing test and a sure guide in this matter: A.I.R. 1925 Mad. 67, *Diss.*; 12 M.I.A. 397 (P.C.); 3 I.A. 154; 1 Mad. 69 (P.C.); 1 Mad. 174 (P.C.); 30 Mad. 50 (P.C.), *Ref.*; 41 Mad. 988 (P.C.), *Expl.* (*Spencer and Venkatasubba Rao, JJ.*). KESAR SINGH *v.* SECY. OF STATE.
93 I.C. 651=49 Mad. 652=1926 M.W.N. 540=24 M.L.W. 878=A. I. R. 1926 Mad. 881=51 M. L.J. 16.

———According to the Bombay School, the consent of the husband's kinsmen is not necessary for the adoption by a Hindu widow who has not been authorised by her husband to adopt to him: A. I. R. 1922 P.C. 216, *Foll.* (*Lord Phillimore.*) HARIGIR *v.* BHARATHI. **88 I.C. 343=21 N.L.R. 127=22 M.L.W. 355=1925 M.W.N. 414=A.I.R. 1925 P.C. 127 (P.C.).**

———The consent of the husband's mother would validate an adoption by a widow, in the absence of any other sapindas. (*Spencer, Offg. C. J, and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.**

———*Consent of one only of two kinsmen.*

Consent of one only of two kinsmen is not that of majority even where the other was asked; and the consent of a remote kinsman cannot cure the defect. (*Ramesam and Jackson, JJ.*). A. BRAHMAYYA *v.* C. RATTAYA. **83 I.C. 59=20 M.L.W. 503=1924 M.W.N. 844=A.I.R. 1925 Mad. 67.**

———Adoption by widow—Courts should examine the motives of the sapindas in giving consent—Object of helping widow to screen alienation by widow, from the attacks of nearer reversioners makes consent invalid—Consent obtained by promise of payment of some money is corrupt. (*Ramesam and Jackson, JJ.*). A. BRAHMAYYA *v.* C. RATTAYYA. **83 I.C. 59=20 M.L.W. 503=1924 M.W.N. 844=A.I.R. 1925 Mad. 67.**

———*Husband's authority — Sapinda's consent—Difference between.*

There is an essential difference between the authority of the husband and the assent of a sapinda. The former is intended to be exercised only after the death of the husband. The latter is intended to be used at a reasonable time, after the consent is given. When the interval is short, the death of the sapinda may not matter; but a sapinda's assent is not to be pocketted by the widow and used long after it was given, when entirely different considerations as to the expediency of the adoption may apply. Again, the boy to be adopted ought also to be referred to the consideration of the sapinda whose consent to the adoption of "any

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boy at any time" is invalid. *(Ramesam and Jackson, JJ.)*. A. BRAHMAYYA *v.* C. RATTAYYA.
83 I.C. 59=20 M. L. W. 503=1924 M. W. N. 844=A.I.R. 1925 Mad. 67.

———*Refusal of consent by Sapinda—Failure to give reasons for refusal.*

Any refusal unaccompanied by reasons is not necessarily an improper refusal. It is, of course, improper if the sapinda were asked to state his reasons and 'declines' to state, them, either at the time or later on, in the course of the judicial proceedings. *(Ramesam and Jackson, JJ.)*. A. BRAHMAYYA *v.* C. RATTAYYA. **83 I. C. 59=20 M L. W. 503=1924 M.W.N. 844=A.I.R. 1925 Mad. 67.**

———Madras Law—Adoption of daughter's son with consent of deceased husband or sapindas is legal: A.I.R. 1923 Mad. 517, *Foll.* *(Schwabe, C.J. and Coutts-Trotter, J.)*. PARTHASARATHY REDDI *v.* KANDASWAMI REDDI. **73 I.C. 954=18 M.L.W. 156=32 M. L. T. 349=1923 M.W.N. 423=A. I. R. 1923 Mad. 711=45 M. L. J. 161.**

———*Sapinda's refusal—Court can scrutinise reasons*—Bhinnagotra *sapindas need not consent.*

The right of the Court to scrutinise the kinsmen's reasons extends only where consent is refused and not where consent is given inasmuch as the law imposes a responsibility upon kinsmen in granting their consent to an adoption. A daughter's son is not entitled to be consulted regarding an adoption by a widow who has obtained the consent of the nearest sapindas, as he is not a *gnati*, and *Bhinnagotra* sapindas are not included under the terms sapindas in the texts which require their consent to an adoption. Consent of the sapindas to an adoption by the widow is material as guaranteeing the propriety of the widow's action in making the adoption. Where such consent has not been shown to have been obtained by fraud, coercion or corruption, it is sufficient authority for the adoption. *(Oldfield and Phillips, JJ.)*. VADREU RANGANAYAKAMMAGARU *v.* RYALI SOMASUNDRA RAO.
59 I.C. 609=43 Mad. 876.

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———Authority given to a wife to adopt has to be strictly pursued: 12 M.I.A. 350 (P.C.), *Ref.* *(Sir Binod Mitter.)* RAJENDRA PRASAD BOSE *v.* GOPAL PRASAD SEN. **11 P. L.T. 587=1930 A.L.J. 1184=32 L.W. 324=34 C.W.N. 1161=52 C.L.J. 287=A.I.R. 1930 P.C. 242 (P.C.).**

———*Will directing mother to adopt would amount to nearest sapinda's consent and not to authority.*

Per *Kumaraswami Sastri* and *Reilly, JJ.*—So far as the authority to adopt is concerned, it can only be given by the husband and so son's will directing mother to adopt, can in law only amount to a consent by the son who under the Hindu Law would be the nearest sapinda of his mother. *(Coutts-Trotter, C.J., Madhavan Nair and Jackson, JJ.)*. ANNAPURNAMMA v. APPAYYA SASTRI.
119 I.C. 389=52 Mad. 620=29 M.L.W. 858=A.I.R. 1929 Mad. 577=56 M.L.J. 760 (F.B.).

———It must be assumed that a Hindu husband who for the purpose of continuing his line and providing for the purpose of performance of religious ceremonies for the salvation of his soul and authorizing an adoption to be made, does not authorize an invalid adoption. *(Srinivasa Aiyangar and Reilly, JJ.)*. TIRUVENGADARATNAM *v.* BUTCHAYYA. **113 I.C. 347=52 Mad. 373=28 M.L.W. 727=1928 M.W.N. 53=A. I. R. 1929 Mad. 11=55 M.L.J. 757,**

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———*A special power to adopt has to be strictly construed.*

A power to adopt, where it happens to be a special as distinguished from a general power, has to be strictly construed and no limitation should be imported into the document, independently of what would flow from the plain etymological meaning of the document itself; where the words are clear and unambiguous, full effect has to be given to those words, without any regard to extraneous circumstances such as the conduct of the parties or the particular surroundings, which might have influenced the intention of the testator. *(Sen and Niamatullah, JJ.)*. DHARAM PRAKASH *v.* MT. KALAWATI DEVI. **110 I. C. 665=50 All. 885=26 A. L. J. 1106=A.I.R. 1928 All. 459.**

———*Adoption to be made with consent of father-in-law—Adoption after father-in-law's death—If valid—Authority to be liberally construed.*

The Courts should not be astute to defeat an adoption but should rather do their utmost to support it unless it is clearly in excess or in breach of the power.

In a written permission to adopt there was a clear intention that an adoption was necessary. If a specified person was not adopted, another was to be adopted with the consent of the father-in-law. But there was no penalty attaching to the failure to take the consent. The father-in-law died and afterwards an adoption was made.

Held, that the primary intention was to adopt and the consent was a secondary consideration, failure to obtain which, through a cause beyond the control of person acting upon the deed, does not invalidate the adoption. The deed should be construed liberally: 16 C.L.J. 304; 18 Cal. 385; 29 Mad. 382 (P.C.), *Foll.*; 32 M.L.J. 47; A.I.R. 1921 P.C. 88 and (1869) 12 M.I.A. 350 (P.C.), *Dist.* *(Ross and Wort, JJ.)*. RAJENDRA PRASAD *v.* GOPAL PRASAD. **108 I.C. 545=7 Pat. 245=9 P.L.T. 123=A.I.R. 1929 Pat. 51.**

———*Will giving absolute power over estate to widow and a power to adopt if she wished—Adoption by widow—Estate vests in the adopted son.*

Where by a will the widow is given absolute power over the property and a power to adopt if she wished, the bequest of the estate to the widow with absolute powers should be regarded only as a provisional bequest subject to the exercise of the power to adopt given by the will. On the election by the widow to exercise the power and make an adoption the provisional bequest ceases and the implied intention of the testator that from the date of the adoption the adopted son should represent him and his estate should take effect: A.I.R. 1925 Mad. 932, *Rel. on*; 10 M.I.A. 279 and 26 Bom. 526, *Ref. to.* *(Phillips and Srinivasa Aiyangar, JJ.)*. KRISHNAMMA *v.* LAKSHMINARAYANA. **108 I.C. 202=1927 M.W.N. 625=A.I.R. 1928 Mad. 271.**

———Where a Hindu testator directed in his will that the executors should cause a certain boy to be adopted to him,

Held, that the clause did not mean that the power to adopt was given by the testator to the executors and that it must be held that the power was given to the widow. *(Srinivasa Ayyangar and Curgenven, JJ.)* SRIRANGAM AYYANGAR *v.* VENGU AMMAL. **108 I. C. 654 (Mad.).**

———*Power to adopt need not be exercised at once.*

Under the Hindu Law, when power is given to the widow to adopt, there is no obligation on her

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part to make the adoption at once. It is well known that it takes time and trouble to select a suitable boy. Horoscopes have to be consulted and the opinions of Laudets taken. (*Mr. Ameer Ali.*) RAWAT SHEO BAHADUR SINGH *v.* BENI BAHADUR SINGH. **98 I. C. 567=1 Luck. 403= 3 O. W. N. 761=29 O. C. 305= 31 C.W.N. 438=A.I R. 1926 P.C. 97 (P.C.).**

———A Hindu widow though directed by her husband to adopt cannot be legally compelled to adopt a boy. The adoption to some extent is a matter of her a discretion and this is specially so when the boy to be adopted has not been named. (*Mears, C. J. and Sulaiman, J.*). MITTAR SAIN *v.* DATA RAM. **90 I.C. 1000=24 A.L.J. 185=A.I.R. 1926 All. 194.**

———*Widow forbidden to adopt without consent of persons named—Absence of consent vitiates adoption.*

When the general intention of a Hindu to be represented by an adopted son is clear, there is no reason why effect should not be given to such intention, if it is possible to do so without contravening the law. At any rate, the Court will not be astute to defeat the intention of the testator, and all powers are to be liberally construed in furtherance of the purpose for which they were created. But, where special reasons exist for placing restrictions on the authority, and special instructions are given for the guidance of the wife and restriction is placed on the authority, they are to be strictly followed.

Where not only was the wife to adopt according to the selection, and with the consent of two persons named in the deed, but it was expressly provided that she shall not have the power (according to her choice) to adopt without their consent,

Held, that an adoption without the consent of the two persons was invalid. (*Chatterjea and Pearson, JJ.*). PRAN GOPAL GOSWAMI *v.* CHANDRA MOHAN CHAKRABARTY. **95 I.C. 777= 41 C.L.J. 55=A.I.R. 1925 Cal. 619.**

———*Existence or non-existence of authority inferred from circumstances.*

Where it was alleged that a young man of about 30 years who had only been married for about 3 years had authorized 3 days prior to his death his second wife to adopt a son to him,

Held, that as unless the man had been stricken with some serious illness it was not likely he would think of there being a necessity for a son being adopted to him, the question as to how long he had been ailing prior to his death was a vital question in determining whether he had or had not authorised the adoption.

Held, further, that inasmuch as the contestants of the adoption had failed to prove that the man had been seen attending to his ordinary avocations during the period when the opposite party asserted he had been suffering and as other circumstances left the matter entirely in doubt, there was not evidence of sufficient cogency to interfere with the judgment of the High Court which was to the effect that the adoption had been authorized. (*Lord Dunedin.*) RAMADHIN SINGH *v.* MT. CHANDRAMA. **89 I.C 565=22 M.L.W. 91= A.I.R. 1925 P.C. 54 (P.C.).**

———Where the will recited "I have no male issue, etc., but have two married wives only." They two should adopt a boy for the perpetuity of my name after me. And at present there is one of my kinsman, Totelal Kenhaylal Agarwal, resident of Burhampur. My wives should adopt him as son

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after me. If he is not available, my two wives should with the consultation of each other, adopt any other boy of my own family. If no boy in the family is available my wives should adopt none. If there is a difference of opinion between the two wives as to the boy to be adopted that boy should be adopted whom my younger wife Sonu will choose and "perpetuate my name and manage the property."

Held, looking to the intention of the testator, which was that a certain boy was to be adopted, though both widows are mentioned, the will does not restrain the authority of either. The main object was that a particular boy was to be adopted; the mention of both widows was subservient to the adoption itself. The document gave the widows as far as this boy is concerned no option, it did not allow them any power of selection. Therefore the fulfilment of the wish of the testator by the remaining widow who was the only person who could fulfil it was not against, but in accordance with what the testator contemplated. (*Kotval and Prideaux, A. J. Cs.*). AMBADAS *v.* KASHIBAI. **71 I.C. 979=A.I.R. 1923 Nag. 27.**

———Mahratta School—Authority by husband—Particular boy named but no prohibition to adopt other boys—Boy named not available—Adoption of other boy is valid. (*Sir John Edge.*) YADO *v.* NAMDEO. **64 I.C. 536=20 A. L.J. 431= 15 M. L.W. 565= 26 C.W.N. 393=24 Bom. L.R. 609= 49 Cal. 1=30 M.L.T. 53= 48 I.A. 513=17 N.L. R. 145= A.I.R. 1922 P.C. 216=42 M.L.J. 219 (P.C.).**

———*Bombay School—Widow—Must obey husband's mandatory directions.*

According to the Bombay School of Law the duty of a Hindu widow to obey her husband's command compels her to act upon any mandatory direction that he may give by Will as to the way in which her power of adoption should be exercised.

A Hindu governed by the Bombay School directed by his Will as follows: "If I did not adopt a son during my life-time my wife should, as far as possible, adopt *S.* the second son of my elder brother *J.* If the boy cannot be obtained, any other boy should be adopted, with the advice of the trustees."

Held, that "Should as far as possible" means that unless there are conditions outside the Will preventing the possibility of the adoption, the widow, when she does adopt is to exercise her power in favour of *S.* (*Lord Buckmaster.*) SITABAI *v.* BAPU ANNA PATEL. **57 I.C. 1= 47 Cal. 1012=47 I.A. 202= 16 N.L. R. 162=22 Bom. L.R. 1359= 28 M.L.T. 408=12 M.L.W. 386= 1920 M.W.N. 556=25 C.W.N. 97= A.I.R. 1921 P.C. 88=39 M.L.J. 106 (P.C.).**

—Adoption—Authority—Co-widows.

———*Husband authorising adoption and selecting boy—One co-widow dying before actual adoption—Adoption is valid.*

Where a man has died leaving a number of widows with authority to adopt a son to him and he has selected the boy and where before the actual adoption one of the widows dies but she consents to the boy being adopted and desires him to perform her funeral ceremonies, the adoption is not rendered invalid by her death before the actual taking place of adoption. (*Spencer, Offg. C.J. and Kumara-*

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swami Sastri, J.). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1= A. I. R. 1925 Mad. 497.**

———*Power given to two widows together—Adoption by one after death of the other was held valid.*

Where the Will recited, "I have no male issue, etc., but have two married wives only. They two should adopt a boy for the perpetuity of my name after me. And at present there is one of my kinsmen, Totelal Kanhaylal Agarwal, resident of Burhanpur. My wives should adopt him as son after me. If he is not available, my two wives should, with the consultation of each other, adopt any other boy of my own family: If no boy in the family is available my wives should adopt none. If there is a difference of opinion between the two wives as to the boy to be adopted that boy should be adopted whom my younger wife Sonu will choose and perpetuate my name and manage the property,"

Held, looking to the intention of the testator which was that a certain boy was to be adopted, though both widows are mentioned, the will does not restrain the authority of either. The main object was that a particular boy was to be adopted; the mention of both widows was subservient to the adoption itself. The document gave the widows as far as this boy is concerned no option. It did not allow them any power of selection. Therefore the fulfilment of the wish of the testator by the remaining widow who was the only person who could fulfil it was not against but in accordance with what the testator contemplated. (*Kotval and Prideaux, A. J. Cs.*). AMBADAS *v.* KASHIBAI. **71 I.C. 979=A.I.R. 1923 Nag. 27.**

—Adoption—Authority—Determination of.

———Authority to adopt to be exercised with *A's* consent ends with *A's* death if not exercised earlier: 27 Cal. 996 (P.C.), *Ref.*

Deceased authorised his wife to adopt a particular boy and the authority provided that in case the particular boy could not be adopted, she should adopt another with the permission of deceased's father. The particular boy could not be adopted and before adopting another the father died,

Held, that the words "with the permission of my father" created a condition precedent to the exercise of the power of adoption certainly during the lifetime of the father, and there was no reason for holding that the words were to have a different effect after the death of the father and therefore the wife's power came to an end on the father's death: 7 Pat. 245; 108 I.C. 545; A.I.R. 1929 Pat. 51, *Overruled.* (*Sir Binod Mitter.*) RAJENDRA PRASAD BOSE *v.* GOPAL PRASAD SEN. **A.I.R. 1930 P.C. 242 (P.C.).**

———*Estate vesting in senior widow — Junior widow's authority comes to an end.*

The right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate. She can exercise the power, so long as it is not exhausted or extinguished. The authority to adopt cannot, however, be exercised when the power of adoption itself has come to an end. The vesting of the estate in the senior widow is the proper limit to the exercise of the junior widow's power and the moment that limit is reached, the power of adoption of the junior widow is at an end: 1 Mad. 69 (P.C.); 31 Bom. 373 (P.C.) and A. I. R. 1918 P. C. 192, *Dist.*; 26 Bom. 526; A.I.R. 1918 P.C. 74; 28 Bom. 461 and

HINDU LAW — Adoption — Authority—Prohibition.

A.I.R. 1928 Bom. 291, *Foll.* (*Patkar and Baker, JJ.*). HIRABHARTHI JAMNEBHARTHI *v.* BAI JAVER. **113 I.C. 406=30 Bom. L.R. 1555= A. I. R. 1929 Bom. 35.**

———*Power given to widow in a joint family is not extinguished by death of her husband.*

Where a member of a joint Hindu family has given his widow power to adopt, that authority is not automatically exhausted by his death, because his property vests in the other members by survivorship: A.I.R. 1918 P.C. 192, *Rel. on*; (*Case-law discussed.*) (*Kendall and Niamatullah, JJ.*). HIRA LAL *v.* PIAREY LAL. **111 I.C. 622= 51 All. 54= 26 A.L.J. 849=A.I.R. 1928 All. 505.**

—Adoption—Authority—Necessity of.

———Sitambari Jains—*Widow may adopt without husbands' authority.*

Among *Sitambari Jains* the widow of a sonless Jain can legally adopt to him a son without any express or implied authority from her deceased husband, and the adopted son may, at the time of adoption, be a grown up and married man. The only essential ceremony necessary is the giving and taking of the adopted son. (*Sir John Edge.*) SHEOKUERBAI *v.* JEORAJ. **61 I. C. 481= 1920 M.W.N. 627=16 N.L R. 170= 2 U.P.L R. 161=25 C.W.N. 273 (P.C.).**

—Adoption—Authority—Presumptions about.

———"*Express authority*" *meaning of—Process of adoption by giving and taking begun in lifetime of adopting father—Authority to widow can be implied.*

The phrase "express authority of the husband" so often used in decisions means nothing more than an affirmative indication enabling the widow to adopt, which can be traced to the mind of the husband.

The word "express" is not used in opposition to the word "implied" and an authority can be implied from the facts of a particular case.

In all cases where the process of adoption has begun by a giving and taking in the life-time of the adopting father, there is a clear indication of his desire and no further authority is needed to enable the widow to adopt. It should be necessarily implied in such taking by the adoptive father. (*Ramesam and Venkatasubba Rao, JJ.*). SEETHARAMAMMA *v.* SURYANARAYANA. **97 I.C. 615= 49 Mad. 969=25 M.L.W. 183= A. I. R. 1926 Mad. 1184=51 M.L.J. 466.**

———Widow—Adoption in 1867 not questioned till adoptee's death—Authority can be presumed. (*Ramesam, J.*). SAMBASIVA SASTRIAL *v.* RAMASWAMY SASTRIAL. **86 I. C. 772= A.I.R. 1925 Mad. 803=48 M.L.J. 353.**

———Per *Kumaraswamy Sastry, J.*—Husband's authority—Boy taken by husband with a view to adoption and brought up—Actual ceremony by widow—Authority may be presumed. (*Spencer, Offg.C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1=A.I.R. 1923 Mad. 497.**

—Adoption—Authority—Prohibition.

———"*Khanden*" *includes ascendants, descendants and collaterals in the male line—Wife prohibited from adopting a son of the relations of her family—Adoption of her brother's daughter's son is not prohibited.*

In the case of a Hindu, his *khandan* consists of his lineal ascendants and descendants and his collaterals in the male line,

There was a direction in the will to the following effect: If *K* (testator's junior wife) should like to adopt a son, she shall not adopt any son of

HINDU LAW — Adoption — Authority—Prohibition.

the relations of her family or that of *B* (the senior wife), or the mother. If my brother *J* should give his son into adoption, she should adopt him; otherwise she should adopt some other boy, and she shall not have power to make a gift. In case of necessity *K* shall have power to sell or mortgage a portion of the property." *K* adopted *D*, the son of the daughter of her brother, but later she filed a suit for declaration that the son was not adopted son and his adoption was invalid. She impugned the deed of adoption on the ground that the adopted son belonged to a class or category of persons adoption from whom was expressly probibited by the testator,

Held, that the adoption of *D* was outside the prohibition imposed by the testator and was, therefore, valid in law. (*Sen and Niamatullah, JJ.*). DHARAM PRAKASH *v.* MT. KALAWATI DEVI.

110 I.C. 665=50 All. 885=26 A.L.J. 1106=A. I. R. 1928 All. 459.

———*Prohibition may be inferred from circumstances.*

A prohibition of adoption according to the Bombay Law need not be express: A.I.R. 1922 P.C. 216, *Expl.*; 23 Bom. 250; 23 Bom. 789 and 37 Bom. 107, *Rel. on.*

But if an implied prohibition is to be established, it must be gathered from the whole of what the husband said and did on the occasion or occasions in question, of which the disposition of his property in his will may be an important part to be taken into consideration; and no doubt the disposition of his whole property in favour of persons other than his widow would be strong evidence that he did not intend an adoption to be made, and little additional evidence might be needed to make out a prohibition. (*Phillips, O. C. J. and Reilly, J.*). SUKHEVDOSS RAMPRASAD *v.* MT. CHOTI BAI.

109 I.C. 5=1928 M.W.N. 32=27 M.L.W. 145=A.I.R. 1928 Mad. 118.

———Refusal by husband to adopt is not tantamount to prohibition to the widow to adopt: 7 B.H.C. (App.) 1, *Expl.* (*Case-law considered.*) (*Fawcett and Patkar, JJ.*). SITABAI RAM RAO *v.* GOVIND RAO RAM RAO. **101 I.C. 46=51 Bom. 217=29 Bom. L.R. 236=A.I.R. 1927 Bom. 151.**

———An implied prohibition is sufficient to prevent a widow adopting; it is not necessary to prove an express prohibition. 12 M.I.A. 397 (P.C.); 22 Mad. 398 (P.C.), *Rel. on.* (*Krishnan and Venkatasubba Rao, JJ.*). KRISHNA RAO *v.* RAJA OF PITTAPUR. **102 I.C. 713=A.I.R. 1927 Mad. 733.**

—Adoption—Authority—Proof of.

———*Adoption recognised as valid for more than 40 years by all parties concerned including plaintiff—No element of usurpation in widow's conduct—Adoptee living in adopted home as member of that household—Authority to adopt was held to be proved.*

The burden, resting, altogether apart from the law of limitation upon any litigant who challenges the authority of an adoption that has been recognised as valid during a long course of years is of the heaviest order.

The same witnesses who proved the adoption also proved the authority to adopt; the adoption was challenged as having been made without the husband's authority, about 42 years after it had taken place; the conduct of the adopting widow had no element of usurpation in it but simply the element of carrying out her husband's dying wish. Adopted son was transferred from his natural home to his adopted home and he had lived there

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all his life as a member of that household. The plaintiff did not question the authority to adopt during the adopting widow's life which extended for 30 years beyond that of her husband. The local authorities had recognised the adoption as valid and treated the adopted son as such. In various litigations, the plaintiff had acted along with the adopted son acknowledging in the course of the proceedings his right, and all other parties concerned had all along recognised the validity of the adoption,

Held, that the authority to adopt was proved. (*Lord Shaw.*) SEETHARAMACHANDRA *v.* KRISHNA ROW. **89 I.C. 817=A.I.R. 1925 P.C. 201=53 M.L.J. 858 (P.C.).**

———*Authority by husband aged 15 years—Improbable circumstances—Adoption cannot be held to be proved.*

A Hindu died leaving his wife and widows of two predeceased sons. The younger son's widow adopted plaintiff. It was alleged that her husband, who was only 15, had given her authority to adopt and according to the wishes of his younger son the father had instructed his wife to get the widow of the younger son to adopt. A Kaifiyat, expressing consent to the adoption, alleged to have been executed by the mother-in-law of the adoptive mother was produced to serve as proof of the instructions of her husband, but its execution by her was not proved. The ceremony of adoption was performed under suspicious circumstances and the mother-in-law, who had nothing to do with it and had applied for mutation in her name, was absent,

Held, that on the facts the adoption was invalid. It is improbable that a boy of fifteen would think of adoption or his father would agree to his wishes leaving aside his own wife or widow of his elder son. (*Kotval and Prideaux, A.J.Cs.*). GOVIND *v.* RADHABAI. **68 I.C. 325=A.I.R. 1923 Nag. 7.**

—Adoption—Authority—Setting aside.

———*Suit to declare authority to be invalid before adoption—If lies.*

Where a suit for declaration that the authority to adopt was invalid had been tried and decided in the lower Court, High Court in second appeal applied its mind only to the question whether the case was a fit one in which a Court with a due exercise of discretion should grant a declaration before any adoption has been made.

Quaere: Whether a suit for declaration that an authority to adopt is invalid lies where no adoption has actually been made. (*Spencer and Ramesam, JJ.*). YELUKUR SUBHADRAMMA *v.* YELKUR VENKATA SESHIAH. **98 I.C. 681 (Mad.).**

—Adoption—Authority—Who can give.

———*Father-in-law cannot authorise daughter-in-law to adopt—Consent by sapinda cannot be given by way of will.*

There is no authority for holding that a father-in-law can authorise his daughter-in-law to adopt under the Hindu Law; the only way in which a widow can adopt is either by the authority of her husband or by the consent of her nearest sapindas given *bona fide* and honestly. No sapinda is entitled to give by way of a Will to take effect after his death, a consent to an adoption by a widow: The consent has to be given with reference to the circumstances attendant upon the proposed adoption and usually at the request of the widow: 36 Mad. 145, *Ref.* (*Krishnan and Ramesam, JJ.*). T. LAKSHMI NARASIMHAM *v.* V. RUKMANIAMMA.

A.I.R. 1923 Mad. 225.

HINDU LAW——Adoption—Burden of proof.

—Adoption—Burden of proof.

——*Onus rests heavily on person setting up adoption.*

Very grave and serious onus rests upon a person who seeks to displace the natural succession of property by the act of an adoption. In such a case the proof requires strict and almost severe scrutiny and the longer the time goes back from the date when the power was given to the time when it comes to be examined, the more necessary it is having regard to the fallibility of human memory and the uncertainty of evidence given after the lapse of such time, to see that the evidence is sufficient and strong. (*Lord Buckmaster.*) DAL BAHADUR SINGH *v.* BIJAI BAHADUR SINGH.

122 I.C. 8=1930 A.L.J. 122=7 O.W.N. 295=34 C. W. N. 369=32 Bom. L. R. 487=51 C.L.J. 230=57 I.A. 14=52 All. 1=A.I.R. 1930 P.C. 79=58 M.L J. 446 (P.C.).

——Grave and serious onus rests on person seeking to displace natural succession by act of adoption. In such case, the proof requires strict and almost severe scrutiny: A.I.R. 1930 P. C. 79, *Rel. on.* (*Addison and Bhide, JJ.*). BALAK RAM HIGH SCHOOL, PANIPAT *v.* NANU MAL. **31 P.L.R. 509=A.I.R. 1930 Lah. 579.**

——The onus of proving whether there has been a valid adoption is on the person who asserts it. The assertions and admissions made by his natural father and uncles on former occasions as to the validity of the adoption would tend to shift the burden of proof. (*Kinkhede and Mohiuddin, A.J.Cs.*). YAMUNABAI *v.* DHANNALAL.

114 I.C. 616 (Nag.).

——Per *Spencer, Offg. C. J.*—Where an adoption is alleged to have been made by a man who was *in extremis* and who was delirious and not in full possession of his faculties, the onus lies on those who profound the adoption, of proving that he was in a fit state of mind to perform the act of taking the child in adoption with a proper consciousness of the nature of the act that he was performing. (*Spencer, Offg. C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I. C. 705=48 Mad. 1=A. I. R. 1925 Mad. 497.**

——*Apparently valid adoption proved—Opposite party should prove failure in ceremonial.*

It is the duty of the person who asserts that an adoption had been performed, to prove it. But if it is proved that an adoption is apparently valid as performed then in as much as there is presumption that things are done as they should be done, it is necessary for the person attacking the adoption to demonstrate in what particular respects there has been a failure of ceremonial or ritual. (*Kennedy and Percival, A.J.Cs.*). MT. CHATIBAI *v.* SHRIMATI KUNDIBAI. **88 I.C. 573=A. I. R. 1925 Sind 223.**

——*Onus is on party setting up adoption—Shifting of onus.*

The onus of proving an adoption is on the party setting it up. But very slight evidence may be sufficient for this purpose, where the alleged adopted son has been treated as such for a long series of years. (*Mookerjee and Cuming, JJ.*). KAILASH CHANDRA NAG *v.* BEJOY CHANDRA NAG. **72 I.C. 630=36 C.L.J. 434=A. I. R. 1923 Cal. 18.**

——Adoption by minor widow of her guardian's son—Onus of proving validity is on adoptee who sets it up.

HINDU LAW—Adoption—Capacity to take.

In the case of a Hindu widow of immature age the Court is bound to consider all the circumstances surrounding the adoption set up which she disputes as not having been made by her of her own free will. (*Macleod, C.J. and Coyajee, J.*). GHANASHYAM DAS VISHNUDAS GANDHI *v.* LAXMIBAI. **70 I.C. 953=24 Bom.L.R. 726=A.I.R. 1922 Bom. 218.**

——The admission of an adoption in a deed amounts to an admission both of the fact and the validity of the adoption and the burden of proving the contrary lies upon the person making the admission. (*Sadasiva Iyer and Spencer, JJ.*). SOORLA SINGH *v.* KANAKA SINGA. **59 I.C. 585=43 Mad. 867=12 L.W. 243=1920 M.W.N. 528.**

—Adoption—Capacity to take.

——Whether the adoption is made during the lifetime of the husband or after the death, only one wife can receive a child in adoption so as to step into the position of being its adoptive mother: 37 Mad. 199 (P.C.), *Rel. on.* (*Macnair, Offg. J. C. and Staples, A.J.C.*). YAMUNA BAI *v.* JAMUNA BAI. **12 N.L.J. 75=26 N.L.R. 39=A. I. R. 1929 Nag. 211.**

——*Hindu governed by Bombay School dying leaving a widow and widow of predeceased son—The latter cannot adopt after the widow's death although the estate may vest in her.*

Where the last male holder dies leaving a nearer heir other than the adopting widow, the latter's power of adoption comes to an end, as soon as his estate is vested in the nearer heir, and is incapable of being revived at any future date.

Where a Hindu governed by the Bombay School dies leaving behind him his widow and a widowed daughter-in-law, the power of the daughter-in-law to adopt to her husband comes to an end by the vesting of the estate in the widow and does not revive again by the death of the widow. An adoption of the son by a daughter-in-law, therefore, although the estate has vested in her, after the widow's death is invalid. (*Case-law discussed.*) (*Findlay, J.C., Kinkhede and Mohiuddin, A.J.Cs.*). UTTAM RAO *v.* DAULAT. **116 I.C. 499=25 N.L.R. 144=A.I.R. 1929 Nag. 98 (F.B.).**

——Step-mother succeeding as *gotraja* sapinda is incapable of adopting. 32 Bom. 499, *Foll.* (*Patkar and Baker, JJ.*). BASANGOWDA *v.* RUDRAPPA. **110 I.C. 633=52 Bom. 393=30 Bom.L.R. 591=A.I.R. 1928 Bom. 291.**

——The widow of a predeceased son can make a valid adoption with the contemporaneous consent of the mother-in-law in whom the estate of the last full owner has vested as an heir: 23 Bom. 327 and 38 Bom. 724, *Foll.*; A.I.R. 1921 Bom. 55 and A.I.R. 1918 P. C. 192, *Ref.* (*Patkar and Baker, JJ.*). YESHVADHAI WAMAN *v.* RAMCHANDRA SHANKAR. **105 I.C. 351=29 Bom. L. R. 1320=A.I.R. 1927 Bom. 652.**

——*Adoption by girl of twelve years—Girl capable of judging for herself, the effect of adoption—Acquiescence and treatment as valid by near relations.*

Held, that especially, having regard to the circumstances that the adoption was questioned after so many years, it was impossible to say that it had not been satisfactorily established that the girl was capable of taking the boy in adoption. (*Coutts-Trotter, C.J. and Srinivasa Aiyangar, J.*). ABAYAMBAL *v.* RAJARATHNA AYYAR. **104 I.C. 336=1927 M.W.N. 298=A. I. R. 1927 Mad. 1095.**

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——Husband can validly adopt without or against wife's consent. (*Phillips and Madhavan Nair, JJ.*). SUNDARAMMA *v.* VENKATASUBBIER. **97 I.C. 145=49 Mad. 941==1926 M. W. N. 778=A. I. R 1926 Mad. 1203=51 M.L.J. 545.**

——*Mother, succeeding to her son's estate on the re-marriage of his widow cannot adopt.*

Where a Hindu dies, leaving a widow and son and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of adoption by the former widow is extinguished and can never afterwards be revived. It is clear therefore that where the son has left a widow who could have adopted, his mother has no power to do so on her succession to the estate on the re-marriage of her son's widow: 32 Bom. 499; 41 Mad. 855 (P.C.), *Foll*; 19 Bom. 331; 25 Bom. 306; A.I.R. 1924 Bom. 441, *Dist.* (*Baker, J.C. and Prideaux, A. J. C.*). GANAPATI *v.* SALU.

89 I. C. 345=A.I.R. 1926 Nag. 15.

——A widow succeeding to the estate of her son who dies issueless and a widower after having attained ceremonial competence can make a valid adoption: 45 I. A. 156, *Expl.* and *Dist.*; 25 Bom. 306, *Foll*; (1903) 27 Bom. 492 (P. C.), *Dist.* (*Macleod, C. J. and Shah, J.*). ANJIRABAI GULABRAO POWAR *v.* PANDURANG BALKRISHNA POWAR.

80 I.C. 185=48 Bom. 492=26 Bom. L. R. 326=A.I.R. 1924 Bom. 441.

——*Grandmother—Adoption by.*

Under Hindu Law a grandmother can validly adopt even when the estate has passed directly from her husband to her grandson and come back to her directly from her grandson without the intervention of any other heir: 26 Bom. 526, *Dist.* (*Macleod, C. J. and Shah, J*). NARHAR GOVIND *v.* BALWANT HARI. **80 I.C. 435=26 Bom. L.R. 528=48 Bom. 559=A.I.R. 1924 Bom. 437.**

——*Son dying after attaining majority—Mother can adopt another son.*

Where a son dies after attaining majority but without leaving a son or a widow, the mother can adopt another son with the consent of the sapindas. There is nothing in 41 M. 855 (P.C.) on which to find on principle that the mere attainment of majority by the son or the adopted son divests his mother of the power to adopt to her husband in the event of that son's death without heir. Under the Hindu Law a minor can marry to get legitimate sons and his widow can adopt to him, so that, even a minor may fulfil the tests laid down in that case though he has not yet come into full disposing possession of his estate. (*Case-law discussed*): 35 M.L.J. 798 and 25 M.L.T. 204 *Diss.* (*Schwabe, C.J. and Wallace, J.*). TRIPURAMBA *v.* VENKATARAMAN. **72 I.C. 278=46 Mad. 423=A.I.R. 1923 Mad. 517=44 M.L.J. 349.**

——*Widow succeeding as* gotraja sapinda *cannot make a valid adoption so as to affect the reversioner's rights.*

A Hindu widow who succeeds to an estate, not her husband's, but as a *gotraja sapinda* of the last male holder in consequence of the absence of nearer heirs, cannot make a valid adoption. It cannot be said therefore that the decision of High Court, that a widow of a *gotraja sapinda* cannot adopt so as to defeat the rights of the reversioners has in any way been shaken by the decision in *Yadho* v. *Namdeo*, A I.R. 1922 P.C. 216.

If the widow of a predeceased son of plaintiff's paternal uncle from whom he was separate though she took a life-estate as a widow of a *gotraja sapinda*, had no power to adopt so as to defeat the rights of the plaintiff as the reversioner then the widow of a grandson of plaintiff's uncle (who was not the last male holder) who in the lifetime of her husband's uncle's widow had only a right of maintenance, had no power to adopt so as to exclude the reversioners. (*Macleod, C.J. and Shah, J.*). Y. N. KULKARNI *v.* LAXMIBAI KESHEO GOPAL.

77 I.C. 117=24 Bom. L.R. 836=47 Bom. 37=A.I.R. 1922 Bom. 347.

——*Daughter-in-law succeeding as* gotraja sapinda *cannot adopt.*

Where a daughter-in-law succeeds as a *gotraja sapinda* of the last male owner in the absence of any nearer heir she cannot adopt to her husband so as to affect the devolution of the estate inherited by her as a *gotraja sapinda*. It may be that, where the adoption has the effect of divesting any estate vested in a third person, it might not be valid, but it does not follow that where it has no such effect the adoption is necessarily valid: 29 Bom. 410; 26 Bom. 526 (F.B.) and 4 Bom. 219, *Foll.* (*Macleod, C.J. and Shah, J.*). DATTATRAYA BHIMRAO SABNIS *v.* GANGABHAI GANESHBAI NAVER. **77 I.C. 17=46 Bom. 541=24 Bom. L.R. 69=A.I.R. 1922 Bom. 321.**

——A person having a grandson subject to the defect of such dumbness cannot correctly be described as sonless. Adoption by him during the lifetime of the grandson is not valid: (1867) 4 Bom. H. C. (A.J.C.) 135, *Foll.*; (*Macleod, C.J. and Shah, J.*). BHARMAPPA, ADOPTIVE FATHER, BHARAMAGAUDA MUDIGAUDAR *v.* UJJANGAUDA, ADOPTIVE FATHER, BHARAMA.

65 I.C. 216=46 Bom. 455=23 Bom. L.R. 1320=A.I.R. 1922 Bom. 173.

——*Minor widow aged 12½ cannot make valid adoption.*

Adoption by minor Hindu widow aged 12½ is invalid. Without attempting to lay down any general rules as to whether at the age of 12½ years a girl could ever make a valid adoption in the absence of any clear evidence as to the special capacity of any particular girl to exercise an independent judgment at that age, it cannot be held that she can exercise such judgment as is required in the case of adoption. (*Macleod, C.J. and Shah, J.*). PARVATAVA *v.* FAKIRNAIK. **64 I. C. 899=46 Bom. 307=23 Bom. L.R. 1075=A.I.R. 1922 Bom. 105.**

——*Senior widow alive—Adoption by junior widow is invalid.*

Where a Hindu died leaving two widows the senior one having lived apart from him for 25 years, and the junior widow after asking for the consent of the senior widow adopted a boy to her husband,

Held, that the adoption was not valid, as the adoptive mother, the second widow had no authority from her husband; and the absence of any relinquishment by the senior wife of her prior right to adopt invalidates the adoption by the junior wife,

Held, further the verses in the Mitakshara clearly prove the superior position of the senior widow and her right to adopt follows as an inference in the absence of prohibition, which leaves the senior widow free to exercise the right which she has according to the Sastras.

The fact therefore that she was living, apart from her husband for no fault of hers does not take away her prior right to adopt nor does it imply a prohibition by the husband to adopt. Verses in the

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Mitakshara explained. (*Spencer and Ramesam, JJ.*). MUTHUSWAMI NAICKEN *v.* PULAVARATAL. **66 I. C. 504=45 Mad. 266=15 M L.W. 40= 1922 M.W.N. 53=30 M.L.T. 60= A.I.R. 1922 Mad. 106=42 M.L.J. 101.**

———Bombay Presidency—Unchaste Sudra widow can adopt: (1894) P.J. 22, *Dist.* (*Macleod, C. J. and Fawcett, J.*): BASWANT MUSHAPPA *v.* MALLAPPA KALLAPYYA.

59 I.C. 800=43 Bom. 459=A.I.R. 1921 Bom. 301.

———The wife of a lunatic cannot validly adopt under the Hindu Law. (*Macleod, C.J. and Fawcett, J.*) RAMAKRISHNA *v.* LAXMINARAYAN.

59 I.C. 458=22 Bom. L.R. 1181.

———Adoption by a minor widow, who has not attained sufficient maturity of understanding the nature of the act, is invalid and she can recover her husband's property from the adoptee unless his position has been prejudiced. In such case there is no estoppel against her : 34 All. 398 (P.C.), *Dist.* (*Sadasiva Aiyar and Spencer, JJ.*). RAMACHARI *v.* SARASWATI AMMAL. **60 I.C. 246=12 M. L. W. 544=1920 M.W.N. 721.**

—Adoption—Ceremonies.

———*Giving and taking essential.*

It is well settled that the physical act of giving and receiving is absolutely necessary in order to constitute a valid adoption. It is of the essence of adoption and the law does not accept any substitute for it : 6 Cal. 381 (P. C.), *Rel. on.* (*Addison and Bhide, JJ.*). BALAK RAM, HIGH SCHOOL, PANIPAT *v.* NANU MAL. **31 P. L. R. 509=A. I. R. 1930 Lah. 579.**

———In Punjab datta homa is not necessary—Gift and acceptance must take place. (*Shadi Lal, C. J. and Hilton, J.*). DAYA RAM *v.* HANS RAJ. **120 I. C. 793=A.I.R. 1930 Lah. 115.**

———*Sudras—Giving and taking essential.*

Though in the case of Sudras no ceremonies are required for a valid adoption, still the giving and taking of a child in adoption should be established in proof of validity of an adoption: 5 Cal. 770 (P.C.), *Foll.* (*Fforde and Agha Haidar, JJ.*). KISHORELAL *v.* MT. JOWOLI. **108 I. C. 62 (Lah.).**

———*Giving and taking is necessary.*

A mere declaration by the adoptive father is not sufficient to create valid adoption and the actual giving and taking is essential for a valid adoption, whether the parties belong to the three regenerate classes or are Sudra: .6 Cal. 381 (P. C.) and 25 C.W.N. 403, *Rel. on.* (*Jwala Prasad and Bucknill, JJ.*). ISHWARI PRASAD *v.* RAI HARI PRASAD LAL. **106 I.C. 620=6 Pat. 506=8 P.L.T. 34=A.I.R. 1927 Pat. 145.**

———*Registered-deed is not essential.*

Per *Mukerji, J.*—A deed of adoption is more often than not, executed after the ceremony of adoption has taken place. The law does not require that an adoption should be evidenced by a registered deed. But as a precautionary measure people do execute such deeds. Any agreement that may have taken place before, and as a consideration of the adoption, may find place in the deed of adoption and in any deed that the adopted son may himself execute subsequent to the adoption. (*Lindsay and Mukerji, JJ.*). MITAR SAIN *v.* DATA RAM. **37 I.C. 724=A.I.R. 1926 All. 7.**

———*Giving and taking completed in adoptive father's life-time—Datta homam may be performed after his death.*

The adoptee living with his natural father was taken to the adopting father with a view to his being adopted. Letters passed between adopting father and the natural father of the boy in respect of the contemplated adoption and all the terms were settled. An auspicious day was chosen and the adoption was fixed for a particular day. In the meantime the adoptive father died. The ceremony of adoption was performed subsequently,

Held, that the only reasonable inference is that the husband gave his consent to his widow making the adoption and that the secular act of giving and taking the boy having been completed in the life-time of the husband, the religious act of datta homam essential to complete the adoption may be performed subsequent to his death. (*Ramesam and Venkatasubba Rao, JJ.*). SEETHARAMAMMA *v.* SURYANARAYANA. **97 I.C. 615=49 Mad. 969=25 M.L.W. 183=A. I. R. 1926 Mad. 1184=51 M.L.J. 466.**

———Only ceremony among Agarwallas is tying turban round the adoptee's head and feasting the caste panchas. (*Mr. Ameer Ali.*) DHANRAJ *v.* SONI BAI. **87 I.C. 357=1925 M.W.N. 692=30 C.W.N. 601=23 A.L.J. 273=2 O.W.N. 335=21 N.L.R. 50=52 Cal. 482=6 L.R.P.C. 97=27 Bom L.R. 837=52 I.A. 231=A.I.R. 1925 P.C. 118=49 M.L.J. 173 (P.C.).**

———Brahmins—Non-sagotra boy—Datta homa is essential. (*Macleod, C.J. and Crump, J.*). GOVINDA PRASAD LALITA PRASAD *v.* RINDABAI LALITA PRASAD. **87 I.C. 472=27 Bom. L.R. 365=49 Bom. 515=A.I.R. 1925 Bom. 289.**

———*Physical handing over of boy by father is unnecessary—Presence and direction to hand over is enough but essential.*

It is not anywhere laid down that it is necessary that the actual physical handing over should be done, by the natural father. The natural father must be present at the time and he must direct that the handing over be done, because there must be an intention in the mind of the father at the moment of the adoption to give up his natural rights, but if that requirement is complied with it is not necessary that the actual, physical handing over should be done by the hands of the natural father. (*Kennedy, J.C. and Percival, A.J.C.*). MT. CHATI BAI *v.* SHRIMATI KUNDIBAI. **88 I.C. 573=A.I.R. 1925 Sind 223.**

———*Datta homam—Presumption of having been performed.*

When an adoption has not been challenged by any member of the family for 48 years though definite evidence is not forthcoming to prove that the *Datta Homa* had been performed at the time adoption took place, it is permissible to presume from the fact, that the adoption had not been challenged for such a long period, that, if the ceremony was necessary, it must have been performed: 29 All. 148 (P.C.), *Ref. to.* (*Kanhaiya Lal and Sulaiman, JJ.*). L. CHHOTEY LAL *v.* CHANDRA BHAN.

80 I.C. 1041=45 All. 59=A.I.R. 1923 All. 176.

———*Mere execution of deed cannot effect—Adoption.*

Mere execution of a deed does not effect an adoption, and it has yet to be found in a Court of law that in a community where an orphan adoption is recognised as valid such an adoption could be made up by a deed alone. (*Macleod, C.J. and Crump. J.*). SHIDAPPA *v.* SANTAWA. **77 I.C. 477=A.I.R. 1923 Bom. 302.**

———Putreshti Jag *or sitting upon the* bedi *is not absolutely necessary for validity of adoption.*

The ceremony of *Putreshti Jag* is not essential to the validity of an adoption even amongst the regenerate classes. (Sir Thomas Strange's Hindu Law, Vol. 1, P. 95, *Ref.*). There must be gift and

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acceptance manifested by some overt act. Beyond this, legally speaking, it does not appear that anything is absolutely necessary. There is no authority to support the view that the giver should actually sit upon the *bedi* during the datta homa ceremony. (*Dawson-Miller, C. J. and Foster, J.*). MAKUND DEB *v.* SHRI JAGANNATH. **72 I.C. 230= 2 Pat. 469=4 P.L.T. 427=1 P.L.R. 201= 1923 P.H.C.C. 97=A.I.R. 1923 Pat. 423.**

———There is no provision for the person giving in adoption and the person taking being the same individual. Such a position is opposed to Hindu Law. (*Macleod, C. J., Shah and Hayward, JJ.*). FAKIRAPPA VEERBHADRAPPA *v.* SAVITRIWA SANGAPPA. **62 I.C. 318=23 Bom. L.R. 482= A.I.R. 1921 Bom. 1 (F.B.).**

—Adoption—Custom.

———*Entry in* wajib-ul-arz *cannot supersede general law as to necessity of husband's authority.*

If an entry in *wajib-ul-arz* with regard to custom of adoption by Hindu widow is silent on the question of husband's permission which is the *sine quâ non* of the validity of adoption by a Hindu widow, the entry cannot supersede the general law that a Hindu widow can make an adoption only with permission of her husband : 12 M.I.A. 523 ; 29 Cal. 828 (P. C.); A.I.R. 1921 P.C. 62 ; 14 M.I.A. 570 and 3 I.A. 259, *Ref.* ; A.I.R. 1923 P. C. 90, *Dist.* (*Wazir Hasan, Ag. C. J. and Pullan, J.*). CHANDI SINGH *v.* GUR PRASAD SINGH. **A.I.R. 1930 Oudh 339.**

———Among Bunjahi Brahmins in the Punjab custom allows a daughter's son to be taken in adoption by his maternal grandfather. (*Bhide, J.*). TANSUKH RAI *v.* SOM DATT. **31 P.L.R. 176= A.I.R. 1930 Lah. 391.**

———*Lingayats — Adoption can be made before Deeksha.*

Vethulagama, one of the Agamas which are of primary authority among Lingayats, deals with adoption and fixes the fifth year as the proper age for adoption. This has been relaxed by custom and adoption can be made before Deeksha ceremony which takes place before marriage : 8 Mad. 440, *Ref.* (*Kumaraswami Sastri and Walsh, JJ.*) SOMASEKHARA *v.* MAHADEV. **53 Mad. 297= A.I.R. 1930 Mad. 496.**

———Lingayats—Custom allowing adoption of married man has not obtained judicial recognition.

Such adoption is invalid even if law governing Sudras be applied to them : 16 Mad. 384, *Ref.* (*Kumaraswami Sastri and Walsh, JJ.*). SOMASEKHARA *v.* MAHADEVA. **53 Mad. 297= A.I.R. 1930 Mad. 496.**

———*Married Marwari Brahmin—Adoption of—If allowed.*

A married Marwari Brahmin cannot be validly adopted in the absence of proof of custom allowing such adoption and mere lapse of time of 30 years cannot cure illegality of such adoption of married person. (*Sulaiman and Pullan, JJ.*). PHULCHAND *v.* GOBARDHAN DAS. **119 I.C. 855= 1929 A.L.J. 979=A.I.R. 1929 All. 739.**

———*Person of Bhinnagotra—Custom against adoption of.*

If an adoption is attacked on the ground that the adoptee was of a different gotra, a special custom that such adoption is invalid in a particular locality, must be proved, because under the Hindu Law there is no restriction in regard to gotra. (*Sulaiman and Kendall, JJ.*). BRIJ RAJ SARAN SINGH *v.* BASANT SINGH. **118 I.C. 154= A.I.R. 1929 All. 561.**

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———The practice of adopting chelas by widows is not proved amongst the Gharbhari Gosais : 5 Bom. 682 ; 5 Bom. L.R. 114 and 5 Bom. L.R. 318 ; *Dist.* (*Patkar and Baker, JJ.*). HIRABHARTHI JAMNABHARTHI *v.* BAI JAVA. **113 I. C. 406= 30 Bom. L.R. 1555=A.I.R. 1929 Bom. 35.**

———*Adoption is only a temporal act among the Agarwallas.*

The Agarwallas differ particularly from the Brahminical Hindoos in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried. They also regard the birth of a son as having no effect on the future state of the progenitor and consequently adoption is a mere temporal arrangement and has no particular object. (*Mr. Ameer Ali.*) DHANRAJ *v.* SONI BAI. **87 I.C. 357=1925 M.W.N. 692= 30 C.W.N. 601=23 A.L.J. 273=2 O.W.N. 335= 21 N.L.R. 50=52 Cal. 482=6 L.R. P.C. 97= 27 Bom. L. R. 837=52 I. A. 231= A.I.R. 1925 P. C. 118=49 M.L.J. 173 (P.C.).**

———Sarin Khatris *settled in United Provinces—Adoption of sister's son is valid.*

The *Sarin Khatris*, settled in the United Provinces came originally from the Punjab. In the Punjab among *Khatris* of all sub-divisions the rules of the Hindu Law relating to adoption are not strictly observed and a custom exists among them by which the adoption of a daughter's son or sister's son is recognized. The adoption of a sister's son is also recognized among the *Sarin Khatris* settled in the United Provinces. (*Lindsay and Kanhaiya Lal, JJ.*). MAKKHAN LAL *v.* KANHAIYA LAL. **86 I.C. 305= A.I.R. 1925 All. 688.**

———Adoption of Daughter's son is allowed among Agharwala Vaishyas by custom. (*Lindsay and Sulaiman, JJ.*). MT. BALLO *v.* RAM KISHAN. **81 I.C. 490=21 A.L.J. 478= A.I.R. 1924 All. 49.**

———Among the Mahrashtra Brahman community of Nagpur the prohibition of the Hindu Law of the adoption of a daughter's son or of a sister's son has been abolished by custom. (*Baker, J. C. and Hallifax, A. J. C.*). JAGESHWAR *v.* PANDURANG. **78 I.C. 840=7 N.L.J. 82= A.I.R. 1924 Nag. 73.**

———*Adoption of orphan—May be valid under a custom.*

The adoption of an orphan is invalid according to orthodox Hindu Law. But the Dhusars of the Gurgaon District Punjab to which the parties belong are governed by customary law according to which the adoption of an orphan by Dhusars is valid. (*Sir John Edge.*) RAMKISHORE *v.* JAINARAYAN. **64 I.C. 782=15 M.L.W. 144= 49 Cal. 120=30 M.L.T. 144=26 C. W.N. 881= 48 I.A. 405=20 A.L.J. 857= 1922 M.W.N. 125=17 N.L.R. 163= A.I.R. 1922 P C. 2=42 M. L. J. 80 (P.C).**

———Among Jains residing in the Idar State in the Mahikanta Agency in the Bombay Presidency, it is customary to adopt an orphan. (*Macleod, C. J. and Fawcett, J.*). PARSHOTAM GANPAT *v.* VENICHAND GANPAT. **61 I.C. 492=45 Bom. 754= 23 Bom. L.R. 227=A.I.R. 1921 Bom. 147.**

———Adoption of daughter's son among Khatris of Amritsar is valid according to custom. (*Shadi Lal, C. J. and Le Rossignol, J.*). PARMA NAND *v.* SHIV CHARAN DAS. **59 I.C. 256= 2 Lah. 69=3 L L.J. 82=21 P.L.R. 1921= A.I.R. 1921 Lah. 147.**

———Adoption of a daughter's son or a sister's son is valid by custom among the Brahmins of the

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Andhra portion of the Madras Presidency as it is in the southern districts. (*Oldfield and Phillips, JJ.*). VADREN RANGANAYAKAMMAGARU *v.* SOMASUNDARA RAO. **59 I.C. 609=43 Mad. 876.**

——According to the custom prevailing among *Kshatriyas* in South Kanara, in the Madras Presidency, the adoption of a brother's daughter's son is valid. (*Sadasiva Aiyar and Spencer, JJ.*). SOORALA SINGA *v.* KANAKA SINGA. **59 I.C. 585=43 Mad. 867=12 M.L.W. 245=1920 M.W.N. 528.**

—Adoption—Dancing girls.

——*Adoption for prostitution is invalid.*

An adoption by a dancing girl for purposes of prostitution is invalid. Such an adoption cannot be validated on the ground of estoppel as an estoppel cannot defeat a prohibition case on ground of public policy. (*Ayling and Coutts-Trotter, JJ.*). KANDAIYA PILLAI *v.* CHOKKAMMAL. **59 I.C. 214=28 M.L.T. 106=12 M.L.W. 7.**

—Adoption—Divesting of estate.

——*Widow adopting to divest property vested in collateral is not allowed.*

A widow with no right of succession of her own cannot adopt so as to divest the estate vesting in the collateral to her deceased husband, so as to keep the succession in the family when his natural born son, though competent to do so, has failed to do so, though having no son of his own, either natural born or adopted, and the mere fact of the attestation of the deed of adoption if such adoption takes place, would not estop the collateral from getting up his title to the estate. (*Jwala Prasad and Scroope, JJ.*). AMARCHANDRA MANSINGH *v.* BANAMALI SINGH. **123 I.C. 770=11 P.L.T. 268=A.I.R. 1930 Pat. 417.**

——After the separation of two brothers, if one of them is adopted, the adoptee takes his separate property to the new family: A.I.R. 1923 Bom. 297, *Foll.* (*Zafar Ali and Dalip Singh, JJ.*). RALIA RAM *v.* MT. SODHAN. **123 I.C. 81=A.I.R. 1930 Lah. 470.**

—— Bengal School—According to Bengal School an estate once vested in the son cannot be divested by his subsequent adoption except in case of extreme degradation: 29 Mad. 437; 5 Cal. 776 (P.C.), *Foll.*; A.I.R. 1928 P.C. 87; 40 Bom. 429, *Dist.* (*Jack and Mitter, JJ.*). SHYAMA CHARAN *v.* SRICHARAN. **120 I.C. 157=49 C.L.J. 298=33 C.W.N. 553=56 Cal. 1135=A.I.R. 1929 Cal. 337.**

——Office of trusteeship vested in widow—She then adopting son—Office of trusteeship like all other private property will vest in adopted son and widow will be divested of same: 20 Mad. 162 and 19 All. 428. *Dist.*; 32 Mad. 167 and 22 C.L.J. 404, *Rel. on.* (*Srinivasa Aiyangar and Reilly, JJ.*). TIRUVENGATARATNAM *v.* BUTCHAYYA. **113 I.C. 347=52 Mad 373=28 M.L.W. 727=1928 M.W.N. 53=A.I.R. 1929 Mad. 11=55 M.L.J. 757.**

——Full owner of property by will bequeathing it to his wife *N* for life and after her, to his widowed daughter-in-law *K* absolutely—Will giving permission to either widow to adopt—Widow *N* entering into contract relating to property and *K* bringing suit for its specific performance—Adoption made after estate had become vested in two widows:

Held, that the adoption could not oust *N* of her life interest nor could it after the death of *N* prevent the vesting of an absolute estate under the terms of the Will for the simple reason that the bequests had taken effect already long before the adoption, that *K* could enter into the contract and that *N* could maintain the suit for specific performance: A.I.R. 1927 P. C. 139, *Rel. on.* (*Jackson and Subhedar, A. J. Cs.*). PARASHRAM *v.* SHRIRAM. **118 I.C. 477=26 N.L.R. 88=A.I.R. 1929 Nag. 321.**

HINDU LAW—Adoption—Divesting of estate.

——Property acquired at partition in the natural family is not divested by a person's subsequent adoption in another family: 29 Mad. 437; 1 C.W.N. 121; A.I.R. 1923 Bom. 297; A.I.R. 1922 Nag. 16; 40 Bom. 429; 43 Bom. 774, *Disc.*; 5 Cal. 777 (P.C.), *Appl.* (*Jackson, A.J.C.*). RAMACHANDRA *v.* HARISCHANDRA. **117 I.C. 268=25 N.L.R. 139=A.I.R. 1929 Nag. 177.**

——Widow holding absolute estate under her husband's will—Adoption of a son divests her of the estate—A.I. R. 1927 P.C. 139, *Cons.*; 10 M I.A. 279 and 5 C.W.N. 20, *Rel on.* (*Phillips, Offg.C.J. and Reilly, J.*). SUKHDEVDOSS RAMPRASAD *v.* MT. CHOTI BAI. **109 I.C. 5=1928 M.W.N. 32=27 M.L.W. 145=A.I.R. 1928 Mad. 118.**

——*Law of divestment does not apply to property given to widow by Government grant for management as the head of a family.*

The Hindu Law of divestment of a widow's estate by an adopted son applies to the property that she inherits from her husband. The trust property given by Government to her by a grant in order that she should manage it as head of the family for the time being, creates a right which is different from the right of a widow who enjoys a property for her lifetime after the death of her husband and acquires no prescriptive right by managing the property. (*Spencer and Ramesam, JJ.*). PRATAP SINHA *v.* SIMJI RAJU. **98 I.C. 442=1926 M.W.N. 793=A. I. R. 1927 Mad. 50=51 M.L.J. 652.**

——The rule that an estate once vested cannot be divested does not apply where the adopted son succeeds not by inheritance but under settlement.

The whole principle underlying the rule as to divesting estates is that a superior title as heir cannot be created by a widow, where the property has already vested in a person who in law has taken the estate from the deceased heir of the last male holder. (*Odgers and Vishwanath Sastri, JJ.*). AMMAMMA *v.* SATYANARAYANA. **96 I.C. 950=49 Mad. 636=24 M L.W. 150=A.I.R. 1926 Mad. 916=51 M L.J. 426.**

——Where a sole surviving co-parcener of a Hindu family is adopted into another family and has a daughter then living, his estate in his natural family vests in his daughter, on his adoption. (*Macleod, C.J. and Crump, J.*). MANIKBAI VISHNUDAS GUJJAR *v.* GOKULDAS RAMDAS KARADGI. **87 I.C. 816=49 Bom. 520=27 Bom. L.R. 414=A.I.R. 1925 Bom. 363.**

——*Vatan property once vested in a collateral can't be divested.*

In the case of Vatan property a widow cannot adopt a son so as to vest the Vatan property in him if on the death of her natural son it was vested in a male member of the family in the absence of any heirs of the son. It is the right to possession and not the possession that is to be vested. (1913) 37 Bom. 598, 602, S.C. 15 Bom. L.R. 783, 788, *Foll.* (*Macleod, C.J. and Shah, J.*). ADIVEVA FAKIRGOWDA *v.* CHANMALLGOWDA RAMANGOWDA. **81 I. C. 1018=26 Bom L. R. 360=A.I. R. 1924 Bom. 393.**

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———*Adoption does not divest estate already vested in the adopted son.*

The rule of Hindu Law or custom according to which an adopted son is deprived of right of inheritance in his natural family cannot apply where succession to the natural father's estate precedes the adoption, unless a contrary custom is proved. (*Zafar Ali, J.*). CHHANGA *v.* JAI LAL.
78 I. C. 161=6 L. L. J. 174= A. I. R. 1924 Lah. 480.

———*Adoption does not divest estate absolutely vested in adopted son.*

The adopted person is not divested by virtue of his adoption, of any property which is absolutely vested in him before adoption. If a son is given in adoption after partition between father and sons the property already vested in the adoptee will not devolve on his natural father. (*Macleod, C.J. and Crump, J.*). MAHABALESHWAR NARAYAN *v.* SUBRAMANYA SHIVRAM.
72 I. C. 309= 25 Bom. L. R. 274=47 Bom. 542= A.I.R. 1923 Bom. 297.

———*Property vested in last surviving co-parcener's widow—Adoption by widow of predeceased co-parcener cannot divest.*

After the death of the last surviving co-parcener when the estate has vested in the widows of that co-parcener the adoption effected by a widow of a predeceased co-parcener cannot have the effect of divesting that estate. On that point the decision in *Yadao* v. *Namdeo*, is silent. It is difficult to accept that the effect of that decision is to overrule by implication the current of decisions on that point : 44 B. 483, *Foll.*; 48 I.A. 513, *Dist.* (*Shah, Ag. C. J. and Crump, J.*). SHIVABASAPPA BIN LOGNAPPA MANOLI *v.* NILAWA KAM SATAPA MANOLI.
82 I.C. 618=24 Bom. L.R. 1162= 47 Bom. 110=A. I. R. 1923 Bom. 17.

———Property absolutely vested in the adoptee before adoption is not divested: 29 Mad. 437, *Differed from.* (*Dhobley, A. J. C.*). MAROTI *v.* LAXMAN.
65 I. C. 362=5 N. L. J. 58= A.I.R. 1922 Nag. 16.

—Adoption—Dwyamushyayana.

———*Dwyamushyayana form is unknown in Punjab—No express agreement—Presumption is of dattaka adoption.*

The dwyamushyayana form of adoption under which the boy adopted, while acquiring the relationship of a son to his adoptive father, retains also his relationship to his natural father, is entirely unknown to the Punjab, and in the absence of a specific plea to this effect, it cannot be held that when the defendant pleaded that he had been adopted, he had meant that he had been adopted in any form other than the ordinary dattaka form which is generally prevalent among the Punjab Hindus in this province.

Under the Hindu Law, in the absence of any express agreement to the effect that the adoption was to be in the dwyamushyayana form, it must be presumed to be an ordinary adoption: 41 Bom. 315 and 42 Bom. 277, *Foll.*

There is no presumption that where an only son has been adopted by a united brother of his father it must be presumed that there was an arrangement that he was to be dwyamushyayana and that the burden of proving that this was not so is on the party who disputes it. (*Martineau and Moti Sagar, JJ.*). MOHUA MAL *v.* MULA MAL.
89 I.C. 688= A.I.R. 1925 Lah. 623.

HINDU LAW—Adoption—Eligibility.

—Adoption—Eligibility.

———Among twice-born Hindus governed by the Mitakshara law an adoption can only be made of a boy whose natural mother could before her marriage have been legally married by the adopter: 21 All. 412 (P. C.) and A. I. R. 1915 P.C. 15. *Rel. on.* (*Stuart, C. J. and Raza, J.*). UDAIRAJ SINGH *v.* MT. RAJ KUNWAR.
121 I.C. 91=6 O.W.N. 725= A.I.R. 1929 Oudh 469.

———*An only son may be adopted.*

The injunction of the Shastras against the adoption of an only son is only commendatory and not mandatory. (*Sen and Niamatullah, JJ.*). DHARAM PRAKASH *v.* MT. KALAWATI DEVI.
110 I.C. 665= 50 All. 885=26 A.L.J. 1106=A.I.R. 1928 All. 459.

———*Janeo ceremony is absolute bar.*

The performance of the upanayana (the janeo ceremony) is an absolute bar to the adoption: 9 All. 253, *Foll.* (*Sulaiman and Iqbal Ahmad, JJ.*). GOPI NATH *v.* MT. KISHNI.
103 I.C. 831= 25 A.L.J. 1009=A.I.R. 1927 All. 634.

———*Married boy cannot be adopted.*

Among twice-born classes of Hindus a boy cannot be adopted after he is married, in the absence of a custom varying Hindu Law. (*Stuart, C.J. and Wazir Hasan, J.*). BISHUNATH KAUR *v.* SHEO BAHADUR SINGH.
104 I.C 587= 4 O.W.N. 550=A. I. R. 1927 Oudh 265.

———Regenerate classes—Adoption of daughter's son, sister's son and mother's sister's son is prohibited—*Factum valet* will not validate such adoption: 21 All. 412 (P.C.), *Foll.* (*Jwala Prasad and Bucknill, JJ.*). ISHWARI PRASAD *v.* RAI HARI PRASAD LAL.
106 I.C. 620=6 Pat. 506= 8 P.L.T. 34= A.I.R. 1927 Pat. 145.

———*No restrictions are imposed as to age of boy—Adoption will not be set aside on the ground that the boy was older than 5 years.*

The Hindu Law imposes no restrictions as to age of an adopted boy and whatever be the age of the adopted son, his adoption is valid if made before upanayana, if he belongs to any of the regenerate classes, and, before marriage, if he belongs to the Sudra caste and therefore an adoption will not be set aside on the ground that the boy adopted was older than five years at the date of the adoption : A.I.R. 1923 Patna 423 and *Mamood, J.*, in 9 All. 253, *Foll.* (*Das and Foster, JJ.*). CHANDRESHWAR PRASAD NARAIN SINGH *v.* BISHESWAR PRATAB NARAIN SINGH.
101 I.C. 289= 3 Pat. 777=3 P.L.T. 510=A.I.R. 1927 Pat. 61.

———Among the Agarwallas the qualifying age for adoption extends to 32 years. (*Mr. Ameer Ali.*) DHANRAJ *v.* SONI BAI.
87 I.C. 357= 1925 M.W.N. 692=30 C.W.N. 601= 23 A.L.J. 273=2 O.W.N. 335= 21 N.L.R. 50=52 Cal. 482=6 L.R.P.C. 97= 27 Bom.L.R. 837=52 I.A. 231= A.I.R. 1925 P.C. 118=49 M.L.J. 173 (P.C.).

———Husband's brother can be validly adopted. (*Macleod, C.J. and Coyajee, J.*). SHRIPAD DATTATRAYA KAMAT *v.* VITHAL VASUDEVSHET PARKAR.
89 I.C. 197=49 Bom. 615= 27 Bom. L.R. 674=A.I.R. 1925 Bom. 399.

———Giving of an only son in adoption by widow is valid: 25 Bom. 537, *Foll.* (*Macleod, C.J. and Crump, J.*). GANPATI SHANKARAPPA *v.* KRISHNAPPA SHIVARAM.
73 I.C. 204=A.I.R. 1924 Bom. 159.

———*Person previously adopted under an invalid adoption, is eligible.*

The defendant claimed to be the adopted son of Krishnaji ; his claim was disputed on the ground that he had been previously adopted by one

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Ramchandra. The factum of that adoption was proved. It was also proved, however, that the first defendant was the sister's son of Ramchandra,

Held, the parties being Deshastha Brahmins, *prima facie* the adoption of a sister's son would be invalid. No attempt was made to show that in the community to which the parties belonged a custom has been established to permit the adoption of the sister's son therefore the fact that the defendant had gone through the ceremony of adoption purporting to result in his passing into the family of Ramchandra, must be considered as a nullity and would not operate as a defect against his being validly adopted by Radhabai into the family of Krishnaji. An adoption must either be effectual for all purposes, or a nullity. (*Macleod, C.J. and Crump, J.*). BHAN ABAJI DESHPANDE *v.* HARI RAMCHANDRA PATKI. **72 I.C. 631= 25 Bom.L.R. 411=A.I.R. 1923 Bom. 301.**

——Under Hindu Law, the adoption of daughter's husband is valid. (*Macleod, C.J. and Shah, J.*). SITABAI NAGES DESAI *v.* PARVATIBAI NAGES DESAI. **69 I.C. 172=24 Bom. L.R. 748= 47 Bom. 35=A.I.R. 1922 Bom. 233.**

——*Upanayanam in the family of invalid adoption—No bar to subsequent adoption.*

An *Upanayanam* is not valid unless performed by the father or in his absence, by another kinsman in the family to which the boy concerned actually belongs. The performance of the *Upanayanam* in a family into which the boy is wrongly believed to have entered by an invalid adoption, is a nullity and is no bar to his subsequent adoption. (*Oldfield and Phillips, JJ.*). VADREU RANGANAYAKAMMA *v.* SOMASUNDARA RAO. **59 I.C. 609=43 Mad. 876.**

——*It is desirable that adoption is made at a tender age.*

It is desirable that a boy should be adopted at a tender age so that he may be thoroughly assimilated to the family into which he is adopted and being bred up from his infancy amidst its members may be looked upon as a natural relation. (*Drake-Brockman, J.C.*). GULAB THAKUR *v.* FADALI. **68 I.C. 566=A.I.R. 1921 Nag. 153.**

——Person standing in same degree from common ancestor as adopter himself, can be adopted. (*Drake-Brockman, J.C.*). GULAB THAKUR *v.* FADALI. **68 I.C. 566=A.I.R. 1921 Nag. 153.**

—Adoption—Estoppel.

——*Likelihood of damage by change of position is enough to be proved.*

It is not cast upon the adopted son who sets up the estoppel against the adoptive father to prove conclusively that he was in fact damnified by the father resiling from the story of the adoption, but it is enough if he proves to the satisfaction of the Court that the likelihood of his being prejudiced by the alteration of position was so great that the Court will presume that the plaintiff must have been damnified: 34 All. 398 (P.C.), *Foll.*

The estoppel will only operate against the adoptive father and in no way against the *aurasa* son of the adoptive father. (*Coutts Trotter, C.J.*). J. PARASURAMAYYA *v.* J. VENKATARAMAYYA. **103 I.C. 855=1927 M.W.N. 311= A.I.R. 1927 Mad. 777.**

——*Agarwalla adoption — Brahminical adoption falsely set up—Acts and representations regarding former cannot create estoppel as to latter.*

The parties were Agarwallas and the adoption was made in the manner customary among the Agarwallas. The story of a regular Brahminical adoption of the same boy previous to the Agarwalla adoption was invented with the object of giving to latter adoption, the rights of collateral succession. The acts and representations of the plaintiffs which were set up as estopping them from questioning the adoption related to the Agarwalla adoption.

Held, that the plaintiffs were not estopped from questioning the adoption and denying that the adopted son acquired any rights of collateral succession by the adoption: 19 W.R. 12 (P.C.), *Foll.* and 34 All. 398 (P.C.), *Distinguished.* (*Mr. Ameer Ali.*) DHANRAJ JOHARMUL *v.* SONI BAI. **87 I.C. 357=23 A.L.J. 273=2 O.W.N. 335= 21 N.L.R. 50=52 Cal. 482=6 L.R.P.C. 97= 27 Bom.L.R. 837=52 I.A. 231=1925 M.W.N. 692= 30 C.W.N. 601=A.I.R. 1925 P.C. 118= 49 M.L.J. 173 (P.C.).**

——*Party can be estopped by, from denying adoption.*

No doubt it is perfectly true that under the Hindu Law an adoption can only be effected by the due performance of certain religious ceremonies; but the plaintiff in an action can be estopped by his own previous conduct from asserting that such valid and binding adoption had not in fact taken place. (*Rafique and Piggott, JJ.*). UDIT NARAIN SINGH *v.* RANDHIR SINGH. **69 I.C. 971= 54 All. 169=20 A.L.J. 945=A.I.R. 1923 All. 58.**

—Adoption—Evidence.

——*Lapse of time—Adopted son treated as such by members of the family and the public—Presumption in favour of valid adoption.*

In all cases it is not necessary to produce direct evidence of the fact of adoption and where it appears that the adoption had taken place long since and the adopted son has been treated as such by the members of the family and in public transactions, every prosumption will be made that every circumstance has taken place which is necessary to account for such a state of things as is proved or admitted to exist: 24 Bom. 473 and 27 All. 271 (P.C.), *Foll.*; 29 All. 519 (P.C.), *Rel. on.* (*Kinkhede and Mohiuddin, A.J.Cs.*). YAMUNABAI *v.* DHANNA LAL. **114 I.C. 616 (Nag.).**

——*Estoppel against father—Real prejudice need not be proved—Likelihood of prejudice enough.*

It is not cast upon the invalidly adopted son who sets up the estoppel against the adoptive father to prove conclusively that he was in fact damnified by the father resiling from the story of the adoption, but it is enough if he proves to the satisfaction of the Court that the likelihood of his being prejudiced by the alteration of position was so great that the Court will presume that the plaintiff must have been damnified: 34 All. 398 (P.C.), *Foll.*

The estoppel will only operate against the adoptive father and in no way against the *aurasa* son of the adoptive father. (*Coutts-Trotter, C.J.*). J. PARASURAMAYYA *v.* J. VENKATARAMAYYA. **103 I.C. 855=1927 M.W.N. 311= A.I.R. 1927 Mad. 777.**

——Reiterated declarations by the adopted son himself, extending over a number of years, that he was adopted son is sufficient proof of adoption against him when he is denying the adoption. (*Lord Blanesburgh.*) CHANDRA SHEKHAR BAKSH SINGH *v.* MT. RAJ KUNWAR. **96 I.C. 836= 24 M.L.W. 320=1926 M.W.N. 596= 31 C.W.N. 417=A.I.R. 1926 P.C. 91 (P.C.).**

——Where the adoption was never challenged for many years,

Held, that the factum of adoption must be taken as proved and that it is a fair presumption to

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make that such adoption was made with the necessary assent of the collaterals. (*Broadway, J.*). KANHAYA *v.* NAURANG. **76 I.C. 754= A.I.R. 1923 Lah. 374.**

———In none of the correspondence which passed between the uncle and the nephew, did uncle refer to nephew as his son: nor did he refer to his wife as the mother of the boy; on the contrary he referred to her as his aunt. Moreover the nephew was the only other member of the family and therefore uncle's only heir and thus there was no necessity to adopt him.

Held, the alleged adoption is not proved. (*Scott-Smith and Moti Sagar, JJ.*). MT. UTTAM DEVI *v.* DINA NATH. **75 I.C. 774=A.I.R. 1923 Lah. 359.**

———Name not changed—No proof of expenditure on ceremony—No reference to adoption at mutation—Adoption is not proved. (*Kotval and Prideaux, A.J.Cs.*). DEORAO *v.* MT. ANNAPURNABAI. **A.I.R. 1922 Nag. 185.**

———Where the plaintiffs sued for a declaration that a widow had no authority to adopt and that she did not adopt and the evidence in the defendant's side which was more valuable and weighty than that of the plaintiffs showed that the widow had asked for Police help at the time of adoption,

Held, that the adoption must be held to be established. (*Das and Adami, JJ.*). CHANDRAMA KUER *v.* RAM GAYAN. **67 I.C. 57=A.I.R. 1922 Pat. 111.**

———*Direct proof is not necessary—Conduct of members of family, etc., is enough.*

It is not necessary to produce direct evidence of the fact of adoption; where it has taken place long since and where the adopted son has been treated as such by the members of the family and in public transactions, every presumption will be made that every circumstance has taken place which is necessary to account for such a state of things as is proved or admitted to exist. (*Mookerjee and Buckland, JJ.*). JAGANNATH MARWARI *v.* MT. CHANDNI BIBI. **67 I. C. 31=34 C.L.J. 432= 26 C.W.N. 65=A.I.R. 1921 Cal. 647.**

———If giving and taking is not established as a faet nc amount of acknowledgment would make a person an adopted son. (*Woodroffe and Walmsley, JJ.*). KRISHNA BHAMINI DASI *v.* BROJA MOHINI DASI. **66 I.C. 38=25 C.W.N. 403= A.I.R. 1921 Cal. 617.**

—Adoption—Factum valet.

———An adoption of a daughter's son, sister's son, and mother's sister's son being expressly forbidden by the texts on Hindu Law is contrary to law and void in the three regenerate classes, Brahmin, Kshatriya and Vaisya, and the principle of *factum valet* will not validate such an adoption. (*Jwala Prasad and Bucknill, JJ.*). ISHWARI PRASAD *v.* RAI HARI PRASADHAH. **106 I.C. 20= 6 Pat. 506=8 P.L.J. 34=A.I.R. 1927 Pat. 145.**

———Adoption of Orphan, is invalid—*Factum valet*, doctrine of, does not apply. (*Ayling and Odgers, JJ.*). MAREYYA *v.* RAMALAKSHMI. **60 I.C. 141=44 Mad. 260=A.I.R. 1921 Mad. 331.**

—Adoption—Relationship.

———Adoption of the daughter's son cannot be in the dattaka form and consequently there is no transplantation of the adoptee into the adopter's family and so as no relationship is created by the adoption beyond the personal relationship of the parties, the adopter's daughters cannot be held to become the sisters of the adoptee: 113 P.L.R. 1908; A.I.R. 1922 Lah. 433, *Rel. on.* (*Shadi Lal, C.J. and Hilton, J.*). UGGAR SEN *v.* KHUSHI RAM. **120 I.C. 5=A.I.R. 1929 Lah. 653.**

HINDU LAW—Adoption—Relationship.

———*Question of adoption is one of status—Law of domicile governs.*

Per *Phillips, J.*—Adoption creates definite relationship between the person adopted and the person adopting and a question relating to its validity is akin to a case of legitimacy. In both the right of a person to be declared as the legal son of a father is involved. Adoption naturally carries with it rights to property but the main element in adoption is a religious element; for, the status conferred by adoption involves religious obligations and it is usually for the performance of such religious obligations that the adoption is effected. The question of adoption is consequently a question relating to the status of the parties and is governed by the law of domicile. (*Phillips and Reilly, JJ.*). RAMAKRISHNAYYA *v.* MAHALAKSHMAMMA GARU. **30 M.L.W. 691.**

———*Natural brother cannot succeed to adopted son's estate in the adoptive family.*

It is not true to say that by Hindu law an adoptee only loses his consanguinity for purposes of succession. Adoption has been spoken of as "new birth" in many cases, a term sanctioned by the theory of Hindu law. The theory itself involves the principle "of a complete severance of the child adopted from the family in which he is born. . . and complete substitution into the adoptive family, as if he were born in it: A.I.R. 1915 P.C. 41, *Ref.*

Consideration of the intimate connexion, which primitive Hindu Laws established between the funeral offerings and ceremonies on behalf of the dead and the right of succession to his property will show that ceremonially the adopted son only becomes new born in the family of his adoptive father, so as to be qualified to provide efficaciously the offerings of which the dead have need, by first dying in the family of his birth, out of which he is given by his natural to his adoptive parent, and in which his offering will be no longer efficacious or desired. Therefore, when such an adopted son dies, his natural brother cannot succeed to him to his estate in the adoptive family being still a member of the family of his birth and bound to make the necessary offerings for his own ancestors and thus not qualified to do the same thing for his brother and his adoptive father and that father's immediate predecessors. (*Viscount Sumner.*) RAGHURAJ CHANDRA *v.* RANI SUBHADRA KUNWAR. **108 I.C. 673=3 Luck. 76=55 I.A. 139= 26 A.L.J. 609=30 Bom.L.R. 829=32 C.W.N. 1009= 5 O.W.N. 443=A.I.R. 1928 P.C. 87. 55 M.L.J. 778.**

———*Adopted son loses all rights in natural family including right to inherit to natural relations.*

It is a well established principle of the Mitakshara law that an adoption in the dattaka form has the effect of transferring the adopted boy from his natural into the adoptive family and consequently of losing all his rights of a son in his natural family including the right of claiming any share in the estate of his natural relations. The only tie or affinity that such a boy retains with his natural family is that he cannot marry in it within the prohibited degree nor can he adopt from that family a boy whom he could not have adopted if he had remained in that family. (*Fforde and Jai Lal, JJ.*). DHANNA MAL *v.* PARMESHARI DAS. **111 I. C. 251=A.I.R. 1928 Lah. 9.**

———It makes no difference as to extinction of a person's rights in his natural family whether he be adopted during the lifetime of his natural father or

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after the death of his natural father. (*Dalal, J.*). DHARAM SINGH *v.* BAKSHI. **94 I C. 315= A.I.R. 1926 All. 425.**

———*Adoptee's son, in existence at father's adoption retains his right to adoptee's natural family (Obiter).*

If any sons of the adoptee are in existence on the date of adoption they will be vested with interest in the property of the natural family and the father's adoption though it involves his civil death as regards the property does not have the same effect on the rights of his son or sons. (*Dalal, J.*). DHARAM SINGH *v.* BAKSHI. **94 I.C. 315= A.I.R. 1926 All. 425.**

———*Wife not actually receiving can be adoptive mother.*

There appears to be no authority for the proposition that the wife does not become the adoptive mother unless she actually receives the boy.

Per *Madhavan Nair, J.*—The wife becomes the adoptive mother, not because she receives the boy in adoption, but because she is the wife of the adopter, her husband, who takes the boy in adoption.

Per *Phillips, J.*—A Hindu son has to offer oblations not only to his father's ancestors, but also to his mother's ancestors. When therefore, he is adopted into a new family, he becomes the son of that family and presumably he would offer oblations not only to his adoptive father's ancestors but to his father's wife's ancestors as well. It would be straining the legal fiction of adoption too far to hold that the boy need have no mother at all, although this may possibly be necessary in the case of an adoption by a bachelor. Wherever possible, therefore, a mother should be found for the boy, and the fact that such a mother died before the adoption can be no obstacle in view of the fictitious character of the whole principle of adoption : *Case-law considered.* (*Phillips and Madhavan Nair, JJ.*). SUNDARAMMA *v.* VENKATASUBBIER.

97 I. C 145=49 Mad. 941=1926 M.W.N. 778= A.I.R. 1926 Mad. 1203=51 M.L.J. 545.

———*Adopted son ceases to be a member of his natural family.*

After adoption in the dattaka form the adopted son ceases in all real sense of the word to be a member of the family of his natural father, and all ties of relationship between him and the family of his natural father come to end. The separation is absolute. The separation is rendered no less absolute because owing to the blood tie, which he cannot escape, he is prohibited from marrying within the prohibited degrees in the family of his natural father. (*Stuart, C. J. and Hasan, J.*). BRIJ INDRA TEWARI *v.* SUBHADRA KUNWAR. **95 I. C. 798= 1 Luck. 233=29 O.C. 218=3 O.W.N. Sup. 34= A.I.R. 1926 Oudh 449.**

———The continuation of sapinda relationship between the adopted person and his natural family does not establish the proposition that the relationship of a brother between the adopted person and his natural brother subsists even after the adoption. *Case-law referred to.* (*Stuart, C. J. and Hasan, J.*). BRIJ CHANDRA TEWARI *v.* SUBHADRA KUNWAR. **95 I. C. 798=1 Luck. 233= 29 O. C. 218=3 O.W.N. Sup. 34= A.I.R. 1926 Oudh 449.**

———Wife of adoptee passes into adoptive family. (*Dhobley, A.J.C.*). MAROTI *v.* LAXMAN. **65 I.C. 362=5 N.L.J. 58= A. I. R. 1922 Nag. 16.**

HINDU LAW—Adoption—Rights of adopted son—Disposition of property.

—Adoption—Rights of adopted son—Adverse possession.

———Time does not run against the adopted son prior to the date of his adoption and adverse possession against the adoptive mother does not affect the rights of the adopted son: 13 Bom. 160, *Dist.* (*Mittra and Prideaux, A.J.Cs.*). SITARAM *v.* RAJARAM. **17 N. L.R. 18= A.I.R. 1921 Nag. 111.**

—Adoption—Rights of adopted son—Co-parcenary.

———Property got by the adoptive father from maternal grandfather—Adopted son is co-parcener in it: 27 Mad. 382; 39 Mad. 930, *Ref.* and 35 Cal. 1039 *Foll.* (*Ramesam and Jackson, JJ.*). A. VENKATA SESHAMMA *v.* A. APPA RAO. **80 I.C. 79= 20 M. L. W. 181=A.I.R. 1925 Mad. 125.**

—Adoption—Rights of adopted son—Disposition of property.

———*Illatom adoption—Subsequent alienation by father-in-law—Rights of illatom son-in-law.*

The practice of illatom is a departure from ordinary Hindu Law, and accordingly it lies upon the party claiming by virtue of the statute to override the provisions of that law to substantiate his claim. This cannot in general be done, as, for instance, can be done in a case of adoption, by appeal to settled rules of law because the practice of illatom being of late occurrence and confined to certain castes, has never become crystallized into fixed rules of law by a long course of judicial decisions. Where therefore, a father-in-law takes a son-in-law in illatom, and subsequently alienates some of his property, it lies heavily upon the illatom son-in-law to show that by specific customary law overriding the general Hindu law, he has a preferential right to the rights of father in-law's alienees: 4 Mad. 272; 21 Mad. 266; 9 Mad. 114; A I.R. 1927 Mad. 708; 7 M. H. C. R. 25 and A. S. No. 206 of 1912, *Rel. on.* (*Beasley, C. J. and Curgenven, J.*). (VATRAPU) SUBBARAO *v.* (PAMIREDDI) MAHALAKSHMAMMA. **A.I.R. 1930 Mad. 883.**

———Son dying after authorising his wife to adopt—Father settling property on daughters after son's death—Plaintiff was adopted later and suing for partition—Father dying during suit and plaintiff then claiming whole property—Doctrine of relation back does not apply and plaintiff takes subject to settlement in favour of daughters.

In the case of adoption by widow the doctrine of relation back has nothing to do with a last male holder. A sole surviving co-parcener in possession of property has always been regarded as the owner of the co-parcenary property, the theory of relation back has only to do with establishing a line of succession to the adoptive father and in order to establish that line, it is necessary that certain intermediate holders should give way to the adopted son's superior claims as that of a natural born son of his adoptive father. He can so to speak insist on the property devolving in a direct line as far as possible from father to son or from grand-father to grand-son and it is in this connexion and this alone that the doctrine of relation back is to be regarded. (*Case-law fully discussed*). (*Odgers and Venkatasubba Rao, JJ.*). VEERANNA *v.* SAYAMMA. **118 I.C. 821=52 Mad. 398= 29 M. L. W. 309=A.I.R. 1929 Mad. 296= 56 M. L. J. 401.**

———After the separation of two brothers, if one of them is adopted, the adoptee takes his separate property to the new family: A.I.R. 1923 Bom. 297,

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Foll. (*Zafar Ali and Dalip Singh, JJ.*). RULIA RAM *v.* MT. SODHAN. **123 I. C. 81= A.I R. 1930 Lah. 470.**

———*Disposition before adoption by adoptive father* —Inter vivos *or by will is binding on adopted son.*

When a disposition is made *inter vivos* by one who has full power over property under which a portion of that property is carried away, no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. For the Will will speak as to the death of the testator and the property is carried away before the adoption takes place. (*Viscount Dunedin.*) KRISHNAMURTHY *v.* KRISHNAMURTHY. **101 I.C. 779=50 Mad. 508= 29 Bom.L.R. 969=1927 M.W.N. 467= 54 I.A. 248=45 C.L.J. 620=31 C.W.N. 910= 4 O.W.N. 621=39 M.L J. 52=26 M L.W. 186= 25 A.L.J. 945=8 P.L.T. 719= A.I.R. 1927 P.C. 139=53 M L.J. 57 (P.C.).**

———*Disposition of property made before adoption by the father is binding on the adopted son.*

In cases of adoption after the death of the adoptive father by his widow under his authority, every lawful disposition of the property made by him, even by a will, would be binding on the adopted son, and the rights accruing by virtue of such adoption are only in that part of the estate which remains undisputed at the moment of the adoption: 12 Mad. 490 ; *Subramania Ayyar, J., in Reference to* 27 Mad. 577 ; A.I.R. 1923 Mad. 376 and 3 I.C. 378, *Foll.* ; 43 Bom. 778 ; 40 Bom. 270; 27 Mad. 577 and 16 Cal. 556, *Dist.* (*Lindsay and Sulaiman, JJ.*). DURGI *v.* KANHAIYA LAL. **101 I. C. 678= 49 All. 579=25 A.L.J. 338= A.I.R. 1927 All. 387.**

———Plaintiff adopted by his uncle—Father and uncle lived jointly—Ancestral land alienated by father and uncle during plaintiff's minority but before his adoption—Plaintiff cannot challenge after adoption as he is dead with respect to his real father and his rights begin from the date of adoption with respect to his adopted father: 26 Mad. 143 and 5 Bom. 630, *Foll.* (*Baker, J.C. and Prideaux, A.J.C.*). NAGARMAL *v.* ABDUL RAHMAN. **89 I.C. 941=A.I.R. 1926 Nag. 5.**

——— *Alienation by widow prior to adoption.*

Adopted son may enforce his right to property alienated by widow (adoptive mother) prior to adoption, without setting aside the transfer. (*Shah, Ag. C.J. and Fawcett, J.*). HANAMGOWDA SHIDGOWDA PATIL *v.* IVGOWDA SHIWGOWDA PATIL. **84 I.C. 374=48 Bom. 654= 26 Bom. L.R. 829=A.I.R. 1925 Bom. 9.**

—Adoption—Rights of adopted son—Liability.

———*Property in the hands of adoptive mother changed with maintenance—Adopted son is bound.*

Where a consent decree was passed between two widows by which each was allotted a half share in certain properties but one of them was further directed to pay out of the property a sum of money to the other for her maintenance and the person who undertook the liability subsequently adopted a son,

Held, that the maintenance holder or her executor could sue to recover the arrears of maintenance which was charged on the estate and that the adopted son was bound by the obligations of the

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widow entered into prior to adoption. (*Graham and Mitter, JJ.*). RAJ NARAIN HAZARI *v.* BEJOY SINGH. **34 C.W.N. 754.**

———*Decree against adoptive mother—Adoptee's liability is not limited to assets taken from her.*

The adopted son is the owner of the estate and represents the estate in its entirety. In this view he should also be made liable for the sum decreed against adoptive mother without the limitation of his liability. In other words plaintiff's liability to pay this sum is not dependent upon any assets which he has taken from adoptive mother if, indeed, he has taken any assets from her at all. (*Rafique and Lindsay, JJ.*). JIWA RAM *v.* NAND RAM. **66 I.C. 144=44 All. 407= 20 A.L.J. 226=A. I. R. 1922 All. 223.**

———*Contracts by adoptive father before adoption are binding.*

Where a person entered into a contract to sell immovable property and died before completing the sale, but his minor widow delivered possession and received the purchase money and subsequently adopted the plaintiff; in a suit by plaintiff to recover possession,

Held, that suit is not maintainable : 41 Bom. 438 (F.B.), *Appl.* (*Macleod, C.J. and Fawcett, J.*). LAXMAN MADHORAO *v.* BHAGWAN SINGH. **59 I.C. 581=45 Bom. 434= 23 Bom. L.R. 55=A.I.R. 1921 Bom. 409.**

—Adoption—Rights of adopted son—Partition.

———*Partition between co-widows is ineffective as against adopted son.*

Partition between co-widows is a mode of separate enjoyment binding on themselves and cannot enlarge their legal rights so as to affect the adopted son. (*Kotval and Prideaux, A.J.Cs.*). MT. ANNAPURNABAI *v.* RUPRAO. **78 I.C. 284= A.I.R. 1924 Nag. 319.**

—Adoption—Rights of adopted son—Share.

———*Sudras in Southern India—Adopted son and after-born son share equally.*

The rule of the Dattaka Chandrika, that on a partition of the joint family property of a Sudra family, an adopted son is entitled to share equally with the legitimate son born to adoptive father subsequently to the adoption, has been accepted and acted upon for at least more than a century in Madras as the law applicable in such cases to Sudras. In Bengal, the same rule applies.

Gopalah v. *K. Venkataraghavulu*, (1.L.R. 40 Mad. 632 ; 29 M.L.J. 710), *Overruled*; *Raja* v. *Subbaraya*, (I.L.R. 7 Mad. 253), *Approved.* (*Sir John Edge.*) A PERRARU *v.* A. SUBBARAYADU. **61 I.C. 690= 3 P. L.T. 1=26 C. W.N. 1= 30 M.L.T. 1=48 I.A. 280=44 Mad. 656= 19 A.L.J. 621=23 Bom.L.R. 920=34 C.L.J. 56= 14 M.L.W. 270=1921 M.W.N. 540= A.I.R. 1922 P.C. 71=41 M.L.J. 33 (P. C.).**

———The adopted son takes one-fourth of the entire estate when there is a real son, in provinces governed by the Mitakshara school. (*Shadi Lal, C.J. and Le Rossignol, J.*). PARMA NAND *v.* SHIV CHARANDAS. **59 I.C. 256=2 Lah. 69= 3 L. L. J. 82=21 P. L. R. 1921= A. I. R. 1921 Lah. 147.**

—Adoption—Rights of adopted son—Status.

———*Dattaka putra and karta putra—Difference between.*

It is a very strong thing to say that a karta putra who retains his status in his natural family and loses no right in that family is in a better position than a datta putra who undoubtedly loses his

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status in his natural family and who is liable to be defeated in his adoptive family by the birth of a natural born son. The modern text books refer to the adoption of a karta putra as an adoption in the kritrima form ; but this is not quite correct. All that is necessary is the consent of the adoptee, which involves the adoptee being an adult. He does not lose the rights of inheritance in his natural family, and takes the inheritance of his adoptive father, but not of his father's father or other collateral relations nor of the wife of his adoptive father or her relations. It is no part of the contract that the adoptee should succeed to the estate left by his adoptive father. A dattak son who loses his status in his natural family has no absolute right to the estate of his adoptive father. He is liable to be defeated by a gift *inter vivos* or by a devise made by his father in favour of another person. He is also liable to be defeated, if not absolutely, certainly to the extent of important shares in the estate by the birth of a natural born son subsequent to the adoption. Succession to the estate of the adoptive father is not inherent in the status of a karta putra. When a natural born son is in existence he is entitled to exclude every other kind of son from sharing with him in the estate of his father: 1 Sel. Rep. 11 ; 6 I.D., Old series, page 8, *Expl. and doubted.* (*Das and Adami, JJ.*). KANHAIYA LAL SAHU *v.* MT. SUGAKUAR.

90 I.C. 65=4 Pat. 824=6 P.L.T. 593=A. I. R. 1926 Pat. 90.

———*Adopted son is similar in all respects to natural born son.*

The rights of the adopted son, unless curtailed by express texts, are in every respect the same as those of a natural-born son and an adoption, so far as the continuity of the line of inheritance is concerned, has a retrospective effect.

In cases of competition between an adopted son and an illegitimate son of a Sudra, it would be unreasonable and against all precedents, in computing the shares, to treat the illegitimate sons as legitimate, presume that the adoption was after the birth of the illegitimate son, add to it the consequence that the adoption is invalid and hold that the illegitimate son could therefore get the whole property and then it should be divided by halves so as to give the illegitimate son and the adopted son equal shares. The proper course is to assume the adopted son to be in the same position as a natural-born son, imagine the illegitimate sons to be legitimate, assume that they can coexist with the legitimate sons, see what shares they would get on that footing, and give the illegitimate sons one-half of it. (*Spencer, Offg. C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.**

———An adopted son takes the place of natural son and has the right to inherit the property of his adoptive mother's ancestors. (*Macleod, C. J. and Shah, J.*). DATTATRAYA BHIMRAO SABNIS *v.* GANGABHAI GANESHBAI NAVAR. **77 I.C. 17=46 Bom. 541=24 Bom. L.R. 69=A.I.R. 1922 Bom. 321.**

—Adoption—Rights of adopted son—Succession.

———*Adopted and aurasa sons share equally in collateral succession.*

Kumaraswami Sastri, J.—Although under Hindu Law an adopted son might have a lesser share in his adoptive father's estate because of the birth of a natural son, so far as succession to collaterals is concerned, the adopted son and the natural born son stand on equal footing and they get equal shares. (*Kumaraswami Sastri, Odgers and Jackson, JJ.*). KRISHNAYYA RAO *v.* RAJAH OF PITHAPUR.

116 I.C. 673=51 Mad. 893=28 M.L.W. 422=A.I.R. 1928 Mad. 994=55 M.L.J. 894 (F.B.).

———*Adoption by daughter-in-law to her husband—Adopted son succeeds to the estate of his adoptive grand-father.*

When a Hindu offers the sacrificial cake or pinda, he secures the advancement of the spirit of the father grand-father and great-grand-father, each to an equal degree; and no offerings by any other descendant or by any collateral are of the same order of efficacy. When a son is adopted his offering of the pinda to his adoptive father, and to his adoptive grand-father and great-grand-father, are as efficacious as the offerings of a natural son; and for this reason he is entitled to succeed to share in the family property, as if he were a begotten son. Where, therefore, an adoption secures to the spirit of the last male holder of an estate, that advancement, otherwise lacking, which is given by the offering of the pinda, then the imposition of pious duties on the adopted person should carry with it the legal rights to succeed to the estate of the last male-holder. But this broad principle is subject to the following equitable restrictions :

(1) That the estate is not already vested by inheritance in a person other than the adopting widow, or her co-widows.

(2) That if the estate is a share in an estate held by co-parceners the consent of the co-parceners is necessary.

Where the last male holder dies in exclusive possession of his estate, and his estate vests directly in his daughter-in-law, her husband, (*i. e.*, the son of the last holder) having pre-deceased the last holder, her adopting a son to her husband makes the adopted son, an heir to the last holder: 14 Bom. 463 ; 20 Bom. 250 ; 21 Bom. 319 ; 26 Bom. 526, *Ref.*; A. I. R. 1922 Bom. 321 ; 29 Bom. 410 ; 31 Bom. 373 and 32 Bom. 499, *Dist.* (*Hallifax and Mitchell, A. J. Cs.*). BASWANTRAO *v.* DEORAO.

99 I.C. 369=A.I.R. 1927 Nag. 2.

———Adopted son can inherit to the relations of his adoptive father's wife, deceased before adoption. (*Phillips and Madhavan Nair, JJ.*). SUNDARAMMA *v.* VENKATASUBBIER. **97 I. C. 145=49 Mad. 941=1926 M.W.N. 778=A. I. R. 1926 Mad. 1203=51 M.L.J. 545.**

———Son adopted by widow succeeding as *gotraja sapinda* and taking life-interest cannot succeed to her interest but can inherit adoptive father's property. (*Macleod, C. J. and Coyajee, J.*). HAMNAVA *v.* VENKAPPA. **91 I. C. 305=27 Bom. L.R. 1331=A.I.R. 1926 Bom. 26.**

———Adopted son in Bombay takes one-fourth of the share of a subsequently born natural son, even among Sudras: 17 Bom. 100, *Foll.* and 44 Mad. 656 (P.C.), *Expl.* (*Crump and Coyajee JJ.*). TUKARAM MAHADU *v.* RAMCHANDRA MAHADU.

89 I.C. 984=49 Bom. 672=27 Bom. L.R. 921=A.I.R. 1925 Bom. 425.

———An adopted boy cannot inherit to the relations of the wife of the adoptive father if the wife does not or cannot take part in adopting him, as for instance, where the adoption takes place after her death. (*Devadoss, J.*). VENKATASUBBIER *v.* SUNDARAMMA. **85 I.C. 318=20 M.L.W. 925=A.I.R. 1925 Mad. 340=48 M. L. J. 126.**

HINDU LAW—Adoption—Rights of adopted son —Succession.

———*Adopted son cannot succeed to his natural maternal grand-fathers' property.*

The theory of adoption involves the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line and therefore, the adopted son cannot succeed to the property of his maternal grandfather in his natural family: 10 I.A. 138, *Ref.* (*Macleod, C. J. and Crump, J.*). BHANSAHEB *v.* RAMGAUDA. **76 I.C. 937= 25 Bom.L.R. 813=A.I.R. 1923 Bom. 471.**

———Adoption not in Dattaka form—Adopted son does not succeed collaterally: 67 P.L.R. 1911, *Foll.* (*Broadway and Abdul Raoof, JJ.*). THIRTHA RAM *v.* MT. KHAN DEVI. **60 I.C. 101= 3 L.L.J. 35=A. I. R. 1921 Lah. 149.**

—Adoption—Setting aside.

———*Widowed daughter adopting—Next reversioner can sue to set aside the adoption.*

If the widowed daughter of the propositus professes to adopt a son, the nearest reversioner in the family of the propositus has a right of suit within the terms of S. 42, Act I of 1877, to set aside such adoption: A.I.R. 1916 P.C. 117, *Dist.*; A.I.R. 1917 P. C. 196, *Appl.*; 42 Mad. 699; A.I.R. 1921 Mad. 710 and 35 M.L.J. 144, *Ref.* (*Jackson, J.*). MUTHUKRISHNA MUDALIAR *v.* HARI NARAYANA MUDALIAR. **105 I. C. 154= 26 M.L.W. 282=A.I.R. 1927 Mad. 785= 53 M.L.J. 601.**

———*Aura son's right to challenge adoption—Nature of.*

The case of the *aurasa* son of an adoptive father stands on a different footing, from that of a reversioner. The cause of action is one and the same whatever may be the number of the reversioners. But the case of an *aurasa* son is altogether different, for the adoption affects him as it affects no one else: for if the adoption is held valid his right to the family property would be cut down under the Hindu Law. But if the adoption is held to be not valid then he would succeed to the whole of the family property. Therefore decisions which relate to suits by reversioners would not apply.

The mere fact that the father who made the illegal adoption was alive for more than six years after the adoption would not bar the right of a son born a year or two after the adoption to question it.

Son's right to challenge the adoption is quite independent of that of the father. (*Devadoss, J.*). SIDDA REDDI *v.* DEVA JAYARAMI REDDI.

98 I. C. 435=24 M.L.W. 601=1926 M.W.N. 736= A.I.R. 1926 Mad. 1123=51 M.L.J. 757.

—Adoption—Texts.

———*Vyavahara Mayukha—Right of widow in Bombay to adopt without husband's authority.*

Per *Spencer, Offg. C.J.*—About 1674 the present law that a widow can adopt without the authority of her husband was also the law as expounded in Bombay. Though Vyavahara Mayukha came into use only by about 1700 it did not introduce a new Law of its own but only declared the law prevailing even before it was written. (*Spencer, O.C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705= 48 Mad. 1=A.I.R. 1925 Mad. 497.**

———*Kalikapurana—Age of adoptee.*

The passage attributed to the *Kalika Purana* which restricts the age of the adoptee cannot be relied upon as authentic and the adoption of a child over five years of age is therefore permissible: 9 A. 253, *App.* (*Dawson-Miller, C.J. and Foster, J.*). MAKUND DEV *v.* SHRI JAGANATH. **72 I.C. 230=2 Pat. 469=4 P.L.T. 427= 1 Pat. L. R. 201=1923 P.H.C.C. 97= A.I.R. 1923 Pat. 423.**

—Adoption—Validity—Bar to adoption.

———Per *Kumaraswami Sastry, J.*—Sword wives' sons though legitimate, still if incompetent to perform ceremonies, do not invalidate adoption. (*Spencer, O.C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.**

—Adoption—Validity—Bombay school.

———Adoption of a boy older than adoptive father is valid in Bombay Presidency. (*Macleod, C.J. and Shah, J.*). BALABAI TUKARAM *v.* MAHADU KRISHNA. **80 I.C. 529=48 Bom. 387= 26 Bom. L.R. 222=A.I.R. 1924 Bom. 349.**

—Adoption—Validity—Caste.

———*Adoption in a different sub-caste of the same caste valid.*

Adoption would not be invalid so long as the adoptive father and the adopted son belonged to a sub-caste of the same primary caste especially when inter-marriage between the two sub-castes is permissible: 17 O.C. 186, *Ref. to.* (*Sulaiman and Kanhaiya Lal, JJ.*). SHIB DEO MISRA *v.* RAM PRASAD. **87 I.C. 938=46 All. 637=22 A.L.J. 690= A.I.R. 1925 All. 79.**

—Adoption—Validity—Form.

———*Mithila School—Adoption in dattaka form is valid—Adoptee can inherit to collaterals.*

Adoption made in the dattaka form by a person of Mithila would not be illegal and the adopted son is capable of inheriting to collaterals. (*Das and Foster, JJ.*). CHANDRAHWAR PRASAD NARAIN SINGH *v.* BISHESHWAR PRATAB NARAIN SINGH. **101 I.C. 289=5 Pat. 777=8 P.L.T. 510= A.I.R. 1927 Pat. 61.**

—Adoption—Validity—Illegal adoption.

———Adoption of same boy by two brothers is illegal. (*Mr. Ameer Ali.*) DHANRAJ *v.* SONI BAI. **87 I. C. 357=1925 M.W.N. 692=30 C.W.N. 601= 23 A.L.J. 273=2 O.W.N. 335=21 N.L.R. 50= 52 Cal. 482=6 L.R. P.C. 97=27 Bom.L.R. 837= 52 I.A. 231=A.I.R. 1925 P.C. 118= 49 M.L.J. 173 (P.C.).**

—Adoption—Validity—Invalid.

———*Mere lapse of time does not validate invalid adoption.*

Patkar, J.—Mere lapse of time would not validate an invalid adoption. A long course of recognition and acquiescence on the part of the members of the family and persons acquainted with the facts may give rise to an inference that conditions relating to the adoption were duly fulfilled.

Baker, J.—The fact that the adoption was recognized and acted upon cannot make that, which was invalid under the Hindu Law, valid. (*Patkar and Baker, JJ.*). BASANGOWDA *v.* RUDRAPPA. **110 I.C. 633=52 Bom. 393=30 Bom.L.R. 591= A.I.R. 1928 Bom. 291.**

———Where there are two brothers in a joint family and one of them (*B*) dies leaving his wife pregnant and the other *A* dies subsequently leaving his wife, who adopts *P*, and then *K* is born to *B*'s wife, in a suit against *K* for recovering half share of the property,

Held, that *K* is in law a co-parcener from the date of his conception and that the adoption by *A*'s wife of *P*, while *K* was in the womb, without the authority of husband, is not valid and gives *P*, no-

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interest in the joint family property. (*Fawcett and Madgavkar, JJ.*). BALA *v.* AKUBAI. **99 I.C. 417= 28 Bom. L.R. 1254=50 Bom. 722= A.I.R 1926 Bom. 584.**

———Two of five relatives not consulted—Adoption is invalid: 30 M. 50 (P.C.), *Rel. on.* (*Venkatasubba Rao, J.*). SUBBAMMA *v.* ADIMOORTHAPPA. **86 I.C. 269=21 M.L.W. 85= 1925 M.W.N. 107=A.I.R. 1925 Mad. 635.**

—Adoption—Validity—Kashmir Brahmins.

———*Adoption after thread ceremony is valid.*

Among Kashmir Brahmins of Amritsar where adoption of a boy after thread ceremony was recognised as valid by the Biradri and by the friends of the family, and its validity was not questioned by any one from 1896 until the dispute arose in 1913,

Held, that the adoption was valid. (*Sir John Edge.*) DURGA DEVI *v.* SHAMBU NATH. **80 I.C. 965=29 C.W.N. 106=22 A.L.J. 394= 5 L.R.P.C. 83=5 Lah. 200=26 Bom. L.R. 537= 34 M.L.T. 93=1924 M.W.N. 434=51 I.A. 182= 20 M.L.W. 216=A.I.R. 1924 P.C. 113= 46 M.L.J. 661 (P.C.).**

—Adoption—Validity—Motive.

———*Bad motive of adoptive father cannot invalidate an adoption otherwise valid.*

Where it was alleged that the adoption by appellant was induced by a bribe,

Held, that the mere fact that the adopter has mixed motives for the adoption would not be sufficient in law to render it invalid. Where the adopter has a right to adopt a son no question of fraud or coercion arises. If the adopter's own object in making the adoption is the perpetuation of his family and other sufficient reasons, and if in addition there are other motives of a worldly nature which also induced him to do that which he has an absolute right to do, there is no reason why, where the rights of no other person are infringed, this should in any way affect the validity of his act: 35 B. 169 ; 22 B. 199; 22 B. 558 (F. B.) and 1 M. 174 (P. C.), *Ref.* Public Policy does not concern itself with the motives which induce a person to exercise his lawful rights without risk of injury to Society. (*Dawson-Miller, C.J. and Foster, J.*). MAKUND DEB *v.* SHRI JAGANATH. **72 I.C. 230=2 Pat. 469=4 P.L.T. 427= 1 Pat.L.R. 201=1923 P.H.C.C. 97= A.I.R. 1923 Pat. 423.**

—Adoption—Validity—Nature of.

———*Adoption held valid is valid for spiritual as well as temporal purposes.*

There is no possible distinction between the validity of an adoption for spiritual purposes and its validity for temporal purposes, or between its validity for any one purpose and its validity for any other. Under the Hindu Law if an adoption is valid at all, it is valid entirely, and a person validly adopted becomes for all purposes, spiritual or temporal, the natural son of the person by or to whom he is adopted. (*Hallifax and Mitchell, A. J. Cs.*). BASWANT RAO *v.* DEORAO. **99 I.C. 369=A.I.R. 1927 Nag. 2.**

—Adoption—Validity—Objections to.

———Plaintiff relying on the rule of prohibition of adoption of daughter's son among regenerate classes should raise the point in his plaint allowing defendant to plead family custom to the contrary. (*Jwala Prasad and Bucknill, JJ.*). ISHWARI PRASAD *v.* RAI HARI PRASAD LAL. **106 I.C. 620= 8 P.L.T. 34=6 Pat. 506=A.I.R. 1927 Pat. 145.**

HINDU LAW—Adoption—Validity—Sudras.

—Adoption—Validity—Orphan.

———*Orphan cannot be validly adopted in absence of a custom.*

Under Mitakshara law an orphan cannot be validly adopted. However, if a custom is proved under which such adoptions do take place, they would have to be held to be valid. But the burden lies heavily to prove a special and unusual custom on the person setting it up. (*Lindsay and Sulaiman, JJ.*). SUKHBIR SINGH *v.* MANGEISAR RAO. **100 I.C. 778=49 All. 302=25 A. L. J. 185= A.I.R. 1927 All. 252.**

———*Orphan cannot be adopted.*

It is essential to the validity of an adoption that the child should be 'given' to the adopter by the father or, if he be dead, by the mother. No other person has the right, nor can such right be delegated to anybody else. Consequently a boy who has lost both his parents cannot be adopted. (*Mr. Ameer Ali.*) DHANRAJ *v* SONI BAI. **87 I.C. 357=1925 M.W.N. 692=30 C.W.N. 601= 23 A.L.J. 273=2 O.W.N. 335=21 N.L.R. 50= 52 Cal. 482=6 L.R.P.C. 97=27 Bom. L.R. 837= 52 I.A. 231=A.I.R. 1925 P.C. 118= 49 M.L.J. 173 (P.C.).**

———Adoption of married orphan and only son is invalid. (*Zafar Ali, J.*). CHHANGA *v.* JAI LAL. **78 I.C. 161=6 L.L.J. 174= A.I.R. 1924 Lah. 480.**

—Adoption—Validity—Sudras.

———*Adoption of married man, even though Sudra, is invalid except in Bombay.*

Except in the Bombay Presidency where Mayukha prevails, in all the other provinces in India, the adoption of a married man, even though he happens to be a Sudra, is invalid. In the portion of Bombay Presidency where the Mayukha is followed, such adoption is held valid : A.I.R. 1925 Mad. 272; 33 Bom. 669; A.I.R. 1925 Bom. 363. *Ref.* (*Kumaraswami Sastri and Walsh, JJ*). SOMASEKHARAH *v.* MAHADEVA. **53 Mad. 297= A.I.R. 1930 Mad. 436.**

———The adoption of a sister's son amongst the three twice-born castes is prohibited and invalid, whilst amongst Shudras it is valid : 22 Bom. 973 and 21 All. 412 (P.C.), *Foll.* (*Madgavkar and Patkar, JJ.*). SUBRAO *v.* RADHA. **113 I.C. 497= 52 Bom. 497=30 Bom. L.R. 692= A.I.R. 1928 Bom. 295.**

———As Jats are Sudras, a sister's son can be adopted among them. (*Harrison and Campbell, JJ.*). HIRA *v.* SHIBBU. **84 I.C. 1=6 Lah. 52= 6 L.L.J. 442=26 P. L. R. 225= A. I. R. 1925 Lah. 163.**

———The existence of illegitimate children was held to be no bar to adoption among Sudras. (*Spencer, Offg. C. J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I. C. 705=48 Mad. 1= A.I.R. 1925 Mad. 497.**

———In Madras Presidency adoption of a married person amongst Sudras is invalid. (*Case-law reviewed*). (*Ramesam and Reilly, JJ.*). V. LINGAYYA CHETTY *v.* CHENGALAMMAL. **89 I.C. 923=20 M.L.W. 959=1925 M.W.N. 268= 48 Mad. 407=A.I.R. 1925 Mad. 272= 47 M.L.J. 776.**

———Lewa Patidars in Gujarat are Sudras and adoption of sister's son is valid, amongst them: 44 Bom. 166, *Ref.* (*Macleod, C. J. and Crump, J.*). KAHANDAS NARAN *v.* JIWAN PARAG. **73 I. C. 1023=25 Bom.L.R. 510= A.I.R. 1923 Bom. 427.**

HINDU LAW—Adoption—Validity—Sudras.

———The adoption of a married man even among Sudras is invalid. (*Chevis, J.*). HIRA *v.* HARDAT SINGH. **68 I.C. 763=47 P.L.R. 1922= A.I.R. 1926 Lah. 26.**

—Adoption—Widow—Bombay School.

———Adoption made by a widow of a co-parcener without having authority from her husband and without obtaining the consent of the co-parceners is invalid: A.I.R. 1926 Bom. 435 (F.B) and 6 Bom. 498 (F.B.), *Foll.* and A.I.R. 1922 P.C. 216, *Ref.* (*Subhedar, A.J.C.*). YASHODI *v.* CHANDRABHAN. **121 I.C. 50=A.I.R. 1929 Nag. 367.**

———Widow of a co-parcener in Bombay cannot adopt without husband's authority or consent of co-parceners: A.I.R. 1926 Bom. 435 (F.B.) and 6 Bom. 498 (F.B.), *Foll.*; A.I.R 1922 P.C. 216 and A.I.R. 1925 P.C. 127, *Dist.* (*Patkar and Baker, JJ.*). BHIMABAI *v.* GURUNATH GOUDA. **114 I.C. 392= 30 Bom. L.R. 859=A.I.R. 1928 Bom. 367.**

———*Widow has independent authority to adopt in Bombay.*

In the Mahratta country of the Bombay Presidency a Hindu widow whose husband does not expressly forbid her to adopt a son to him, has power to do so without the authority of her husband or the consent of her husband's kinsmen, whether or not her husband's estate is vested in her and whether or not he dies separated. (*Spencer, Offg. C. J. and Kumaraswamy Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.**

———*Widow can adopt whether the husband was joint or separate at the time of his death.*

The rule that in the Mahratta country, a Hindu widow may, without the permission of her husband and without the consent of her kindred, adopt a son to him if the act is done by her in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive, is equally applicable whether her husband at the time of his death was joint or separated and whether his property was or was not vested in her as his heir at the time when she made the adoption. *Rakhmabai* v. *Radhabai*, 5 Bom. H.C.R.A.C. 4 (181) 1868, *Foll.* (*Sir John Edge.*) YADEO *v.* NAMDEO. **64 I.C. 536=20 A. L.J. 481= 15 M.L.W. 565=26 C.W.N. 393=24 Bom. L.R. 609= 49 Cal. 1=30 M.L T. 53=43 I.A. 313= 17 N.L.R. 145=A.I.R. 1922 P.C. 216= 42 M.L.J. 219 (P.C.).**

—Adoption—Widow—Co-widows.

———*Concurrent adoption by two widows is valid.*

Where the widows concurrently adopt a son, the adoption need not be held invalid although it be supposed that the adoptee thereby stands in the relationship of a son to two mothers, for adoption in Hindu Law is based on what is essentially a fiction and there must be obvious limits to the extension of such fiction: 37 Mad. 199 (P. C.), *Not Appl.* (*Srinivasa Ayyangar and Reilly, JJ.*). TIRUVENGADARATNAM *v.* BUTCHAYYA. **113 I.C. 347=28 M.L.W. 727=1928 M.W.N. 53= 52 Mad. 373=A.I.R. 1929 Mad. 11= 55 M.L.J. 757.**

———*Two widows jointly authorised to make adoption—Adoption should be deemed to be made by and to senior widow and is therefore valid.*

Where an authority to adopt is given to both the widows jointly and they both concurrently make the adoption, the act of adoption should be deemed to have been made by the senior widow only and to herself as mother, even though both the widows

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might have concurred in making the adoption. Considering the genius of Hindu Law and what may be considered as the custom and consciousness of the community at large, at any rate in South India, it will be more in accordance with the reason of the thing to regard the adoption in such a case as having been made by and to the senior widow or the dharmapatni The junior widow becomes only the step-mother of the adoptee. The adoption therefore is valid: 37 Mad. 199 (P.C.), *Not appl.*; 39 Mad. 772, *Rel. on.* (*Srinivasa Aiyangar and Reilly, JJ.*). TIRUVENGATARATNAM v. BUTCHAYYA. **113 I.C. 347=52 Mad. 373= 28 M.L.W. 727=1928 M.W.N. 53= A.I.R. 1929 Mad. 11=55 M.L.J. 757.**

—Adoption—Widow—Madras School.

———In the Madras School, the cousultation with daughter's son who is a major, next heir and otherwise competent to advise is necessary—Per *Jackson, J.*:—It is not necessary. (*Ramesam and Jackson, JJ.*). BRAHMAYYA *v.* RATTAYYA. **83 I.C. 59= 20 M.L.W. 503=1924 M.W.N. 844= A.I.R. 1925 Mad. 67.**

———*Consultation with reversioners—What is.*

A registered letter to a person, containing a request to assent to an adoption, the letter being never opened by him and returned, is not a valid consultation. (*Ramesam and Jackson, JJ.*). A. BRAHMAYYA *v.* RATTAYYA. **83 I.C. 59= 20 M.L.W. 503=1924 M.W.N. 844= A.I.R. 1925 Mad. 67.**

—Adoption—Widow—Motive.

———*Adoption out of religious motives and for personal gain—Adoption valid—Arrangement for personal gain void.*

Kumaraswami Sastri, J.—The adoption is a religious sacrament, according to Hindu law-givers, as a marriage. The necessity for the adoption of a son in the case of childless Hindus is insisted upon as an act necessary for their salvation and is looked upon as very meritorious. Secular motives do come into play and influence persons in making adoption. Where an adoption is made by a widow both in fulfilment of her religious duties and also for the purpose of getting a gain for herself, the proper thing is to hold that the adoption would be valid while any arrangement for her personal benefit if not within the limits actually allowed by law, would be void. (*Kumaraswami Sastri, Odgers and Jackson, JJ.*). KRISHNAYYA RAO *v.* RAJAH OF PITTAPUR. **116 I.C. 673=51 Mad. 893= 28 M.L.W. 422= A.I.R. 1928 Mad. 994=55 M.L.J. 894 (F.B.).**

———*Widow's motive is not irrelevant in Madras.*

Jackson, J.—Considering that adoption is only a method by which a married couple can have a child it may seem incongruous that a Court of law should concern itself with the underlying motive, and question whether it was caprice or corruption. That incongruity however disappears when the other aspect of adoption is considered, namely, a method by which the holder of a life interest can interrupt the normal succession, and confer an absolute estate. Sapindas do not merely affirm the conduct of the widow; they pronounce a decision in their own right as persons having an interest in the protection of the inheritance; and in this view if no such decision has been pronounced, owing to an equal division between the sapindas, there can be no adoption and there is no need for the Court to go further and inquire itself into the widow's motive. But in Madras, it cannot be said that the widow's motive is entirely irrelevant, either as

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guiding the sapindas or in their absence, as guiding the Court. (*Kumaraswami Sastri, Odgers and Jackson, JJ.*). KRISHNAYYA RAO *v.* RAJAH OF PITTAPUR. **116 I.C. 673=51 Mad. 893=28 M.L.W. 422=A.I.R. 1928 Mad. 994=55 M.L.J. 894 (F.B.).**

———*Motive of widow in making adoption—If material.*

The corrupt motive of the widow in making the adoption cannot be relied on by the Court to declare the adoption invalid, although it would certainly be a very proper ground for a kinsman to consider when he is called upon by the widow for his consent, he would be justified in refusing his assent if he finds that the widow's motive in proposing the adoption is in part at least corrupt or improper: 22 Bom. 558, *Foll.*

When it is shown that the widow has sought the advice of her kinsman, the Court must not embark upon an enquiry as to what the motives of the widow are in seeking consent. A duty is cast upon the widow to apply for consent and, when she performs that duty, her act cannot be questioned on the ground that her motives were bad. It is for the kinsmen who are called on to grant consent to examine the motives and where it is found that effective consent has been granted, the Court will treat that as the decision of a domestic tribunal and will not trouble to canvass the propriety of the consent. (*Krishnan and Venkatasubba Rao, JJ.*). KRISHNA RAO *v.* RAJAH OF PITTAPUR.

102 I.C. 713=A.I.R. 1927 Mad. 733.

———*Religious motive to be presumed.*

Per *Spencer, Offg. C. J.*—If the act of adoption can be referred to proper religious motive, the Court ought to presume that the adopting widow was influenced by religious motives and not by mere caprice. Acting in opposition to co-widows or other relations is immaterial. (*Spencer, Offg. C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR.

93 I. C. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.

———Courts have no jurisdiction to question the motives of a widow who adopts a son to her husband. (*Kennedy, J.C. and Percival, A.J.C.*). MT. CHATIBAI *v.* SHRIMATI KUNDIBAI.

88 I. C. 573=A.I.R. 1925 Sind 223.

—Adoption—Widow—Power to give.

———Widow after re-marriage can't give her son by first husband. (*Baker, J. C., Kotval and Prideaux, A. J. Cs.*). MT. SHEOKABAI *v.* GANPATH. **79 I. C. 142=20 N. L. R. 57=A. I. R. 1925 Nag. 1 (F.B.).**

———*Mother can give in adoption.*

It appears to be well settled that a mother may give her son in adoption even without her husband's express consent in cases where such consent cannot be obtained, as where he is dead or has joined a religious order. (*Dawson-Miller, C. J. and Foster, J.*). MAKUND DEB *v.* SHRI JAGANNATH. **72 I. C. 230=2 Pat. 469=4 P. L. T. 427=1 Pat. L. R. 201=1923 P. H. C. C. 97=A.I.R. 1923 Pat. 423.**

———Widow cannot give in adoption her son by first husband after re-marriage: 33 Bom. 107, *Overruled*: 24 Bom. 89, *Foll.* (*Macleod, C. J., Shah and Hayward, JJ.*). FAKIRAPPA VEERBHADRAPPA *v.* SAVITREWA SANGAPPA. **62 I.C. 318=23 Bom. L. R. 432=A.I.R. 1921 Bom. 1 (F.B.).**

—Adoption—Widow—Right to adopt.

———Adoption by widow with no right of succession to her husband on death of natural born son without son natural or adopted, and when capable of adopting, cannot divest estate vesting in collateral nor can attestation of deed of adoption by such collateral estop him from setting up his title to estate. (*Cases discussed.*) (*Jwala Prasad and Scroope, JJ.*). AMARENDRA MANSINGH *v.* BANAMALI SINGH. **123 I.C. 770=11 P. L. T. 268=A. I. R. 1930 Pat. 417.**

HINDU LAW — Adoption — Widow — Right to adopt.

———*Bombay School—Husband dying—Joint property not vested in widow—Widow cannot adopt.*

A Hindu widow in the Maratha country of the Presidency of Bombay, who has not her husband's estate vested in her and whose husband was not separate at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of her father-in-law of her husband's undivided co-parceners: 6 Bom. 498 (F.B.), *held not overruled by*, A.I.R. 1922 P.C. 216; A.I.R. 1926 Bom. 435(F.B.), *Appr.* (*Jackson, A.J.C.*). JAIN *v.* KRISHNAPPA. **118 I.C. 685=25 N.L.R. 208=A.I.R. 1929 Nag. 289.**

———*Widow inheriting as mother can adopt without consent of other collaterals.*

In order that the widow may have a right to adopt, the husband need not be a separate member at the time of his death.

Even if the husband dies while he was united and as a member of the joint family, the right may be exercised by the widow, when she inherits as the mother of her son who, in the meantime has separated from the other co-parceners: 44 Bom. 297, *Foll.* (*Patkar and Baker, JJ.*). BHIMABAI *v.* GURUNATH GOUDA. **114 I.C. 392=30 Bom L.R. 859=A.I.R. 1928 Bom. 367.**

———*Joint family—Widow of a co-parcener has no inherent power to adopt without authority of her husband or consent of surviving co-parceners—Widow succeeding as mother can adopt.*

Per *Macleod, C.J.*—Privy Council have not decided by their judgment in *Yadao* v. *Namdeo*, A.I.R. 1922 P.C. 216, that a widow in a Hindu joint family can, in the absence of any directions by her husband, adopt without the consent of her husband's co-parceners, and the decision of the Full Bench of this Court in *Ramji* v. *Ghamau*, 6 Bom. 498 (F.B.), has not been overruled.

Per *Shah, J.*—Though *Ramji* v. *Ghamau*, 6 Bom. 498 (F.B.), is overruled, so far as it can be held to conflict with the decision in *Yadao* v. *Namdeo*, A.I.R. 1922 P.C. 216, *i.e.*, where the husband died in union, leaving an express authority to the widow to adopt, and where subsequently the estate came to be vested in the widow as the heir of her son, adopted in pursuance of the said authority, on account of a subsequent partition between the son and other co-parcener, and where the estate was so vested in her at the time of the adoption, it is not overruled so far as the main point involved in *Ramji* v. *Ghamau*, 6 Bom. 498 (F.B.), is concerned, *viz.*, that where the husband died in union leaving no express authority to the widow to adopt, the widow cannot adopt without the consent of the surviving co-parceners in whom the estate is vested by survivorship at the time of the adoption. In the absence of the express authority of her husband, the widow of a Hindu co-parcener in an undivided family cannot adopt without the consent of the surviving co-parceners, in whom the property is vested by survivorship at the time of the adoption: 12 M.I.A. 397; 1 Mad. 69 (P.C.), *Foll.*; A.I.R. 1922 P.C. 216, *Expl.*

Per *Crump, J.*—Their Lordships of the Privy Council have laid it down as a correct rule of law

HINDU LAW — Adoption — Widow — Right to adopt.

that the widow of a Hindu in the Maratha country of the Presidency of Bombay has, where there is no prohibition by the deceased husband, an inherent right to adopt which is not subject to any of those limitations which have hitherto been placed upon it.

Per *Madgavkar, J.*—In so far as the observations of Westropp, J. on a review of Hindu authorities in (1866) 7 B.H.C.R. App. laid down that the husband's refusal in his lifetime, and even on the day preceding his death, to adopt a son was tantamount to a positive prohibition to the widow to adopt after his death, their Lordships of the Privy Council in *Yadao* v. *Namdeo*, A.I.R. 1922 P.C., 216, held that whatever the case in other parts of India, in the Maratha country these observations of Westropp, J., have no application; and they prefer the decision and the principles in (1868) 5 B.H.C.R. (A.C.J.) 181 as applicable to the fact in *Yadao* v. *Namdeo*, A.I.R. 1922 P. C. 216. The decision in *Yadao* v. *Namdeo*, A.I.R. 1922 P.C. 216, has not in any way affected the main point of the principle in *Ramji* v. *Ghamau*, 6 Bom. 498 (F.B.), *viz.*, the necessity of the consent of the undivided co-parceners for a valid adoption by a widow in a joint family made without the authority of her husband.

In a family which is undivided at the time of her husband's death but which is subsequently separated in status, even though the property is not actually partitioned, a Hindu widow in the Maratha country can, after the separation in status, and when the property vests in her and her co-widow, adopt without the consent of the collaterals, so long as there is no prohibition, express or implied, by the deceased husband to that particular adoption. Absence of express authority, or refusal to adopt in his lifetime, is not of itself a prohibition in the Maratha country. (*Macleod, C.J., Shah, Crump, Madgavkar and Coyajee, JJ.*). ISHVAR DADU *v.* GAJABAI. **96 I.C. 712= 50 Bom. 468=28 Bom.L.R. 782= A. I. R. 1926 Bom. 435 (F.B.).**

———*Property escheated to Government—Widow can adopt.*

Even where the property of the last owner has been escheated to the Government, there is no bar to the adoption of a son by the widow of the owner. (*Spencer, Offg. C. J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYER. **93 I.C. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.**

———*Re-grant of confiscated property to the heirs of the owner—Widow can adopt but the terms of the grant cannot be disturbed.*

The property of a certain Raja was confiscated by the Government on his death. Subsequently, the Government relinquished the estate to the heirs of the Raja and conveyed the same to the Raja's senior widow. She was to manage the property and to provide for the participative enjoyment of the other widows, described by the grant as "co-heirs." Upon the death of the last surviving widow the Raja's daughter and failing her, the next heirs of the Raja were to inherit the property. After the grant had taken place, the senior widow adopted a son to her husband,

Held, that under the circumstances of the case there had been no escheat to the Government: but if there had been such escheat, the widow's right of adoption of a son for spiritual purposes was unfettered,

Held, further that the grant did not prohibit the adoption or show any intention to exclude the adoptee from inheriting the property, though the adoption could not disturb the arrangements taking place under the terms of the grant. (*Spencer, Offg. C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.**

HINDU LAW—Adoption—Widow—Validity.

———Where a man dies leaving a son and a widow and that son marries and begets a daughter and his wife and daughter die and after them he also dies, the widow of his father can adopt a son to him (the father) : 46 Mad. 423, *Foll.* (*Spencer, Offg. C. J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I. C. 705= 48 Mad. 1=A.I.R. 1925 Mad. 497.**

———*Husband dying after making invalid adoption —Widow cannot make a second adoption during lifetime of adoptee.*

The widow is bound by the act of her husband and to accept all the implications of an adoption by him, valid or invalid. In spite of the liberal interpretation of her powers to adopt, in the Bombay Presidency, the Hindu Law cannot have contemplated, and certainly it has not provided, that the widow could practically ignore and supersede her husband's act of adoption. A widow can adopt only in the absence of a prohibition by her husband. That prohibition may be express or implied by the husband's act of adoption. It is implied that his widow shall not adopt any other boy to him during the life-time of the adopted boy or until the adoption is declared invalid by a competent Court at the instance of somebody other than the widow interested in the estate. (*Shah and Fawcett, JJ.*). BHAN ADGAUDA PATIL *v.* NARASAGAUDA TATYA PATIL. **64 I.C. 614= 46 Bom. 400=23 Bom. L.R. 1272= A.I.R. 1922 Bom. 300.**

———Under the Hindu Law the widow of deceased co-parcener cannot adopt unless she has either the express authority of her husband or the consent of her husband's co-parceners. If she otherwise adopts such adopted son cannot claim to be entitled to the self-acquired property of his adoptive father. (*Macleod, C.J. and Fawcett, J.*). PANDU KRISHNA JADHAV *v.* DHONDI KRISHNA PATIL. **59 I. C. 783=22 Bom. L. R. 1403.**

—Adoption—Widow—Successive adoptions.

———A Hindu widow can adopt a second son, if the first adopted son dies without leaving behind him an issue or a widow: 29 Mad. 382 (P.C.); 25 Bom. 306, *Foll.* (*Kotval, A.J.C.*). SHEIKH DALLU *v.* PUNJAB. **78 I.C. 95=A.I.R. 1924 Nag. 344.**

—Adoption—Widow—Validity.

———If it is established that events had occurred which could constitute an adoption, apart from any question of the competency of the person alleged to be adopted, the widow cannot dispute such an adoption made by her husband : A.I.R. 1922 Bom. 397, *Foll.* (*Macleod, C.J. and Crump, J.*). SHIDAPPA *v.* SANTAWA. **77 I. C. 477=A.I.R. 1923 Bom. 302.**

———Adoption by husband—Wife is bound by the adoption. Whether valid or not: 23 Bom.L.R. 1272, *Foll.* (*Macleod, C. J. and Coyajee, J.*). CHIMABAI MALGAUDA PATIL *v.* MALLAPPA PAYAPPA. **67 I. C. 654=24 Bom. L. R 489= 46 Bom. 946=A.I.R. 1922 Bom. 397.**

———Where a Hindu died leaving two widows *K* and *G* and one *A* the widow of a pre-deceased nephew ; *A* adopted a son with *G's* consent and *G* subsequently adopted a son *R* to her husband,

Held, that as soon as *A* adopted a son to her husband, *G's* power to adopt came to an end and so

HINDU LAW—Adoption—Miscellaneous.

the adoption of *R* is invalid. (*Macleod, C.J. and Shah, J.*). VAMAN VITHAL *v.* VENKAJI KHANDO.
61 I.C. 460=45 Bom. 829=23 Bom. L.R. 269=A. I. R. 1921 Bom. 55.

—Adoption—Miscellaneous.

———Power to adopt is in some ways analogous to a power of appointment and must be distinguished from trust. Powers are never imperative; they leave the act to be done at the will of the party to whom they are given and are not obligatory upon the conscience of the party interested. (*Sen and Niamatullah, JJ.*). DHARAM PRAKASH *v.* MT. KALAWATI DEVI.
110 I.C. 665=50 All. 885=26 A.L.J. 1106=A. I. R. 1928 All. 459.

———*Court-fee.*

According to the Madras High Court a relief with regard to the validity or otherwise of an adoption is capable of valuation: 6 Mad. 192, *Foll*; 15 All. 378 and 35 Bom. 264, *Dist.*; 37 Cal. 860, *Not Appr.* The valuation of such relief should be calculated according to the market value of the property likely to be affected by the adoption being held as invalid or as not having taken place at all: A. I. R. 1927 Mad. 563, *Ref., but not Cons.*; 12 Mad. 223 and 5 P. L. J. 397, *Dist.* (*Devadoss, J.*) *In the matter of* RAMASWAMI ASARI.
113 I.C. 363=28 M.L.W. 660=1928 M.W.N. 729=52 Mad. 340=A.I.R. 1928 Mad. 1294=56 M L.J. 107.

———*Father leaving no estate—Adoption is still valid.*

A valid adoption to a deceased father is not impossible even when the father has left no property to which the adopted son can succeed by inheritance or survivorship: 1 Mad. 69 (P. C.), *Rel. on*; 10 M. I. A. 279; 8 Cal. 302 (P. C.); 10 Mad. 205 (P. C.); 26 Bom. 526 (F. B.) and A. I. R. 1918 P.C. 74, *Cons.* (*Phillips, Offg. C. J. and Reilly, J.*). SUKHDEVDOSS RAMPRASAD *v.* MT. CHOTI BAI.
109 I.C. 5=1928 M.W.N. 32=27 M.L.W. 145=A.I.R. 1928 Mad. 118.

———*Condition of postponement attached to adoption is valid.*

A condition of postponement attached to an adoption is valid, although the full operation of the adoption is postponed for two lives both already in existence. (*Hallifax, A. J. C.*). KOLHI *v.* CHHOTIBAI.
68 I. C. 294=A.I.R. 1923 Nag. 121.

—Alienation.
Applicability.
Co-parcener.
Father.
Guardian.
Lender's (alienee's) duty.
Manager.
Manager of endowment.
Necessity.
Partial enforcement.
Recitals.
Refund.
Setting aside.
Widow.
Miscellaneous.

—Alienation—Applicability.

———*Mitakshara law of alienation is not applicable to impartible estate with rule of primogeniture.*

Mitakshara law of alienation is inconsistent with and inapplicable to an impartible estate in which the succession is according to primogeniture. The person disputing alienation has to prove custom according to which the estate is inalienable, the

HINDU LAW — Alienation — Co-parcener — Consent.

question of legal necessity for debt being irrelevant: 10 All. 272 (P.C.), *Rel. on*; A.I.R. 1921 P. C. 62; A.I.R. 1927 P.C. 159 and 31 All. 224, *Ref.* (*Courtney-Terrell, C.J. and James, J.*). MADHUSUDAN DEB *v.* KHESTABASI SAHU.
121 I. C. 462=8 Pat. 932=A. I R. 1930 Pat. 137.

—Alienation—Co-parcener—After born co-parcener.

———*After-born co-parcener when can challenge alienation.*

Where a co-parcener who could challenge a deed was alive at the execution of the deed, and the plaintiffs were born during his lifetime and within twelve years of the alienation.

Held, they undoubtedly obtained a right to challenge it. A right to sue is not however co-parcenary property in which a son acquires interest by birth. Section 6 of the Limitation Act cannot be pleaded by a plaintiff who was not in existence when the alienee took possession. He is entitled to take advantage of the existing cause of action so long as it subsists; but he does not obtain a fresh period of 21 years from the date of his birth. Even a co-parcener who challenges an alienation does so in virtue of his own independent right as a person who has acquired interest in the family estate by birth. Plaintiffs cannot rely on S. 7 where there was no joint right when the period of limitation commenced; plaintiffs can bring their suit within three years of the date when the co parcener could have attained majority: 33 All. 654; 9 Lah. 558; 24 O.C. 330; 4 All. 235; 27 All 704, *Foll* (*Daniels, J.*). DHANRAJ RAI *v.* RAM NARESH RAI.
79 I.C. 1019=5 L.R.A. Civ. 325=A. I. R. 1924 All. 912.

—Alienation—Co-parcener—Burden of proof.

———*Co-parcener challenging alienation must prima facie prove want of necessity.*

When a creditor wants to enforce a charge on the joint family property created upon it by one member of the joint family, it is for the creditor to make out a *prima facie* case of legal necessity if the charge is challenged by the other members. But where one of the members of the joint family seeks for a declaration that the charge created upon the family property should be declared null and void on the ground that it was created without legal necessity, there should be some *prima facie* evidence given by the plaintiff before the creditor is called upon to give evidence with regard to the validity of his document. (*Rafique and Piggott, JJ.*). RAM RAGHUBIR LAL *v.* DIP NARAIN SINGH.
71 I.C. 749=21 A.L.J. 168=45 All. 311=4 L.R.A. Civ. 380=A.I.R. 1923 All. 287.

—Alienation—Co-parcener—Consent.

———A minor co-parcener cannot assent to an invalid transaction affecting his interest until he attains his age. (*Ramesam and Thiruvenkatachariar, JJ.*). *In the matter of* AMIRTHALINGA THEVAN.
112 I. C. 553=1923 M.W.N. 602=28 M.L.W. 634=A.I.R. 1923 Mad. 986.

———*Consent may be implied from circumstances.*

The joint family property can be made the subject of a gift by one co-parcener with the consent express or implied of the other co-parceners: 39 All. 437 (P.C.), *Foll.* Where a gift was made by one member without express consent of other members but a subsequent sale of another portion of joint property was effected by all members and both deeds were registered on the same day and in the same place.

HINDU LAW—Alienation—Co-parcener—Powers of co-parceners.

Held, that consent of the other members may be implied from their conduct: 19 Cal. 123, *Foll.* (*Kanhaiya Lal, J. C.*). MAHABIR PANDE *v.* MATHURA PRASAD. **72 I.C 470=11 O.L.J. 343= A.I.R. 1924 Oudh 138.**

—Alienation—Co-parcener—Powers of co-parceners.

———Under Hindu Law each individual member of a divided family is the exclusive owner of the property that falls to his share on partition and is competent to alienate it. (*Zafar Ali and Bhide, JJ.*). PAKHAR DAS *v.* THAKAR DAS. **120 I.C. 168= 31 P. L. R. 481=A. I. R. 1930 Lah. 213.**

—Alienation—Co parcener—Refund.

———If a sale by a co parcener is, in a suit to set aside the sale, found not binding on the joint family the purchaser is entitled to a refund of the purchase money paid by him. (*Kulwant Sahay and Macpherson, JJ.*). RAM DAS SINGH *v.* TANAK SINGH. **111 I. C. 51=9 P. L. T. 758= A. I. R. 1928 Pat. 557.**

—Alienation—Co-parcener—Rights of co-parceners

———*Mortgage by a co-parcener, of family property, is binding only to the extent of his share—Other co-parceners are not entitled to redeem.*

If one of the co-parceners who is not a manager mortgages property held in co-parcenary by himself and others, the mortgage is binding so far as the mortgagor's joint share in the property is concerned but it does not bind the other co-parceners and their interest in the mortgaged property remains unaffected. The other co-parceners are not, therefore, necessary parties to a suit instituted by the mortgagee to enforce the mortgage for the reason that whatever interest they possessed in the mortgaged property is not in law affected by the foreclosure decree and they are not entitled to redeem the mortgage: 14 N.L.R. 117 and 4 N.L.R. 9, *Rel. on.* (*Subhedar, A. J. C.*). DINKARRAO *v.* SHAMRAO. **122 I.C. 699=26 N.L.R. 208= A.I.R. 1930 Nag. 173.**

———*Obiter*—Though an alienation without necessity is void at the outset it is still open to the other co-parceners to validate it by their ratification if they are competent to do so: 35 Mad. 177, *Diss from*; A. I. R. 1922 Mad. 112, *Expl.* (*Ramesam and Thiruvenkatchariar, JJ.*). *In the matter of* AMIRTHALINGA THEVAN. **112 I.C. 553=1928 M.W.N 602=28 M.L.W. 634= A.I.R. 1928 Mad. 986.**

———Where both the brothers in a joint Hindu family alienated by way of mortgage specific items of joint property and later on one of the mortgagors sold his share in those items to the mortgagee and the other co-parcener, being aware of such alienation, alienated his share in favour of the plaintiff:

Held, that plaintiff cannot insist, in a redemption suit, that he should have been allowed to redeem the whole of the property and thus compel the mortgagee to sue for partition, that the law applicable to mortgages should be applied in cases of this kind and not the strict rule of Hindu Law which is against the alienee of specific item of property from one co-sharer, claiming to be in possession of that property and that partial redemption is the proper relief in such a case: A.I.R 1923 Mad. 533, *Appl.*; A.I.R. 1921 P.C. 125 and 31 M.L.J. 275, *Dist.* (*Devadoss and Jackson, JJ.*). GANAPATHI BHATTA *v.* BEERU BHANDARY. **106 I.C.196=27 M.L.W. 206=A.I.R. 1927 Mad. 1039.**

HINDU LAW—Alienation—Co-parcener—Rights of co-parceners.

———*Other co-parceners can prove that sale was nominal.*

When a member of a joint family has purported to sell his share to a stranger and does not himself plead that the transfer was not a sale or that it was for no consideration, it is open to the other members of the family to put forward such pleas and prove that there was no sale or no consideration for the sale and thus retain that property for the members of the joint family including the member who professed to sell it: 5 Cal. 148 and 25 Mad. 690, *Rej.*; 27 Mad. 162, *Rel. on.*; 27 All. 271, *Dist.*; 37 Mad. 435, *Expl.* (*Wallace, J.*). MUTHUSAMY GOUNDAN *v.* PALANI GOUNDAN. **105 I.C. 845=A.I.R. 1927 Mad. 950= 53 M.L.J. 763.**

———*Co-parceners retaining benefit of the alienation cannot challenge it.*

A co-parcener purchased certain property, paid a portion of consideration from joint family funds and for the rest executed a mortgage of the same property in favour of the vendor. In a suit by other co-parceners to set aside the mortgage,

Held, that the co-parceners are not entitled to have the mortgage set aside while retaining the benefit of the consideration money. (*Hasan and Misra, JJ.*). ABHAIDAT SINGH *v.* RAGHO INDAR PARTAB SAHAI. **91 I C. 976=1 Luck. 1= 3 O.W.N. 40=13 O L.J. 37= A. I. R. 1926 Oudh 77.**

———There is no justification in reason or authority for the proposition that the liability of a Hindu co-parcener as regards executory contracts (*e.g.*, to sell land) is different from his liability as to executed contract. A minor co-parcener can enforce specific performance of the contract which is highly beneficial to the family and not entered into by the deceased manager to discharge any debt: 26 Mad. 74; 32 Mad. 320; 2 P.L.J. 513 and 3 L. W. 435, *Foll.* (*Rupchand Bilaram, A. J. C.*). LAKSHMICHAND ISARDAS *v.* FIRM OF KHUSHALDAS MANGATRAM. **88 I.C. 116=18 S.L.R. 230= A.I.R. 1925 Sind 330.**

———*Any co-parcener can challenge an alienation made without necessity.*

A single member of a joint Hindu family, whose rights have been infringed by a sale of joint family property, can have the entire sale set aside, because if the vendors were entitled to deal with the joint family property, the alienation is wholly valid but as they were not entitled to do so, a single co-parcener cannot alienate even his own share: 39 All. 437 (P. C.), *Foll.* (*Dalal and Simpson, A. J. Cs.*). DWARKA PRASAD *v.* RAM DEBI. **77 I.C. 329=10 O. L. J. 360= 27 O. C. 140=A. I. R. 1924 Oudh 120.**

———*Suit by another co-parcener for his share only on ground of no necessity does not lie.*

A co-parcener in a joint family property who establishes that a member of the family has alienated that property without legal necessity, can sue to recover the whole property. He cannot be allowed to sue for his own share or any specific portion thereof for in a Mitakshara joint family no particular share can be predicated as belonging to any individual member. (*Mullick and Bucknill, JJ.*). SHYAM SUNDER RAI *v.* JAGARNATH MISRA. **74 I.C. 758=2 Pat. 925=1923 P.H.C C. 263= 1 Pat. L R. 373=5 P.L.T. 193= A.I.R. 1923 Pat. 590.**

HINDU LAW—Alienation—Co-parcener—Rights of purchaser.

—Alienation — Co-parcener — Rights of purchaser.

———*Transferee has no right for separate possession —Suit for general partition must be filed—When prayer for separate possession can be granted.*

A transferee of an undivided interest of a member of a co-parcenary has no right to separate possession of his purchase except by a partition of the whole estate belonging to the family claimed in a properly constituted suit for partition to which all proper persons are impleaded as parties.

In the absence of anything on record to show that the array of parties is complete in the sense that there are no other members in the family for whom any provision either by way of maintenance or marriage portions has not to be made in the event of partition, and in the absence of any material to show that all the equities and right of all persons interested can be settled, the request for a grant of a decree for separate possession after the partition of the entire estate cannot be granted in a suit for possession by the purchaser: 9 N.L.R. 18, *Foll.* (*Kinkhede, A.J.C.*). MAMUJI *v.* DALPAT.

104 I.C. 569=A.I.R. 1928 Nag. 37.

———*Property alienated worth more than alienor's share—Whole property should be allotted to alienee.*

Where in execution of a decree against a co-parcener, a specific joint family property was sold and the other co-parcener instituted a suit later on against the vendee for recovery of the property sold, and it was found that on the date of the sale, the value of the alienor's share in the joint family property was considerably more than the value of the specific item of property sold.

Held, that the vendee was entitled to ask the Court in the co-parcener's suit itself to allot the alienated property to his vendor's share and thereby allow him to retain the property. (*Devadoss, J.*). SIVANARAYANA *v.* MUTHUKUMARA. **100 I.C. 747= 38 M.L.T. 122=A.I.R. 1927 Mad. 1084.**

———*Auction-purchaser of whole estate may challenge alienations.*

A transferee of whole interest in joint family property even in an execution sale under money decree is entitled to contest the validity of a transfer made by one of the members of the family on the ground of want of legal necessity: 33 All. 783 (F.B.), *Appl.* (*Mears, C. J. and King, J.*). RAJ BALLAW PRASAD *v.* DALIP NARAIN SINGH. **97 I.C. 344=A.I.R. 1926 All. 718.**

———*Stranger purchaser if in possession may hold as tenant-in-common as also a person in possession under adverse possession.*

A stranger purchaser of the undivided share of a co-parcener in a joint Hindu family, if in possession, need not be ejected in a suit for recovery of possession brought by an excluded co-parcener, but can be declared to be entitled to hold (pending a partition) as a tenant-in-common with the other co-parceners: 3 Cal. 198 (P.C.), *Expl.*

Each case (as to the propriety or otherwise of allowing the purchaser to retain possession) should be decided on its own facts: 26 Bom. 141, *Ref.*

Held: (Per *Fawcett, J.*, in application for review). The same principles apply to a person who is not a "purchaser" in possession of a joint family property, but is merely a person who had successfully remained in possession by virtue of his adverse possession. (*Fawcett and Coyajee, JJ.*). BHAN LAXMAN *v.* BUDHA. **96 I.C. 166= 50 Bom. 204=28 Bom. L.R. 765= A.I.R. 1926 Bom. 399.**

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———*Suit to set aside alienation should not be converted into one for general partition—Alienee must file separate partition suit and both may be tried together to obviate possible plea of* res judicata.

It is not competent for the Court in a suit by a co-parcener for setting aside an alienation of a certain item of family property to grant relief which it would grant on a general partition. The proper course for the alienee would be to sue for partition and ask the Court to allot to his alienor the specific property conveyed to him and if the Court finds that the interests of the other co-parceners would not be prejudiced by allotting to the alienating co-parcener the specific property alienated by him the Court may allow the alienee to retain the property. His suit for partition is not barred by *res judicata* by reason of a previous suit for setting aside the alienation. If both the suits are tried together there would not be any difficulty at all, as the possible plea of *res judicata* can then be obviated: A.I.R. 1922 Mad. 112, *Affirmed*; 43 Dom. 17, *Rel. on*; A.I.R. 1926 Mad. 241, *Diss. from.* (*Devadoss and Waller, JJ.*). KANDASWAMI *v.* VELAYUTHA.

96 I.C. 993=50 Mad. 320= 1926 M.W.N. 399=24 M.L.W. 367= A.I.R. 1926 Mad. 774=51 M.L.J. 99.

———Purchaser from co-parcener of his undivided interest is not a tenant-in-common as in Bombay but only a holder of equity to get partition: 38 Mad. 684 and 39 Mad. 265, *Rel. on.* (*Spencer and Odgers, JJ.*). SHANMUGAM PILLAI *v.* PANCHALI AMMAL. **95 I.C. 209=43 Mad. 596= 23 M.L.W. 551=A.I.R. 1926 Mad. 683= 50 M.L.J. 681.**

———In a suit by a co-parcener for recovery of the property or for partition, the alienee is entitled to claim partition, if it can conveniently be done: 40 Cal. 906, *Foll.* (*Phillips and Venkatasubba Rao, JJ.*). RAMASWAMI AYYAR *v.* VENKATARAMA AIYAR. **75 I.C. 406=46 Mad. 815= 18 M.L.W. 183=1923 M.W.N. 786= A.I.R. 1924 Mad. 81=45 M.L.J. 203.**

———*Purchaser's right is to compel a partition—He cannot take possession.*

A member of a Mitakshara Hindu family has an interest which is capable of being attached in execution of a decree as against him. But though a creditor can attach and purchase the interest of such a member it is not open to him to take possession of that interest. He only acquires a right to compel a partition. (*Das and Kulwant Sahay, JJ.*). MADRI PRASAD *v.* NAND KESHWAR.

85 I.C. 1014=2 Pat. 386=6 P.L.T. 742= A.I.R. 1923 Pat. 451.

—Alienation—Co-parcener—Setting aside.

———*Reversioners can challenge alienation.*

If an alienation is made by one member of a joint Hindu family, which is really not binding on the estate and afterwards that member dies and also the surviving members die, the reversioners would have the right to challenge the alienation: 8 A.L.J. R. 901, *Ref.* (*Walsh and Sulaiman, JJ.*). SARJU PRASAD *v.* MANGAL SINGH.

87 I.C. 294=47 All. 490=23 A.L.J. 254= 6 L.R.A. Civ. 201=A. I. R. 1925 All. 339.

———*Co-parcener seeking to set aside alienation must pay his share of amount supported by necessity.*

A sale-deed alienating the family property was executed by the major of three brothers constituting a Hindu joint family on his own behalf and not as manager of the family and by his mother

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acting as the guardian of his minor brothers. One of the minor brothers, on attaining majority brought a suit to recover the property on the ground that the sale was invalid being without legal necessity and his mother not being entitled to execute the sale-deed on his behalf.

Held, that the suit could only be decreed for recovery of the plaintiff's one-third share in the property subject to the payment of one-third of the amount found to be for legal necessity. (*Daniels, A.J.C.*). MAHESH DAT *v.* RAM ASRE.

67 I.C. 814=9 O.L.J. 138= A.I.R. 1922 Oudh 114.

—Alienation—Co-parcener—Validity.

———*Alienation by a member of joint family—Principles as to, considered.*

In the case of an alienation by a member of a joint Hindu family, three possible cases arise (1) where the whole of the consideration, even after being allotted to the alienor's shares only, is grossly inadequate, the whole transaction may have to be set aside, making the consideration proved a charge on the family property, (2) where the whole consideration is not grossly inadequate and can be regarded as the price of the alienor's share, but is less than the value of such share, the transaction may be upheld as the sale of the alienor's share only and the other members who question the transaction are entitled to recover their share of the property without being subjected to any other equity. In such a case, if the members are divided and the alienor leaves other heirs than the members who question the transaction, he or his heirs may have a right to contribution, and (3) where the consideration proved exceeds the value of the alienor's share, the transaction may be upheld as sale of the alienor's share only and for the excess a charge may be given over the shares of the other members: 26 M.L.J. 604 and A.I.R. 1927 Mad. 1116, *Not foll.*; 37 Mad. 435, *Diss. from*; (1917) M.W.N. 273, *Dist*; 27 Mad. 162, *Rel. on.* (*Kumaraswamy Sastry and Ramesam, JJ.*). VENKATAPATHI *v.* PAPPIA. **113 I.C. 158= 51 Mad. 824=28 M.L.W. 228= 1928 M.W.N. 410=A. I. R. 1928 Mad. 788= 55 M.L.J. 489.**

———*Minors—Alienation by manager or father, and that by guardian distinguished.*

Ananthakrishna Ayyar, J.—Sales conducted by co-parceners among whom is the father or the manager of the family conveying out not only their individual shares, but also the shares of the minors of the family, stand on a different footing from sales effected by guardians of property of minors in which the guardians have no personal interest, for this reason that the co-parceners who join in such sales have themselves got an interest in the property they purport to sell. (*Srinivasa Aiyengar and Ananthakrishna Aiyer, JJ.*). SATHAPPAN AMBALAM *v.* VADIVELU.

109 I.C. 106=A.I.R. 1928 Mad. 450.

———*Power by two brothers to third to mortgage family property—Mortgage by the third to pay debts binding on family is valid.*

A power of attorney executed by two brothers in favour of the third provided among other things "in respect of any mauza or share of land owned and possessed by us, the executants, the said Mokhtar-Am shall grant simple or Zarpeshgi-Thika or make mortgage with possession,"

Held, that these words were quite sufficient to confer the power to execute mortgage for debts for

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which the joint family, consisting of the three brothers, was liable. (*Lord Carson,*) DWARKA NATH SINGH *v.* KESHRI MALL. **101 I.C. 377= 1927 M.W.N. 433=31 C.W.N. 890= 39 M.L.T. 270=A.I.R. 1927 P.C. 111= 53 M.L.J. 592 (P.C.).**

———*A mortgage of an undivided share is void but a share separated can be available as security for mortgage-debt.*

A mortgage of the whole or a share of the joint family property of a Mitakshara family is void and inoperative as against the property hypothecated and gives the mortgagee no rights even against the mortgagor's undivided share but where the mortgagor's interest has been separated from that of the other members of the family it may become available as security for the mortgage debt: 5 P.L.J. 605, *Ref.* (*Simpson and Dalal, A. J. Cs.*). RAM RATAN *v.* GANGA BAKHSH. **71 I.C. 581= 26 O.C. 245=10 O.L.J. 193= A.I.R. 1923 Oudh 265.**

———*Validating circumstances, what are—Interpretation of Mitakshara, Ch.* 1, *Paras* 27 *to* 29.

The three circumstances which are mentioned in paragraph 28, Ch. 1 of the Mitakshara are exceptions to the general rule laid down in paragraph 27 and must be deemed to be disjunctive clauses. The circumstances which would justify transfers of joint ancestral property by one of the members of the family are, as stated in that paragraph (1) a season of distress, (2) for the sake of the family and (3) specially for pious purposes. The last portion of paragraph 29 is not intended to be a limitation of pious purposes as mentioned in paragraph 28. (*Mears, C.J. and Banerji, JJ.*). SRI THAKURJI *v.* NANDA AHIR. **63 I.C. 546=19 A.L.J. 580= 43 All. 560=A.I.R. 1921 All. 333.**

———Mortgage by some co-parceners not for necessity and not by father for antecedent debt, does not bind even mortgagor's undivided share. (*Dawson-Miller, C. J., Jwala Prasad, Das, Adami and Bucknill, JJ.*). MATHURA PRASAD *v.* RAJKUMAR MISRA. **62 I.C. 132=2 P.L.T. 407= 6 P.L.J. 526=1921 P.H.C.C. 245= A.I.R. 1921 Pat. 447 (F.B.).**

—Alienation—Father.
Admissions by.
After-born son.
Antecedent debt.
Benefit to estate.
Burden of proof.
Consent of co-parceners.
Court's duty.
Decree against.
Extent of validity.
Justifications for.
Limitation.
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Presumption.
Refund.
Rights of alienee.
Setting aside.
Son's liability.
Subsequent partition.
Surety.
Miscellaneous.

—Alienation—Father—Admissions by.

———*Admissions by father cannot be used against sons.*

No admission by a father can be used against the sons in a case where they are impugning the authority of the father to make them liable for the

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father's alienation of their property, alienated by him otherwise than as manager. (*Ashworth, A.J.C.*). BHARATH SINGH *v.* SHEODAT SHARMA.
91 I.C. 189=A.I R. 1926 Oudh 266.

—Alienation—Father—After born son.

———*After-born son cannot challenge.*

A son cannot object to alienations validly made by his father before he was born or begotten, because he could only by birth obtain an interest in property which was then existing in his ancestor: 34 Cal. 372, *Rel. on.* (*Das and Adami, JJ.*). HITENDRA *v.* SUKHDEB. **115 I.C. 886=8 Pat. 558=10 P.L.T. 79=A.I.R. 1929 Pat. 360.**

———*Right of a son born after alienation explained.*

A son cannot object to alienations validly made by his father before he was born or begotten because he can only by birth obtain an interest in property which was then existing in his ancestor. Hence if at the time of the alienation there has been no one in existence whose assent was necessary or if those who were then in existence have consented, he cannot afterwards object on the ground that there was no necessity for the transaction. On the other hand, if the alienation was made by a father without necessity and without the consent of the sons then living it would not only be invalid against them but also against any son born before they had ratified the transaction and no consent given by them after his birth would render it binding upon him. The reason of the thing is not of course that the unborn son has any right in the family property at the time of the alienation but that on his birth he acquires a share in the family properties as it then stands. If a previous alienation of any portion of the family properties was validated by consent or failure to set it aside in time on the part of the other members of the family then in existence, the property in which he acquires a share at birth is diminished to the extent of the portion thus alienated. If the alienation was invalid he acquires a share in the whole property including the portion purported to be alienated, not because the alienation was an invasion of his rights, for he had none, but because it was bad in itself and did not diminish the corpus of the joint family property: A. I. R. 1925 P. C. 33, *Expl.* (*Ramesam and Thiruvenkatachariar, JJ.*). *In the matter of* AMIRTHALINGA THEVAN. **112 I. C. 553=1928 M.W.N. 602=28 M L W. 634=A.I.R. 1928 Mad. 986.**

———A grandson, who was not born at the time when ancestral property was disposed of by the grandfather, cannot question the validity of the disposition, the property having been parted with at a time he had not come into existence. (*Srinivasa Ayyangar and Cornish, JJ.*). VENKATARAMANI *v.* SUBRAMANIA. **108 I.C. 639=A.I.R. 1928 Mad 945.**

——— *Grandson not born at the time can challenge.*

A grandson is entitled to challenge an alienation made by his grandfather on the ground of want of legal necessity even though he was not born on the date of the alienation. (*Walsh and Pullan, JJ.*). BABU RAM *v.* MAHADEO RAM. **98 I.C. 1012=A.I.R. 1927 All. 127.**

———*Alienation without necessity and without consent of living son can be attacked by subsequently born son.*

A son cannot object to alienations validly made by his father before he was born or begotten; but if the alienation was made by a father without necessity and without the consent of a son then living, it would be invalid not only against him but also against any son born before he had ratified the transaction: 11 W.R. 480; 12 C. P. L. R. 63; 16 Mad. 76 and A.I.R. 1924 Nag. 200, *Appl.* (*Findlay, O.J.C.*). GUNAJI *v.* RAMCHANDRA. **94 I.C. 948=A I.R. 1926 Nag. 360.**

———*No fresh cause of action for after-born son.*

An after-born son does not get a fresh cause of action by his birth after the alienation but he can take advantage of the existing cause of action provided the title has not completely vested in the transferee. (*Daniels, A.J.C.*). OUDH BEHARI LAL *v.* DAL SINGH. **79 I.C. 666=10 O L.J. 404=A.I.R. 1924 Oudh 205.**

———*Sons born after alienation take subject to it.*

Sons and grandsons not born at the date of the mortgage take by their birth an interest in the family property subject to the mortgagee's rights in respect of the father's shares as they existed at the date of the mortgage and they are not entitled to object to the alienation of such shares. (*Kotval and Prideaux, A.J Cs.*). RUKHMABAI *v.* VITHUSA. **78 I.C. 384=A. I. R. 1924 Nag. 398.**

———*Can challenge only if it is invalid against sons holding at the date of the alienation.*

A son cannot object to alienations validly made by his father before he was born or begotten but if the alienation was made by a father without necessity and without the consent of sons then living, it would not only be invalid against them, but also against any son born before they had ratified the transaction; and no consent given by them after his birth would render it binding upon him: 33 All. 654; 11 W.R. 480, *Foll.*

If a previous alienation of any portion of the family property was validated by consent or failure to set it aside in time the property in which he acquires a share at birth is diminished to the extent of the portion thus alienated. 12 C.P.L.R. 63, *Foll.*

Any one son whose claim is not barred by time, could recover the whole of the property to be held for the benefit of the joint family: 35 All. 571, *Dist.*

If the alienation is valid, the subsequently born son cannot sue to set it aside, but if the alienation is invalid the subsequently born son can sue not because the alienation was an invasion of his rights for he had none, but because it was bad by itself and did not diminish the corpus of the joint family property. (*Baker, Offg. J.C.*). MANSINGH *v.* KARAN SINGH. **78 I.C. 260=A.I.R. 1924 Nag. 200.**

———*Suit by one son does not bar a similar suit by an after-born son.*

A Hindu son, who was in existence at the time his father sold certain ancestral property, brought a suit for recovery of the property sold, but before the suit was decided another son was born,

Held, that such son also acquired a cause of action as regards the same and the first suit not being in a representative character, the second suit by the second son is not affected by the result in the first suit: 19 A.L.J. 978, *Ref.* (*Dalal, J.C.*). JANG BAHADUR SINGH *v.* RANI SINGH. **77 I.C. 353=10 O.L.J. 353=27 O.C. 107=A.I.R. 1924 Oudh 141.**

———*Alienation by father—Son born after, sets no new cause of action.*

A son born in a joint Hindu family acquires by birth interest in ancestral property but does not acquire any interest in any right to sue. The cause of action accrues after an alienation when the purchaser takes possession and a new cause of action

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does not accrue upon the subsequent birth of a son in the family. In the case of an after-born son the time from which the period of limitation is to be reckoned is the date of the transfer and as he was not born on that date and was under no disability on that date he cannot obtain the benefits of the provisions of S. 6 of the Limitation Act. When he cannot save limitation for himself he can give no benefit under S. 7 to his elder brothers: 40 Cal. 966, *Dist.*; 8 W. R. 15; 23 W. R. 285; 4 All. 120, *Ref.* (*Dalal and Wazir Hasan, A. J. Cs.*). RANODIP SINGH *v.* RAMESHAR PRASAD. **66 I.C. 938= 9 O.L.J. 45=A.I.R. 1923 Oudh 52.**

———*After-born son cannot challenge.*

A son born after execution of a mortgage by the father could acquire no rights in the co-parcenary property as it stood before his birth but could only obtain rights on his birth in the co-parcenary property as it then stood, *i. e.*, although no doubt on his birth he would obtain a share in the equity of redemption of the property, he would have no *locus standi* to challenge the mortgage or set aside on any ground whatsoever. (*Schwabe, C.J., Oldfield and Coutts-Trotter, JJ.*). KONGA RAMASWAMI IYER *v.* THUMBAYASAMI. **70 I.C. 769=1922 M.W.N. 526= 31 M.L.T. 370=16 M.L.W. 981= A.I.R. 1922 Mad. 452.**

———*Mortgage by father—After-born sons cannot challenge.*

The right of challenging an alienation made by the family manager is personal and is not inherited by the surviving members. Sons of the mortgagor born after the mortgage take the family property as it existed at their birth and cannot impeach any previous alienation. *Moti* v. *Kanya*, 5 N. L. J. 181 at 188, *Foll.* (*Dhobley, A. J. C.*). JAIRAM *v.* VENKATRAO. **65 I.C. 658=5 N. L.J. 66= A. I. R. 1922 Nag. 101.**

———Son conceived at time of alienation has same rights as son in existence—Subsequently born son can also challenge alienation: 16 Mad. 76 and 33 All. 654, *Ref.* (*Chevis and Scott-Smith, JJ.*). DWARKA DAS *v.* KRISHANKISHORE. **61 I.C. 628=2 Lah. 114=3 L.L.J. 349= 73 P.L.R. 1921=A.I.R. 1921 Lah. 34.**

———*Subsequently born persons get no fresh right to attack.*

The right to challenge an alienation by an ancestor of family property on the ground that it was not made for legal necessity is a right which comes into existence as soon as the alienation is made and is available at once to any member of the joint family, who being in existence at that time, has not consented to the alienation, but every person who is born into the family afterwards does not acquire a fresh right to attack such an alienation: 4 All. 120 (P.C.), *Rel. on.* (*Lindsay, J. C.*). OUDH BEHARI SINGH *v.* SURAJ BALI. **61 I.C. 801=8 O.L.J. 205= A.I.R. 1921 Oudh 127.**

—Alienation—Father—Antecedent debt.

———*Sale for antecedent debt—A fourth of debt not for legal necessity—Sale cannot be impeached.*

Where the purchaser acts in good faith after due enquiry and is able to show that the sale was justified by legal necessity the mere fact of that part of the price is not proved to have been applied to a necessary purpose does not invalidate the sale,

Held, that the sale which the vendor had to make in order to pay off his antecedent debts cannot be impeached simply because the vendee has not

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established necessity for a portion of the price which is more than one-fourth and less than one-third of the total consideration. (*Shadi Lal, C. J. and Agha Haidar, J.*). BUTA MAL *v.* GOPAL SINGH. **30 Punj. L.R. 532 (Lah.).**

———*Antecedent debt—Meaning of.*

An antecedent debt means a debt antecedent in fact as well as in time that is to say, that the debt was truly independent and not part of the transaction impeached: 46 A. 95 (P. C.), *Rel. on.* (*Shadi Lal, C. J. and Agha Haidar, J.*). BUTA MAL *v.* GOPAL SINGH. **30 Punj. L.R. 532 (Lah.).**

———*Grand-father—Debt of—Grandson's share if liable.*

A Hindu father or grandfather has special powers of alienating co-parcenary property for the payment of an antecedent debt wkich is not incurred for immoral or illegal purposes. In such a case the whole of the co-parcenary property is liable for the payment of the debts contracted by the paternal grandfather and the grandson is in the same position as the son. (*Shadi Lal, C.J. and Bhide, J.*). GANPAT RAM *v.* SAGAR MAL. **114 I C. 703= 30 Punj L.R. 99.**

———*Alienation to discharge antecedent debt is binding.*

The managing co-parcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity: if he is the father and the reversionaries are the sons he may, by incurring debt so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of the debt. If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate. (*Broadway and Jai Lal, JJ.*). ABDUL GHANI *v.* SAMSAR CHAND. **107 I.C. 385= A.I.R. 1928 Lah. 101.**

———The fact that a previous debt in favour of the same mortgagee is set off and forms the consideration for the second mortgage deed does not prevent the former debt from being an antecedent debt: A.I.R. 1927 All. 150, *Foll.* (*Sulaiman and Boys, JJ.*). BABU LAL *v.* MT. KASHMIRO. **98 I.C. 1037 (All.).**

———*Bulk of consideration for antecedent debt—Alienation as a whole should be considered to determine whether it should be upheld and to what extent in each case.*

The propriety of the alienation as a whole has to be considered. It may be that in certain cases where the bulk of the consideration for an alienation made by a father in respect of joint family property consists of antecedent debt or is justified by a legal necessity, the alienation may be held binding upon the sons; where there is much more in an alienation than the simple question as to the amount of the consideration that might be of a valid character the Court must consider it in its entirety and come to the conclusion in the particular circumstance of each case as to whether it should be upheld or set aside. (*Wazir Hasan, A. J. C.*). GAURI SHANKAR *v.* BADRI NATH. **88 I. C. 474= A. I. R. 1925 Oudh 685.**

———*Antecedent debt includes debt under usufructuary mortgage.*

The language of proposition 3 in the case of *Brij Narain* v. *Mangla Prasad*, A.I.R. 1924 P.C. 50 is broad enough to include debt incurred under usufructuary mortgage within the term 'antecedent debt'. That language is not susceptible of any

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limitation restricting the term to such mortgage debts only as are incurred under a simple mortgage alone. (*Wazir Hasan and Kendall, A. J. Cs.*). MADHO PRASAD *v.* NIAMAT. **84 I.C. 501= 11 O. L. J. 579=27 O. C. 366= A. I. R. 1925 Oudh 185.**

———*Court cannot enquire into prior history of the debt.*

Where a father sold a piece of land for paying off certain money due on a prior mortgage this must be regarded as an antecedent debt and the Court cannot go backwards and find that only sum due as an antecedent debt was the orignal sum due on a promissory note prior to the execution of mortgage. (*Sen and Pullan, JJ.*). SHYAM LAL *v.* BADRI PRASAD. **1929 A.L.J. 1149=51 All. 1039= A.I.R. 1929 All. 789.**

———Mortgages of joint family property executed for legal necessity are antecedent debts, and a sale executed in consideration of those antecedent debts is a good transfer, and is binding on the sons and grandsons : A.I.R. 1925 P. C. 264, *Foll.* (*Stuart, C. J. and Nanavutty, J.*). KAILASH SINGH *v.* BALBHADDAR SINGH. **112 I. C. 151 (Oudh).**

———*Debts mentioned in the deed fictitious—But vendee paying off real antecedent debts—Sale is valid.*

Per *Sulaiman, J.*—Antecedent debts of the father unless tainted with immorality or illegality are binding on the sons, and a transfer in lieu of them is perfectly valid. It does not make any difference in principle if a portion of the sale consideration though originally intended to pay off one antecedent debt, is as a matter of fact, when it is discovered that that debt does not exist, honestly utilized to pay off another antecedent debt. When both the debts are binding on the sons they cannot complain if one is paid off rather than the other. The payment of debts due from the father is considered to be one of the recognized legal necessities. When therefore, an antecedent debt has in fact been discharged, though not the one actually mentioned in the deed, the transfer should not be vitiated unless there be circumstances showing an attempted fraud. In cases where false recitals are dishonestly and fraudulently entered in deeds of transfer in order to deceive persons entitled to challenge the alienation, a Court may prevent the transferee from shifting his ground and setting up his own fraud: 1 U.P.L.R. (A.) 119, *Foll.*

Per *Boys, J.*—Alteration of the destination of the consideration is not itself sufficient to invalidate the transaction where the actual disbursement would support an allegation of legal necessity. But where the mis-description of the reason for the transaction is coupled with the further element that the reason had little or no existence in fact it cannot be accepted as a broad proposition of general application that it is quite immaterial what purpose is set out in the deed if only the vendee or mortgagee can subsequently show that the money was in fact disbursed for a proper purpose. But he who seeks equity must do equity, and if in the peculiar circumstances of a case equity is wholly on the side of the vendee, he ought to be protected.

Where the vendee was clearly very careless in not making proper enquiry at the outset, but on discovery of his mistake he exercised proper caution in securing that the money which he was to advance and which he still held was only devoted to objects which could have supported his sale-deed if they had the original objects set out in the deed and where the father was himself behind the suit

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for challenging the sale and therefore, the plaintiff could not really have suffered any surprise by the defendant vendee setting up a good antecedent debt as having been actually discharged out of the sale consideration instead of the hollow one mentioned in the sale-deed,

Held, that the equities were all on the side of the vendee and the sale to him should not be disturbed. (*Sulaiman and Boys, JJ.*). PIARE LAL *v.* SRI THAKURJI. **88 I.C. 964=23 A.L.J. 909= 6 L.R.Civ. 537=A.I.R. 1926 All. 79.**

———Father as a manager executing a mortgage to discharge antecedent debt—Mortgage is binding on entire family estate : A. I. R. 1924 P. C. 50, *Foll.* (*Hasan and Misra, JJ.*). JAI NARAIN *v.* MAHABIR PRASAD. **95 I. C. 857=2 Luck. 226= 13 O. L. J. 574=3 O.W.N. Sup. 23= A.I.R. 1926 Oudh 470.**

———Mortgages can be antecedent debts which would justify for their liquidation a sale of family property : A.I.R. 1924 P.C. 50, *Foll.* (*Lord Blanesburgh.*) LAL BAHADUR *v.* AMBIKA. **91 I.C. 471= 28 O.C. 371=47 All. 795=52 I.A. 443= 23 M. L. W. 220=12 O. L. J. 649= 30 C. W. N. 701=1925 M.W.N. 852= 2 O.W.N. 913= A. I. R. 1925 P. C. 264 (P.C.).**

———Mortgage effected to discharge antecedent debt—Sons are liable unless antecedent debt is immoral or illegal : 39 A. 437 (P.C.) and A. I. R. 1924 P.C. 50, *Ref.* (*Lindsay and Kanhaiya Lal, JJ.*). KANHAIYA LAL *v.* NIRANJAN LAL. **86 I.C. 98= 47 All. 351=23 A.L.J. 52=6 L.R.A. Civ. 247= A. I. R. 1925 All. 367.**

———Alienation by father, in satisfaction of earlier mortgage and mortgage decree is for antecedent debt and if the debts are not tainted with immorality the sons are bound by the alienation : 44 I. A. 197 ; A.I.R. 1924 P.C. 50, *Foll.* (*Mears, C. J. and Piggott, J.*). BHIMSINGH *v.* RAM SINGH. **84 I.C. 13=46 All. 301=22 A.L.J. 180= 5 L.R.A. Civ. 75=A.I.R. 1924 All. 309.**

———*Father can alienate joint property for antecedent debt contracted on the security of family property.*

A Hindu father has power to alienate the joint family property for an antecedent debt where such antecedent debt has been contracted on the security of the family property. This rule is not affected in any way whatever by the observation of the Privy Council in 39 All. 437 : 42 Mad. 711, (F. B.), *Foll.* (*Moti Sagar, J.*). DALJIT SINGH *v.* HARI CHAND. **78 I.C. 11=A.I.R. 1923 Lah. 669.**

———*Personal covenant in an earlier mortgage deed—If an antecedent debt.*

A personal covenant given by a father at the time of entering into a mortgage could not be described as "disconnected in fact as well as in time." Even if the personal covenant be contained in an earlier mortgage, as that earlier mortgage is an alienation and not a debt, there is no antecedency on the principle of *Chet Ram* v. *Ram Singh*, A.I.R. 1922 P. C. 247. Thus whether the personal covenant be contemporaneous or previous, if it is part of a mortgage, it is not antecedent in the legal sense.

Whether there is an antecedent obligation dissociated in time and in fact from the sale or mortgage in any particular case is a question of fact.

Per *Devadoss, J.*—Where a personal covenant to pay is outstanding in a mortgage document I cannot see why the covenant cannot sustain a sub-

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sequent alienation as an antecedent debt. (*Spencer and Devadoss, JJ.*). VADAMALAI *v.* SUBRAMANIA.
71 I. C. 130=16 M.L.W. 936=
1923 M.W.N. 57=A. I. R. 1923 Mad. 262.

———*Mortgage in lieu of promissory-notes—Mortgage binding on sons.*

Where a mortgage was taken by the creditor in lieu of pro-notes executed by the father and the father died in the course of the suit on the mortgage,

Held, the effect of the novation of the contract was practically to render the earlier bonds unenforceable. The consideration of the mortgage is therefore a good consideration binding on the sons who were charged under the Hindu Law with the responsibility of paying the debts due by their father. (*Kanhaiya Lal, J C.*). RAMSING *v.* MT. RAGHUBANSA. **72 I.C. 877=26 O.C. 201=**
A. I. R. 1923 Oudh 3.

———*Debt not immoral to purchaser's knowledge—Sale is valid.*

Where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons by reason of their duty to pay their father's debts, cannot recover that property unless they can show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted: 39 All. 437 (P.C.), *Ref.*

The principle holds good even where the father, whose debt was so paid, is alive : 23 O C. 244, *Ref.* (*Kanhiaya Lal, A.J.C.*).RAM NIDH *v.* ISHURDIN.
63 I.C. 288=24 O.C. 161=
A.I.R. 1921 Oudh 117.

———*Sale not for antecedent debt, is not binding on sons.*

The principle that when once ancestral property has passed out of a family under a sale-deed executed by the father the sons cannot recover the property merely by proving absence of legal necessity, only applies where the sale under which the property had passed away from the family is executed in lieu of antecedent debt or in execution of a decree for debt, but it does not apply to a sale for cash down: 39 All. 437 (P.C.), *Expl.* and *Foll.* (*Daniels, J.C.*). LACHHMAN SHUKUL *v.* RAMKISHORE. **64 I. C. 220=24 O.C. 218=**
A.I.R. 1921 Oudh 102.

———*Sons cannot question alienation save by showing that the debts were illegal or immoral to the knowledge of the alienee.*

Where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debts, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted: 5 Cal. 148 (P.C.), *Foll.* (*Wazir Hasan, A.J.C*). BASDEO LAL *v.* MAHABIR. **59 I.C. 570=8 O.L.J. 18=**
A. I. R. 1921 Oudh 63.

———*Antecedent debts need not be unsecured debts.*

Per *Full Bench* (*Dawson Miller, C. J., Dissenting*) :—A mortgagee is entitled to enforce a mortgage, executed by the father of a joint Mitakshara Hindu family, against the father and sons, even in absence of legal necessity provided the loan was not raised for an illegal or an immoral pur-

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pose where the consideration for the mortgage is a debt which though in substance and in reality incurred antecedently to the mortgage, is incurred on the security of joint family property or the object of the mortgage is to raise a loan to pay such a debt: 5 P.L.J. 120 and 61 I. C. 102 ; 6 P.L.J. 72 ; A.I.R. 1921 Patna 18, *Overruled*; 41 All. 235 (F.B.), *Diss. from* ; 42 Mad. 711 (F.B.), *Foll.* ; 39 All. 437 (P.C.), *Discussed*; *Other cases referred.* (*Dawson Miller, C.J., Jwala Prasad, Das, Adami and Bucknill, JJ.*). MATHURA MISRA *v.* RAJAKUMAR MISRA.
62 I.C. 132=2 P.L.T. 407=6 P.L.J. 526=
1921 P.H.C.C. 245= A.I.R. 1921 Pat. 447 (F.B.).

—Alienation—Father—Benefit to estate.

———Where the father manager mortgaged the family property—a share in a village—in order to purchase another share in the village over which he had a usufructuary mortgage and which was for sale,

Held, the mortgage was binding on the family : 1 P.L.T. 136 and 24 C.W.N. 938, *Rel. on.* (*Ross and Fazl Ali, JJ.*). JAN MOHAMMAD *v.* BIKOO MAHTO.
116 I.C. 33=7 Pat. 798=10 P.L.T. 811=
A. I. R. 1929 Pat. 130.

———*Sale resulting in benefit to family should be upheld.*

Where the father was neither a spendthrift nor a profligate but a well-behaved person possessing considerable experience of the world, and he was in his youth a patwari, was next employed as manager of the estate of his brother-in-law and then a pleader's Munshi, and where it was found that the land sold was quite unproductive yielding no income but the vendees paid a large amount for it because it adjoined their house which they wanted to extend.

Held, that the sale was for benefit of the family and was not assailable by his sons. (*Zafar Ali and Addison, JJ.*). KAREMCHAND *v.* RAM LABHAYA MAL. **96 I.C. 443=7 Lah. 476=8 L.L.J. 283=**
27 P.L.R. 444=A.I.R. 1926 Lah. 468.

———Mortgage by, to clear encumbrance on pre-empted property—No benefit to family proved—Sons are not bound : 33 All. 242 and A.I.R. 1923 All. 218, *Dist.* (*Daniels and Neave, JJ.*). BHAGWATI SINGH *v.* GURCHARAN DUBE. **92 I.C. 332=**
5 L.R. A. Civ. 647=A.I.R. 1925 All. 96.

———*Alienation actually resulting in benefit to the estate should be upheld.*

Where the father was under no necessity to sell the estate but for various reasons he wanted to get rid of it ; no enquiry was made by the purchaser ; the bulk of the consideration was employed in a loan and on apparently good security, and the net result of the transaction was an increase of about Rs. 750 per annum in the income of the family.

Held, that the sale resulted in an actual benefit to the family and should therefore be upheld: 1 Pat. L. T. 535, *Ref.* (*Baker, J.C. and Prideaux, A. J.C.*). BHAGWAT *v.* ANANDRAO. **86 I.C. 515=**
22 N L.R. 136=A.I.R. 1925 Nag. 302.

———*Benefit apart from necessity cannot support alienation.*

The sale by the father of undivided ancestral family lands is not binding on the sons where there is no necessity for the sale, no present pressure on the estate, no reasonable marriage expenses of any female members of the family to be met, no Government or other revenue to be paid or any of the rest of the usual matters considered to be necessary purposes. The fact that the father acted *bona fide* and thought that what he did would be for the

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benefit of himself and his sons is not enough to support the sale. (*Sadasiva Ayyar and Coutts Trotter, J.*). DORASAMI AYYAR *v.* S. VENKATARAMA AIYAR. **63 I.C. 228=13 M.L.W. 618=A.I.R. 1921 Mad. 610.**

———A reversioner inheriting property from a collateral gets absolute estate and his sons and grandsons cannot impeach alienations of the property made by him. A mortgage by father binds the family property if made for family benefit or necessity or to pay an antecedent debt. (*Stuart and Kanhaiya Lal, A.J.Cs.*). BHARAT SINGH *v.* SARSRUTI SINGH. **60 I.C. 137=7 O.L.J. 459=23 O.C. 244.**

—Alienation—Father—Burden of proof.

———*Sons disputing consideration ought to prove that property is ancestral.*

Sons and grandson disputing the consideration of mortgage-deeds executed by the father have to prove that the property is ancestral in order to entitle them to question the consideration. They cannot question alienation when the property is proved to be self-acquired property of the mortgagor. (*Stuart, C. J. and Srivastava, J.*). MT BRIJ KUNWAR *v.* SANKATA PRASAD. **123 I. C. 849=6 O.W.N. 933=A.I.R. 1930 Oudh 39.**

———Manager executing mortgage to secure future advances of money and obtaining such advances—Onus lies on alienee to show, contracting of debt was act of prudent manager. (*Ross and Chatterji, JJ.*). BISWANATH SINGH *v.* KAYESTHA CORPORATION. **119 I.C. 405=8 Pat. 459=10 P.L.T. 379=A.I.R. 1929 Pat. 422.**

———*Alience to prove that alienation was to discharge antecedent debt—Then onus is shifted to sons, to prove debts were immoral or illegal.*

Those who deal with a person who has only a limited interest in property and who professes to dispose of a larger interest are *prima facie* bound to make out the facts which authorize such a disposition. The only difference between the powers of a Hindu father as manager of the family, and that of other manager, is that the father can sell the property also for an antecedent debt of his which is neither illegal nor immoral. The sale will be valid if it was made to discharge an antecedent debt contracted by the father and to the extent necessary to discharge that debt. The onus lies on the purchaser to prove that it was to discharge an antecedent debt of the father that the sale to him was made or that he, after using reasonable care to ascertain the existence of such circumstances that would justify the sale, has acted in good faith. If the sale is proved to have been made for discharging the father's antecedent debts, then only the onus is shifted to the sons to establish affirmatively that the said debts were illegal or immoral and that the purchaser had also notice that they were of such a character: A.I.R. 1922 Mad. 112, *Expl.*; A.I.R. 1925 Mad. 1248, *Diss. from.* (*Ramesam and Thiruvenkatachariar, JJ.*). *In the matter of* AMIRTHALINGA THEVAN. **112 I.C. 553=1928 M.W.N. 602=28 M.L.W. 634=A.I.R. 1928 Mad. 986.**

———Purchaser of land belonging to the joint family from a father has to prove the legal necessity or antecedent debt. It is only when the burden has been shifted by some *prima facie* evidence, that the sons can be called upon to show that the transaction was illegal or immoral or otherwise not binding upon them. (*Mullick. Ag.C.J. and Wort, J.*). JOKHER GOSAIN *v.* GANESH SINGH. **106 I. C. 18=8 P. L. T. 704=A. I. R. 1928 Pat. 54.**

HINDU LAW — Alienation—Father—Burden of proof.

———Private alienation—No onus of proof lies on the son challenging alienation—Alienee must prove legal necessity or antecedent debt. (*Dalal, A.J.C.*). JAGAT SINGH *v.* BIKRAM SINGH. **88 I.C. 900=A.I.R. 1925 Oudh 675.**

———Sons must prove illegality or immorality only in case of antecedent debt or execution sale. In other cases, for example, of alienation for cash alienee must prove legal necessity. (*Daniels, J.*). MUNESHWAR LAL *v.* AMAR NATH. **78 I.C. 626=5 L.R.A. Civ. 286=A.I.R. 1924 All. 493.**

———*Transferee to prove legal necessity or antecedent debt.*

It is only when the property has passed out of the family on account of an antecedent debt or where it has been sold by public auction, that the sons cannot challenge the alienation unless they show that the debt was tainted with immorality. It is not correct to say that in every case where the property has passed out of the family (though under a private sale not in lieu of any antecedent debt and even when the legal necessity has not been established) the sons cannot challenge it unless they show that the debts were contracted for immoral purposes. Where a property has been sold by the father and the sons bring a suit to recover it, and apparently the property has not been sold away at public auction, then it lies upon the transferee to justify the alienation of the estate by showing that the debt was in lieu of some antecedent debt or that the alienation was for some legal necessity: A.I.R. 1917 P. C. 61, *Ref.* (*Lindsay and Sulaiman, JJ.*). SAHEB SINGH *v.* GIRDHARI LAL. **73 I.C. 1024=45 All. 576=4 L.R.A. (Civ.) 284=A.I.R. 1924 All. 24.**

———*Necessity for sale proved—Sons to prove that necessity could have been otherwise met.*

When the purchaser has proved that the sale was effected for a purpose which would constitute valid necessity for the transfer, the burden is shifted on those who repudiate the transaction to prove that such necessity could have been satisfied by ways other than the sale of joint family property. Where no evidence has been produced by them for this purpose, the presumption is that no such evidence existed. (*Dalal, J. C.*). BASHIRUDDIN KHAN *v.* MAHADEO SINGH. **79 I.C. 663=27 O.C. 26=11 O.L.J. 565=A.I.R. 1924 Oudh 306.**

———*Burden on transferee to show validity of consideration.*

Where the property has passed out of the family by foreclosure or sale in execution of a decree or where such a decree has been passed and new rights have come into existence, the burden lies on the sons to prove that the transfer was made for an immoral purpose but where there has been a transfer for cash down and the son contests the legality of the sale the burden lies on the vendee to prove the valid nature of the consideration. (*Dalal, J.C.*). JANG BAHADUR SINGH *v.* RANI SINGH. **77 I.C. 353=10 O.L.J. 353=27 O.C. 107=A.I.R. 1924 Oudh 141.**

———Alienee must show connection between the debts of the father and the consideration paid by him. (*Martineau and Harrison, JJ.*). AMIR *v.* MALIK KHAN CHAND. **73 I.C. 818=5 L.L.J. 431=A.I.R. 1923 Lah. 255.**

HINDU LAW—Alienation—Father—Burden of proof.

———*Vendee need not prove necessity.*

In the absence of a finding that a father has been recklessly extravagant or wantonly wasting his property, the vendee of the property from the father is not required to prove that the previous debts were contracted for necessary purposes; he has only to prove their existence. The son cannot impeach such a sale. (*Martineau, J.*). JAGAT SINGH *v.* GANDA SINGH. **69 I.C. 47= A.I.R. 1922 Lah. 301.**

———Consideration made up partly of amount of previous mortgage and partly of cash paid at the time—Son challenging sale—Regarding antecedent debt, son cannot succeed except by proving debt to be immoral—Regarding other items, vendee should prove legal necessity. (*Case-law discussed*). (*Abdul Raoof and Harrison, JJ.*). LAIQ SHAH *v.* DINA NATH. **63 I.C. 515= 3 L. L. J. 491= A.I.R. 1921 Lah. 304.**

—Alienation—Father—Consent of co-parceners.

———*Consent of co-parceners is not necessary.*

The consent of the other co-parceners is not essential where the managing co-parcener makes an alienation either for a valid necessity or for the benefit of the family: A.I.R. 1925 All. 618, *Foll.* (*Zafar Ali and Addison, JJ.*). KARAMCHAND *v.* RAM LABHAYA MAL. **96 I.C. 443=7 Lah. 476= 8 L.L.J. 283=27 P.L.R. 444= A.I.R. 1926 Lah. 468.**

———A transaction by the Manager can be ratified by the son so as to estop the latter from afterwards disputing it: 38 Mad. 396, *Foll.* (*Daniels, J.*). SHEO DEV *v.* HABHI ULLAH KHAN. **75 I.C. 872= A.I.R. 1924 All. 721.**

—Alienation—Father—Court's duty.

———*Details need not be scrutinised if sale is for necessity.*

In a case of alienation by a father if the transaction itself is good, *i.e.*, there is legal necessity and is such as would be authorised and would be binding on the joint family, the mere fact that the father does not describe himself as manager of the joint Hindu family would not make it unauthorised. It is not necessary to scrutinise all the details of sale consideration if the Court is satisfied that the transaction itself is for legal necessity: A.I.R 1916 P.C. 220; A.I.R. 1924 P.C. 50 and 34 All. 296, *Ref.* (*Sulaiman and Pullan, JJ.*). RAM PRASAD *v.* KANHAIYA LAL. **120 I.C. 549= 1929 A L.J. 1223= A.I.R. 1930 All. 73.**

———*Suit by mortgagee for possession, on mortgage executed by father—Sons questioning mortgage on ground of legal necessity—Question can be agitated in that suit.*

Where on a mortgage executed by a Hindu father, the mortgagee brings a suit for possession of the mortgaged property, impleading the sons of the mortgagor as defendants, if sons question the mortgage on the ground that it was neither justified by legal necessity nor supported by any antecedent debts it is necessary to determine in such suit whether or not the mortgage is binding upon the sons: A.I.R. 1917 P.C. 41, *Rel. on*; A.I.R. 1926 Oudh 357, *Expl.* (*Wazir Hasan, C.J., Raza and Srivastava, JJ.*). ANGRAJ BAHADUR SINGH *v.* RAMRUP. **A.I.R. 1930 Oudh 284 (F.B).**

———*Whether the sale as a whole was justified should be found.*

Where a sale by a father is impeached on the ground of want of legal necessity by a son, the question to be decided is not whether his share of the property sold might have been justified by legal necessity but whether the sale of the whole property actually effected was so justified: A.I.R. 1927 P.C. 37, *Foll.* (*Macnair, A.J.C.*). KAMTA PRASAD *v.* MADHAVRAO. **116 I.C. 648= 12 N.L.J. 1=25 N. L. R 28= A.I.R. 1929 Nag. 60.**

HINDU LAW — Alienation — Father — Decree against.

———Mortgagor, a debauchee—Part of the consideration applied to a prior debt—Court should enquire whether the mortgagee had reason to suppose that prior debt was incurred without legal necessity. (*Le Rossignol, J.*). JAGIR SINGH *v.* PAHARA SINGH. **42 P.L.R. 1921= A.I.R. 1921 Lah. 366.**

—Alienation—Father—Decree against.

———Where in a suit upon a mortgage executed by a Hindu father four of his minor sons were impleaded with the mother as guardian *ad litem* but the plaintiff failed to implead one other minor son and the latter subsequently sued to assert his rights though in the prior suit the suit was contested on behalf of the minors on all possible grounds,

Held, that the later suit was not sustainable. (*Adami and Wort, JJ.*). RAGHUNANDAN PRASAD *v.* GHANANDAN. **11 P.L.T. 483= A.I.R. 1930 Pat. 521.**

———Mortgage executed by father for antecedent debt neither immoral nor illegal, being binding on son, decree passed against father in suit for sale of mortgaged property binds son though he is not party to it: 17 All. 537, *Not foll.*; A.I.R. 1924 P.C.50, *Rel. on.* (*Banerji and King, JJ.*). JWALA NATH *v.* CHHANGAMAL. **118 I.C. 383= 1929 A. L. J. 612= A.I.R. 1929 All. 553.**

———*Mortgage decree is binding on sons even though they were not parties to the suit.*

A Hindu father fully represents his minor sons in a mortgage suit brought against him and the decree obtained in such suit against the father is binding on the sons, though not made parties to the suit, and acts as *res judicata*: A.I.R. 1914 P.C. 136; 34 Bom. 354, *Rel on*; 40 Bom. 248 and 41 Cal. 727, *Dist.* (*Baker, J.*). MADHUSUDAN PANDURANG *v.* BHAGWAN ATMARAM. **118 I. C. 788=31 Bom. L. R. 395= 53 Bom. 444= A. I. R. 1929 Bom. 213.**

———*Mortgage decree is binding on sons though they were not parties to the suit—Pious duty of the sons.*

Though a son is entitled to a declaration that a mortgage effected by his father of the joint family property is not binding on him as a mortgage unless the consideration of the mortgage is an antecedent debt of the father not being illegal or immoral or the money is borrowed for family necessity, but if a decree has been obtained by the mortgagee against the father even if the son has not been impleaded as a defendant, then the family property is available for sale in execution of such a decree on the ground of the pious duty of the son to pay the debts of his father: 53 P.R. 1901 and A.I.R. 1924 P.C. 50, *Foll.* (*Zafar Ali and Jai Lal, JJ.*). UJAGAR MAL *v.* RAMDITTA MAL. **111 I.C. 787 (Lah.).**

———Mortgage by father—Decree against father and minor sons cannot be set aside on the ground that the minors were not properly represented in the suit, by proper guardians: 34 All. 549, *Foll.* (*Mukerji and Ashworth, JJ.*). BHAIRON SHANKAR SINGH *v.* SHIAM SINGH. **102 I.C. 5= A.I.R. 1927 All. 746.**

HINDU LAW — Alienation — Father — Decree against.

———*Compromise decree in mortgage suit, providing for sons' shares to be sold is binding on sons.*

A compromise decree in a mortgage suit provided that if the decree was not fully satisfied out of the sale proceeds the balance of the decretal amount may be recovered from the mortgagor personally or from the assets of the mortgagor in the hands of his sons. The sale proceeds proving insufficient the decree-holder sought to execute the decree by sale of other property belonging to the mortgagorand the sale of the interest of his sons in such property,

Held, that the interest of the mortgagor in joint family property as well as the interest of the sons of the mortgagor could be sold in execution as the debt incurred was their father's and was not shown to be either immoral or illegal. (*Wazir Hasan, A.J.C.*). MT. MAHARAJI *v.* RAGHMAN.

89 I.C. 476=A.I.R. 1926 Oudh 61.

———Where a mortgage by father has merged into a decree, it is not sufficient for sons to prove that it was without necessity, but they must prove that it was for illegal or immoral purposes: A.I.R. 1926 Oudh 321, *Foll.* (*Stuart, C.J. and Raza, J.*). KEDAR NATH *v.* SHANKAR DAYAL.

94 I.C. 250 (Oudh).

———*Sale in execution of money decree against father—Son must prove immorality to avoid sale.*

Where joint family property is sold in execution of a money decree obtained against the father alone, the son cannot get rid of the sale without proving that the debt in respect of which the decree was obtained had been incurred by his father for what the Hindu Law would call an immoral purpose: 13 Cal. 21 and A. I. R. 1924 P. C. 50, *Foll.*; A.I.R. 1924 All. 11 and A.I.R. 1924 All. 169, *Ref.* (*Mears, C. J. and Piggott, J.*). RANJIT SINGH *v.* RAMAN SINGH. **87 I.C. 654=A. I. R. 1925 All. 781.**

———*Minor son of mortgagor not made party—Suit not bad for non-joinder—But decree does not bind minor.*

Where a mortgage is executed by two Hindu coparceners and the mortgagee sued them without impleading the minor son of one of the executants, the suit is not bad for non-joinder of parties but may be decreed as against the actual mortgagors. But the suit is not good on the ground that the major defendants represent the minor who has not been impleaded. The minor co-parcener can afterwards set aside the alienation on any legitimate grounds: 34 All. 549 and A.I.R. 1924 All. 908, *Dist.* (*Sulaiman and Ryves, JJ.*). NATHU *v.* RAM SARUP.

87 I.C. 700=47 All. 427=23 A.L.J. 246=A. I. R. 1925 All. 335.

———*Attachment in execution of decree against Father—Sons' shares are liable unless debts are illegal or immoral.*

If the joint ancestral property of a Hindu family governed by the Mitakshara law is attached in execution of a personal decree obtained against the father of the family, his sons can only secure the exemption of their interest in the said property from attachment or sale by satisfying the Court that the debt in respect of which the decree was obtained was tainted with immorality, or was otherwise such a debt as it could not be the pious duty of the sons to satisfy. The sons' liability is not postponed till after the father's death. (*Mears, C.J. and Piggott, J.*). ABDUL KARIM *v.* RAM KISHORE. **86 I.C. 837=47 All. 421=23 A.L.J. 196=A.I.R. 1925 All. 327.**

———*Mortgage-decree against father—Son's shares liable.*

HINDU LAW — Alienation — Father — Decree against.

A mortgage decree can be enforced against the ancestral property in the hands of the sons and grandsons of the mortgagor unless they can show that the mortgage debt was illegal or immoral. It is not sufficient to show that the transaction was extravagant or reckless or that the money might have been got at a cheaper rate of interest. The sons are liable not only for the original mortgage amount but also for the interest.

Semble: The son might perhaps take an objection that the stipulation for interest was in the nature of a penalty. (*Mullick and Ross, JJ.*). TIKAIT GAYANNATH *v.* PANDIT MALHJYI VAIDIJA.

90 I. C. 276=6 P.L.T. 507=1925 P.H.C.C. 160=A. I. R. 1925 Pat. 588.

———When a decree is passed against the father who is the manager of an undivided Hindu family, before it can be executed against the joint family property, all that is necessary is that it should appear that such a decree was as a matter of fact passed against the father in his capacity as representative and manager, and it is not necessary that the decree should be so drawn in express terms. (*Kennedy, J.C. and Raymond, A.J.C.*). NARUMAL MULCHAND *v.* JAGATMAL THARUMAL.

91 I. C. 740=A.I.R. 1925 Sind 288.

———Where joint ancestral property has passed out of a joint family under a sale in execution of a decree for the father's debt, the sons cannot recover that property unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted: 1 I.A. 321 and 39 A. 437 (P.C.), *Foll.* (*Kanhaiya Lal, J.*). JADUBIR *v.* GAJADHAR. **75 I.C. 785=21 A.L.J. 809=5 L.R.A. Civ. 53=A.I.R. 1924 All. 169.**

———Hindu sons cannot recover joint family property which has been sold in execution of a mortgage decree against their father without showing that the mortgage debt was for illegal or immoral purposes: 44 Cal. 524 and 42 All. 58; A.I.R. 1922 All. 310; 48 Cal. 41, *Foll.* (*Ryves and Daniels, JJ.*). SITLA PRASAD *v.* MT. CHAMELI BAHU. **75 I.C. 316=21 A.L.J. 683=4 L.R.A. Civ. 326=A.I.R. 1924 All. 111.**

———*Foreclosure decree against father—Sons not parties—Decree is binding on sons.*

A son or grandson cannot escape the effect of a foreclosure decree passed against his father or grandfather on a mortgage executed for purposes binding on the family estate merely because he was not impleaded by name in the suit. It is open to such a son who is not made a party to a suit to show that a debt in respect of which the mortgage was executed was not really antecedent in the sense accepted by the Privy Council or that if antecedent it was for a purpose either illegal or immoral, but where the mortgage was within the scope of the father's authority the sons are bound by the decree and they may not be impleaded by name: 34 A. 549 (F.B.); 39 A. 437 (P.C.), *Foll.* (*Daniels and Dalal, A.J. Cs.*). BHAGIRATHI *v.* PANDIT ONKAR NATH. **72 I.C. 142=10 O.L.J. 185=A.I.R. 1924 Oudh 17.**

———*Foreclosure decree against father binds sons though not made parties.*

Where the father mortgaged certain properties to the mortgagee and the latter brought a suit thereon against the father alone and got a decree and in execution thereof the property was sold,

Held, that in the absence of anything to show that the debt due by father was a personal debt

HINDU LAW — Alienation—Father—Extent of validity.

and the suit was brought against him in his personal capacity or that the mortgagee had a notice of the existence of the sons, it is not open to the sons, after the property has passed out of the family to set up their right against the remedy obtained by the creditor in enforcement of his debt: 6 O.C. 101, *Foll.* (*Kanhaiya Lal, J.C.*). BHAGWATI PRASAD *v.* KOLLU RAM. **70 I.C. 941= 25 O.C. 256=A.I.R. 1923 Oudh 54.**

—Alienation—Father—Extent of validity.

———*Sale not binding on son's share—Possession to be given of the whole—But purchaser's right to father's share to be declared.*

A purchaser of an estate from a Hindu father, when the sale was not binding on the share of the son, was liable to be dispossessed by the son of the whole and every part of the undivided estate while the family remained undivided, though the purchaser may have remained in possession for many years: 9 N. L. R. 18, *Foll.*; 39 Mad. 265, *Rel. on*; A.I.R. 1926 Bom. 399, *Ref.* But a declaration in favour of the purchaser about his right to the father's share should form part of the decree: 3 Cal. 198 (P.C.), *Foll.* (*Macnair, A.J.C.*). KAMTA PRASAD *v.* MADHAV RAO. **116 I.C. 648= 12 N.L.J. 1=25 N.L.R. 28=A.I.R. 1929 Nag. 60.**

———A Hindu father's alienation of certain property was held to be not binding on his son's shares. One of his two sons had died:

Held: that the other son is entitled to a half share of the property sold, that being his share of the property when he impeached the sale: 2 C.P.L.R. 141, *Dist.* (*Macnair, A.J.C.*). KAMTA PRASAD *v.* MADHAV RAO. **116 I.C. 648= 12 N L J. 1=25 N L.R. 28=A.I.R. 1929 Nag. 60.**

———Mortgage for cash and to pay previous mortgage—Sons can sue to set aside, pleading want of necessity for both mortgages—Previous mortgage itself for cash, is not an antecedent debt to support subsequent mortgage, but if creditor had paid it after *bona fide* enquiry as to necessity, it will be binding on the sons: 16 N.L.R. 64, *Approved.* (*Hallifax, Kotval and Dhobley, A.J.Cs.*). DHUDA BAI *v.* NARAIN. **66 I.C. 239=5 N.L.J. 73= A.I.R. 1922 Nag. 28 (F.B.).**

—Alienation—Father—Justifications for.

———*Immorality or illegality of debt—When sons are bound to prove.*

The circumstances in which it is necessary for the sons to show that the debt was illegal or immoral in order to recover the property are two only. The first is, where property has passed out of the family under a conveyance executed by a father in consideration of an antecedent debt in order to raise money to pay off such debt. The second is, where property has been sold in execution of a decree for the father's debt.

In the case of a private sale executed for an amount paid in cash, there is no necessity to show that the debt supporting the alienation was illegal or immoral. (*Daniels, J.*). BALDEO *v.* BHAGWAN MISRI. **78 I.C. 595=A.I.R 1925 All. 241.**

———*Pious obligation — Liability for antecedent debts—Distinction between.*

A pious obligation which arises only on the death of the ancestor on the one hand and antecedent debts which may support an alienation while the ancestor is alive on the other, are distinct grounds on which justification for an alienation may be pleaded. (*Daniels and Wazir Hasan, A.J.Cs*). RAM SURAN *v.* MANGAL SINGH. **60 I. C. 219= 8 O. L. J. 87=A. I. R. 1921 Oudh 38.**

HINDU LAW—Alienation—Father—Powers of —Alienation—Father—Limitation.

———*Suit to set aside sale—Vendee not in possession—Relief is merely declaratory—Art.* 120 *applies.*

Where a suit was brought by certain Hindus for setting aside a sale-deed executed by their father and where the property was in the possession of the mortgagee even at the time of the institution of the suit and the vendee had never obtained possession, the suit is to be regarded as merely a declaratory suit and Art. 120 and not 126 applies for alienee did not get possession: A.I.R. 1927 All. 702; 41 Mad. 650; 70 P. R. 1914, *Ref.* (*Sulaiman and Pullan, JJ.*). ANGAD SINGH *v.* BAHADUR SINGH. **119 I.C. 90= 1929 A. L. J. 1131=A. I. R. 1929 All. 750.**

———Elder brother not suing to set aside within three years of his majority—Younger son's suit within three years of his majority is not barred: A.I.R. 1926 P.C. 16, *Foll.*; 16 Mad. 436 and 38 Mad. 18, *Not foll.*; A.I.R. 1926 Mad. 1190, *Ref.* (*Kumaraswamy Sastri and Reilly, JJ.*). RAJAGOPALA AYYANGAR *v.* SRINIVASA RAGHAVA AYYANGAR. **109 I.C. 572=51 Mad. 627=28 M.L.W 311= 1928 M.W.N. 708=A.I.R. 1928 Mad. 1055= 55 M.L.J. 30.**

———Suit to set aside by younger son within 3 years of attaining majority. Elder son attaining majority more than 3 years before—Younger's son's suit is not barred. (*Daniels, J.*). LACHHMAN PRASAD *v.* SALU SALIK CHAND. **98 I.C. 508=A.I.R. 1927 All. 188.**

———*Bar of limitation against one major son does not affect other sons.*

A suit brought by some sons within three years of their majority to set aside alienation by father is not barred though one of the sons had long before three years reached majority: 16 Mad. 436 and 33 Mad. 118, *impliedly overruled.* (*Mr. Ameer Ali.*) JAWAHIRSINGH *v.* UDAIPARKASH. **93 I.C. 216=48 All. 152=53 I.A. 36= 24 A.L.J. 97=1926 M.W.N. 197= 3 O.W.N. 365=43 C.L.J. 374= 28 Bom. L.R. 851=30 C.W.N. 698= A.I.R. 1926 P.C. 16=50 M.L.J. 344 (P.C.).**

———Elder son attaining majority but not questioning, the alienation. Suit by younger son within three years of his attaining majority is not barred: A.I.R. 1926 P.C. 16, *Foll.* (*Devadoss and Wallace, JJ.*). NARAYANA *v.* VENKATASWAMI. **98 I.C. 31=24 M.L.W. 475=1926 M.W.N. 767= A.I.R. 1926 Mad. 1190=51 M.L.J. 845.**

—Alienation—Father—Powers of.

———A father can certainly sell joint property for discharging antecedent debts even in absence of pressure: A.I.R. 1923 All. 535, *Diss. from.* (*Ramesam and Jackson, JJ.*). PURUSHOTTAM RAO *v.* RAM RAO. **121 I.C. 837=52 Mad. 856= 30 M.L.W. 251=A. I. R. 1930 Mad. 326= 57 M.L J. 720.**

———*Perpetual lease is not in ordinary course of management.*

Lease is in ordinary course of management where land cannot be cultivated more profitably by manager himself or through hired servants. But perpetual lease is not in ordinary course of management. (*Ashworth, J.*). BANWARI BARHI *v.* RAM RATAN. **119 I.C. 436=10 L.R.A. Rev. 293= A.I.R. 1929 All. 387.**

———Per *Sulaiman, J.*—The restrictions on the power of a Hindu father to alienate immovable property are equally applicable to transfers of moveables: 31 All. 359, *Foll.* (*Sulaiman and Ashworth, JJ.*). BANKEY LAL *v.* NATHA RAM. **107 I.C. 576=A.I.R. 1929 All. 199.**

HINDU LAW—Alienation—Father—Powers of.

———*Father cannot alienate for general benefit without necessity.*

There is no general power in a Hindu father to alienate lands in any way he likes for anything that may be of general benefit to the family, whether or no there is any necessity: 6 M.I.A. 393; A.I.R. 1917 P.C. 33; A.I.R. 1923 Bom. 453 and 36 Cal. 1003 (P.C.), *Foll.* (*Marten, C.J. and Crump, J.*). VENKATARAMAN *v.* JANARDHAN. **106 I.C. 79= 52 Bom. 16=29 Bom. L.R. 1522= A.I.R. 1928 Bom. 8**

———*Father's powers of disposition and management are wider than manager's.*

The powers of a Mitakshara father as karta of the family to bind his infant sons with regard to disposal or management of joint family properties are wider than those of other kartas of such families and rest upon an implied consent on the part of all the members and a presumption that what is done is for the benefit of the family: A.I.R. 1917 P.C. 61, *Foll.* (*Mukerji and Mitter, JJ.*). SURENDRA NATH *v.* SAMBHU NATH. **104 I.C. 219= 55 Cal. 210=A.I.R. 1927 Cal. 870.**

———*Contract to sell—Purchaser privileged to indefinitely postpone completion of sale or repudiate the contract—Contract not binding on sons.*

The father and manager of a joint Hindu family contracted to sell the family property to *A* for payment of a prior mortgage on the property but before the contract was completed into sale, he contracted to sell it to *B*. The contract with *A* remained in force for about three years and it subsequently fell through and the deposit received thereunder was returned to *A*. Immediately afterwards *B* sued for specific performance against manager alone and got a decree. Thereafter the sons, some of whom were adult at the date of the contract, sued to set aside the sale,

Held, that so long as earlier contract with *A* was in existence *B* was under no enforceable obligation to perform his own; and immediate payment of the purchase price being the prime necessity in view of the earlier mortgage to be paid off, the contract bound the vendor to sell, at a fixed price, property of apparently increasing value in circumstances which gave the purchasers the privilege of indefinitely postponing completion of the purchase and payment of the price, with the further privilege, if it so suited them, of repudiating the bargain altogether on the ground that so long as the earlier contract was insisted upon by its purchaser the vendor could make no title. Such a transaction was entirely beyond the power of the father as karta of the joint family, and was not binding on the plaintiffs. (*Lord Blanesburgh.*) RAMCHARAN LONIA *v.* BHAGWANDAS MAHESHARI. **95 I.C. 898= 48 All. 443=53 I.A. 142=24 A.L.J. 622= 3 O.W.N. 783=31 C.W.N. 198=1926 M.W.N. 503= 38 M.L.T. 18=A.I.R. 1926 P.C. 68 (P.C.).**

———*Alienation is binding unless for illegal purposes.*

Alienations made by the father of Hindu minors not only as the manager of a joint Hindu family, but also as their guardian are *prima facie* binding on them. The power of a Hindu father may be more or may be less than the power of a guardian to bind his minor sons, but unless it can be established that the alienations were for unnecessary or illegal purposes the alienations are *prima facie* good: A.I.R. 1922 Mad. 112, *Foll.* (*Odgers, J.*). ALAGAR AIYANGAR *v.* SRINIVASA AIYANGAR. **91 I.C. 709=22 M.L.W. 515=1925 M.W.N. 777= A.I.R. 1925 Mad. 1248=50 M.L.J. 406.**

HINDU LAW—Alienation—Father—Refund.

———If a father transfers property and it is clear that he intends to part with all the interest he possesses in any capacity in the property, a recital in the deed as to its being his self acquired property is not sufficient to invalidate an otherwise proper transaction. (*Spencer and Devadoss, JJ.*). VADAMALAI *v.* SUBRAMANIA. **71 I.C. 130= 16 M.L.W. 936=1923 M.W.N. 57= A.I.R. 1923 Mad. 262.**

———Where the father in a Hindu family consisting of a father and his infant son, alienates family property, he cannot be said to have consented to the alienation in his capacity of guardian to his minor son. (*Wallis, C.J. and Krishnan, J.*). SUBBARAMA REDDI *v.* RAMAMMA. **59 I.C. 681= 43 Mad. 824=12 M.L.W. 249= 1920 M.W.N. 529.**

———The father is authorised not only to sell the joint family property for the satisfaction of his antecedent debts, but also to mortgage it: 15 N.L.R. 85, *Foll.* (*Kotval and Prideaux, A.J.Cs.*). PANDURANG *v.* KESHORAO. **64 I.C. 718= A.I.R. 1921 Nag. 173.**

—Alienation—Father—Presumption.

———*Discretion exercised by father must be presumed to be proper.*

In the case of an alienation by father or manager when there are no circumstances of prejudice or other questionable motive, the discretion of the father or the manager must be taken to be proper until and unless the contrary is established in the evidence or there are circumstances to show the contrary, it must be held that it has not been shown that the discretion exercised by the adult members of the family in effecting a sale was beyond their legitimate powers. (*Srinivasa Aiyangar and Ananthakrishna Ayyar, JJ.*). SATHAPPAN AMBALAM *v.* VADIVELU. **109 I.C. 106=A.I.R. 1928 Mad. 450.**

———Where a major brother and his minor brothers under the guardianship of their mother had executed a transfer, a presumption may arise that the major brother was not acting as *karta* of the family. But, where a father makes a transfer along with his minor sons, under guardianship of their mother, the presumption is that the transfer has been made by the father in his capacity as manager: 9 O.L.J. 138, *Dist.* (*Dalal, J.C.*). JANG BAHADUR SINGH *v.* RANI SINGH. **77 I.C. 353=10 O.L.J. 353=27 O.C. 107= A.I.R. 1924 Oudh 141.**

—Alienation—Father—Refund.

———Mortgage by Hindu father for paying pre-emption money, set aside at son's instance—Money can be charged on pre-empted property. (*Mears, C.J. and Mukerji, J.*). KISHEN SAHAI *v.* RAGHUNATH SINGH. **116 I.C. 438=51 All. 473= 1929 A.L.J. 110=A.I.R. 1929 All. 139.**

———Alienation by father of joint ancestral property not for necessity or payment of antecedent debts—Decree setting aside alienation should not be subject to condition that the consideration money paid by the vendee should be refunded to him: A.I.R. 1922 Lah. 241; 67 I.C. 89 and A.I.R. 1921 Mad 447, *Foll.*; 11 Cal. 396; A.I.R 1923 Lah. 255, *Diss.* (*Shadi Lal, C.J. and Jai Lal, J.*). DAYA RAM *v.* HARCHARAN DAS. **107 I.C. 781= 8 Lah. 678=29 P.L.R. 72= A.I.R. 1928 Lah. 111.**

———*Son getting benefit of purchase money—Purchaser entitled for refund.*

Where joint property is sold by father and it is proved that the purchase money was carried to

HINDU LAW — Alienation—Father—Rights of alienee.

assets of the joint estate and the son had had the benefit of his share of it, the son cannot recover his share of the estate without refunding the share of his purchase money but any laches on the part of the purchaser will debar him from such equitable relief: 9 W.R 511 Cr. (F.B.), *Foll.*; 29 Cal. 473, *Dist.*; 15 W.R. 6 (F.B.); 11 Cal. 396 and A.I.R. 1921 Mad 447, *Ref.* (*Mullick, Ag. C.J. and Wort, J.*). JOKHU GOSAIN *v.* GANESH SINGH.
106 I.C. 189=8 P.L.T. 704=A.I.R. 1928 Pat. 54.

—Alienation—Father—Rights of alienee.

———Father making gift of joint family property to his wife without consent of sons—Gift is voidable at the instance of the members of the joint family—Attaching creditor of father cannot have that option: 33 All. 783 and A.I.R. 1924 All. 29, *Dist.* (*Sulaiman and Kendall, JJ.*). MT. SARASWATI KUAR *v.* MAHABIR PRASAD. **109 I.C. 272=A.I.R. 1928 All. 476.**

———*Son setting aside sale and recovering his share—Subsequent suit by alienee for general partition—Alienee praying that alienated property be allotted to him and in the alternative for other property.*

Held: that the matter is *res judicata* so far as the property sold is concerned and so the first part of the prayer must be disallowed, and further that as it was not in the plaintiff's power to ask for a general partition in the former suit, the suit is competent for allotment to the plaintiffs of other properties as substitute. (*Case-law considered.*) (*Phillips and Ramesam, JJ.*). SOWRIMUTHU *v.* PACHIA PILLAI. **91 I.C. 868=49 Mad. 483=1925 M.W.N. 844=A.I.R. 1926 Mad 241=49 M.L J. 679.**

———*Possession under contract for sale by father and right to specific performance is good defence in ejectment suit by sons.*

The defendant who is in possession of the property and has paid the price can successfully plead his possession and the contract for sale as a defence to a suit for possession by sons of the person agreeing to sell who claim under their father and who are born after the date of the contract to sell by their father, as they could not acquire at birth any interest in the property to which their father had already parted with his title: A I.R. 1924 Mad. 271 (F. B.), *Foll.* (*Spencer, J.*). VENKIAH *v.* MADLEN GURAVIAH. **96 I.C. 290=23 M. L. W. 604=A.I.R. 1926 Mad. 757=50 M. L. J. 669.**

—Alienation—Father—Setting aside.

See also HINDU LAW—ALIENATION—SETTING ASIDE.

———The reservation of a small portion of the property for the maintenance of the widow does not affect the validity of the surrender: 46 I.A. 259; 47 C. 466; 37 M.L.J. 513 (P.C.), *Rel.* A gift for the daughter's life with reverter to the widow is possible; but it would have to be clearly so expressed. But the operation of a surrender is to effect the widow completely so far as the estate is concerned, so that her right is not revived by the death, during her lifetime, of her daughter to whom she had surrendered her estate but the estate devolves in favour of the next reversioner and the succession cannot be interrupted by the mere fact that the widow is still alive: 46 A. 59, *Ref. to.* (*Phillips and Reilly, JJ.*). VEERANNA *v.* SEETANNA. **50 M. L. J. 139.**

—Alienation—Father—Son's liability.

——— *Son bound to pay debts not illegal or immoral.*

If the debt be one which the son is under a pious obligation to pay and since the son is under a pious obligation to discharge every debt contracted by the father unless it is an immoral debt or an illegal debt, the son cannot set up his rights against the alienation made by the father to pay off those debts: 5 Cal. 148 (P.C); 13 Cal. 21, *Rel. on.* (*Das and Wort, JJ.*). RAMTAHAL THAKUR *v.* JAGATNAND JHA. **124 I.C. 844=11 P. L. T. 234=A. I. R. 1930 Pat. 327.**

HINDU LAW — Alienation — Father — Son's liability.

———An alienation by a Hindu grandfather for the payment of antecedent debts not tainted with illegality or immorality is binding on the grand-son being co-extensive with that of the son for paying debts. (*Shadi Lal, C. J. and Bhide, J.*). GANPAT RAM *v.* SAGAR MAL. **114 I.C. 703=30 P.L.R. 99.**

———Mortgage by father—Son, minor at the date of mortgage—He is not personally liable under the mortgage, nor is his self-acquisition. (*Lord Phillimore.*) RAMKISSEN SINGH *v.* MAHOMED ABDUL SATTAR. **109 I.C. 574=30 Bom. L.R. 852=24 N.L.R. 186=18 M L.W. 248=32 C.W.N 1149=48 C.L.J. 570=A.I.R. 1928 P.C. 165=55 M L.J. 292 (P.C.).**

———*Son suing for partition cannot avoid the liability on his share unless he proves illegal or immoral purpose.*

Where in a suit for partition the son asks for a declaration that certain debts incurred by the father by mortgage are not binding upon him, it is for him to show that those debts were incurred for illegal or immoral purposes and if he is able to show that, then he could get relief. Otherwise the debts would be binding upon him. If the mortgagee is able to obtain a personal decree against the father exhausting his remedy against the father's share, then he would be entitled to go against the son's share of the family property to the extent of the balance remaining due after executing the decree against the father's share: 22 Mad. 519 and 38 Mad. 1120, *Dist.* (*Devadoss and Jackson, JJ.*). KANDASAMI GOUNDAN *v.* MARUDACHALA GOUNDAN. **107 I.C. 129=39 M.L.T. 562=A.I.R. 1928 Mad. 105.**

———Alienation by father to pay off prior mortgage—Sons are not bound merely by force of pious obligation: A.I.R. 1925 Oudh 9, *Foll.* (*Stuart, C. J. and Wazir Hasan, J.*). JANG BAHADUR LAL *v.* BHAYA RAGHUNATH SINGH. **98 I. C. 1053=2 Luck 401=13 O. L. J. 833=3 O. W. N. 930=A. I. R. 1928 Oudh 43.**

———Contract to sell by karta—Suit for specific performance with alternative claim for damages for breach of contract—Sons and nephews of karta made defendants— Pending appeal, karta died—Cause title amended to make other defendants heirs of karta—In appeal claim for specific performance given up.

Held: the amendment of the cause title in the appeal before the High Court on the death of defendant 1 did not alter the nature of the suit. Nor did the abandonment of the claim for specific performance at the hearing of that appeal alter the suit as framed into an action for money had and received, or for the recovery of a debt, and no decree could be passed against the surviving defendants. (*Lord Sinha.*) RAM SARAN MANDAR *v.* MAHABIR SAHU. **100 I C 56=6 Pat. 323=54 I.A. 55=25 A.L.J. 74=1927 M.W.N. 69=8 P.L.T. 98=38 M.L.T. 74=31 C.W.N. 469=45 C L. J. 313=25 M. L. W. 635=29 Bom. L. R. 796=A. I. R. 1927 P. C. 18=52 M. L. J. 402 (P.C.).**

HINDU LAW — Alienation — Father — Son's liability.

———*Mere renewal of previous mortgage—No pious obligation.*

Where the alienation in suit is wholly a renewal of the previous mortgage made by the father, sons cannot be bound by the alienation made by the father on the sole ground of pious obligation: A.I.R. 1925 Oudh 9, *Foll.* (*Stuart, C.J. and Hasan, J.*). JANG BAHADUR LAL *v.* BHAYA RAGHUNATH SINGH. **98 I.C. 1053=3 O.W.N. 930= 13 O.L.J. 833=A.I.R. 1928 Oudh 43.**

———Doctrine of pious obligation cannot validate an alienation, if it is otherwise invalid. (*Kanhaiya Lal, J. C.*). RAM AUTAR *v.* BENI SINGH. **68 I.C. 196=25 O.C. 89=10 O.L.J. 7= A. I. R. 1922 Oudh 135.**

———*Mortgage without legal necessity is invalid—But a money-decree can be passed against the sons.*

A mortgage of joint family property by a Hindu father, without legal necessity but not for unlawful or immoral purposes, is invalid from its inception.

A transfer by a father cannot become a valid transfer merely by the accident of the father's death. (*Obiter dictum*): 6 O. L. J. 297, *Diss. from*; 31 All. 176 and 39 All. 437 (P. C.), *Foll.*

Hence the mortgage cannot be enforced against the sons after the father's death. But the sons being under a pious obligation to discharge the debts of their father are liable to have a simple money-decree passed against them. The pious obligation resting upon the sons does not extend to the payment of time-barred debts. (*Lindsay, J.C.*). RAM CHHATAR *v.* RAM LAL. **65 I.C. 950= 24 O.C. 395=A.I.R. 1921 Oudh 230.**

———Mortgage, invalid for want of legal necessity, or antecedent debt is not validated by mere pious obligation to pay: S. A. 134 of 1920, *Rel. on*; 6 O. L. J. 297, *Diss. from.* (*Dalal, A. J. C.*). GAJADHAR BAKHSH SINGH *v.* BAIJNATH. **65 I.C. 967=8 O.L.J. 605= A.I.R. 1921 Oudh 220.**

—Alienation—Father—Subsequent partition.

———*Mortgage without necessity or antecedent debt —Share allotted to wife on partition is not liable.*

Where a father who is the manager of a joint family mortgages, without legal necessity and for paying no antecedent debt, the joint family property and afterwards a partition is made in which a share is allotted to the mortgagor's wife, that share is not liable to the mortgagee. Only the share of the actual mortgagor will be liable. (*Dalal, J. C. and Wazir Hasan, A.J.C.*). MT. KALKA DEVI *v.* CHAUDHURY GANGA BAKSH SINGH. **88 I. C. 127=12 O.L.J. 306= A.I.R. 1925 Oudh 435.**

—Alienation—Father—Surety.

———*Mortgage for suretyship is binding on sons.*

Sons in a joint Hindu family are liable for the due fulfilment of hypothecation bond entered into by their father as surety.

Where a Hindu father, having two sons, entered into a hypothecation bond as surety in respect of joint and ancestral property in the Court of Small Causes and where objection was taken that the bond was worth nothing,

Held: that the bond tendered was a valid hypothecation bond and the mere fact that the executant had sons did not make it invalid: 26 All. 611, *Foll.*; A.I.R. 1924 P.C. 50, *Expl.* and *Dist.* (*Young and Bennet, JJ.*). MATA DIN KANDU *v.* RAM LAKHAN AHIR. **120 I.C. 555=1929 A.L.J. 1283= 52 All. 153=A.I.R. 1930 All. 87.**

HINDU LAW—Alienation—Guardian—Brother's marriage.

———*Father cannot charge joint property as surety.*

No father of a Hindu family can, as a surety charge the family property so as to effect a valid alienation as he can only do so for purposes of necessity or for an antecedent debt: A.I.R. 1924 P.C. 50, *Rel. on.* (*Sulaiman and Kendall, JJ.*). CHAKKAN LAL *v.* KANHAIYA LAL. **119 I.C. 86= 1929 A.L.J. 199=A.I.R. 1929 All. 72.**

—Alienation—Father—Miscellaneous.

———The alienation of a widow stands on a different footing from the sale by a Hindu father. (*Devadoss and Wallace, JJ.*). NARAYANA *v.* VENKATASWAMI. **98 I. C. 31=24 M.L.W. 475= 1926 M.W.N. 767=A.I.R. 1926 Mad. 1190= 51 M.L.J. 845.**

———*Account stated may support alienation.*

An account stated between the father and the alienee may be a good support for the alienation. But if the defendants rely upon other documents they may be entered into, and the alienation disapproved if the debt stated in the account is found to be suspicious in the light of the documents. (*Mears, C.J. and Piggott, J.*). RAM REHKA *v.* RAM SUNDER. **86 I.C. 834=6 L.R.A. Civ. 128= A.I.R. 1925 All. 295.**

———Bona fide *purchaser—Rights of.*

A certain property which was subject to a mortgage was gifted to certain minors by their grandfather. According to a prior family arrangement, the mortgage was to be discharged by the minors' father. The minor's father sold the property. Part of the consideration went to discharge the mortgage. The purchaser acted *bona fide* and had no notice of the family arrangement as to the discharge of the mortgage.

Held: that the sale was valid to the extent of the mortgage. (*Wallace, J.*). NILKANTA SARMA *v.* GANESA IYER. **91 I.C. 310=1925 M.W.N. 43= 21 M.L.W. 685=A.I.R. 1925 Mad. 469.**

———*Consideration for mortgage—Proof of antecedent debt or legal necessity.*

The question of the consideration for a mortgage debt having been required to pay off antecedent debts, or for other legal purposes binding on minor sons depends upon proof of the existence of debts and of the fact of their satisfaction out of the consideration as also upon the existence or otherwise of circumstances amounting to legal necessity for the borrowing of cash. (*Kinkhede, A. J. C.*). MOTILAL RAMLAL *v.* RENI. **78 I.C. 711= A.I.R. 1924 Nag. 348.**

—Alienation—Guardian—Adverse possession.

———Possession given before alienation becomes adverse to minor only from date of alienation. (*Case-law considered*). (*Odgers and Viswanatha Sastri, JJ.*). SEETHARAMAMMA *v.* APPIAH. **92 I.C. 827=49 Mad. 768= 23 M.L.W. 285=1926 M.W.N. 238= A.I.R. 1926 Mad. 457=50 M.L.J. 689.**

—Alienation—Guardian—Brother's marriage.

———Alienation by guardian of a dancing-girl for her brother's marriage is not binding on the girl as she is not bound to perform her brother's marriage. (*Krishnan and Venkatasubba Rao, JJ.*). KANNAMMAL *v.* RAMATHILAKAMMAL. **97 I.C. 632= A. I. R. 1927 Mad. 38.**

HINDU LAW — Alienation—Guardian—Burden of proof.

—Alienation—Guardian—Burden of proof.

———*Alienee must prove necessity or reasonable enquiry on his part as to necessity—He need not see to its application—Application of the money is relevant in considering the existence of necessity.*

In order to justify the alienation by a guardian of the minor's property there must be either "necessity" for the loan, or the creditor before lending money should have made reasonable enquiries to satisfy himself as to the existence of such necessity. Whether there was necessity or not for a loan or sale would depend upon the circumstances of the case : 6 M.I.A. 393 (P.C.), *Foll.* When a creditor seeks to justify alienation on the ground that he made enquiries and was reasonably satisfied that there was necessity, he is not bound further to prove that the money borrowed was actually utilized for the purposes for which it was borrowed; but, in discussing such a question it would be relevant to consider, with reference to the evidence, whether the money was utilized for the purposes for which it was raised. If it was not, then at the time it was raised there could obviously have been no necessity for it. If the evidence shows that the debt for which the money was raised was paid by other means and some time after, then the Court is justified in relying upon it for drawing the inference that there was no necessity justifying the transaction. (*Madhavan Nair, J.*). VEGE RAMAYYA *v.* SURYANARAYANA MURTHI. **105 I.C. 150= A.I.R. 1927 Mad. 890=53 M.L.J. 464.**

———Inadequacy of consideration—*Onus* of proving is not on person challenging sale, but guardian must prove that he tried his utmost to fetch higher procurable price. (*Chakravarti, J.*). BAIKUNTHA NATH *v.* ADHAR CHANDRA. **92 I C. 727= A.I.R. 1926 Cal. 653.**

———*Settlement by widow—Person taking settlement must prove justification for it.*

The adult sons of a Hindu widow are not bound by a settlement made by her of their property, where there is nothing to show that they received any benefit from the settlement, but the minor sons can be bound by it, if it can be justified on the ground of legal necessity or benefit to the minors, the burden to prove which is on the person taking the settlement. (*Chatterjee and Newbould, JJ.*). HEM CHANDRA ROY *v.* SASHI BHUSAN SIL. **63 I.C. 863 (Cal.).**

—Alienation—Guardian—Court's duty.

———*Court must satisfy itself as to the propriety of sale.*

In a case where the interest of the minor is concerned, the case ought not to be decided simply on the questions raised by the parties, but the Court has to satisfy itself, in the interest of the minor, that the sale was a proper sale and the Court must insist upon the purchaser to satisfy it that circumstances justifying a sale of the minor's property did really exist. The mere fact that there was a debt to be paid does not justify the guardian straight off to sell the immovable property of the minor : 12 C. L. J. 586, *Dist.* (*Chakravarti, J.*). BAIKUNTHA NATH *v.* ADHAR CHANDRA. **92 I. C. 727=A.I.R. 1926 Cal. 653.**

—Alienation—Guardian—Debts repayment.

———A minor's guardian sold minor's property for a reasonable price. There was legal necessity for half the purchase money, in the shape of the necessity to discharge loan borrowed by the minor's father. The remaining half of the price

HINDU LAW—Alienation—Guardian—De facto.

was allowed to remain with the vendee subject to the condition that on the minor attaining majority, it should be paid to the minor with interest at 6 per cent. per annum. A promissory note was taken for the sum and the vendee acted in good faith.

Held: that the sale was valid and that the execution of the promissory note for the unpaid half of the purchase money did not put an end to the vendor's lien for the unpaid purchase money and was not imprudent. (*Spencer, Offg. C. J. and Srinivasa Aiyangar, J.*). K. MUNAYYA *v.* M. KRISHNAYYA. **84 I.C. 949=20 M.L.W. 693= A.I.R. 1925 Mad. 215=47 M.L.J. 737.**

———Alienation by the guardian of a minor for the re-payment of the debts of the minor's paternal uncle is invalid.(*Baker, J.C. and Hallifax, A.J.C.*). CHITNAVIS *v.* NATHU SAO. **79 I.C. 1002= 20 N.L.R. 106=7 N.L.J. 170=A.I.R. 1925 Nag. 2.**

———Alienation by the guardian of a minor for re-paying the time-barred debts of his father is invalid. (*Baker, J.C. and Hallifax, A.J.C.*). CHITNAVIS *v.* NATHU SAO. **79 I.C. 1002= 20 N.L.R. 106=7 N.L.J. 170=A.I.R. 1925 Nag. 2.**

—Alienation—Guardian—Decree, setting aside.

———Money borrowed by guardian for trade of the maternal uncle of the minor is not a necessary purpose and a mortgage by the guardian for it does not bind the minor's estate. Decree can be set aside without proof of fraud or collusion. (*Spencer and Ramesam, JJ.*). CHUNDURU PUNNAYYAH *v.* RAJAM VIRAMMA. **70 I.C. 668=45 Mad. 425= 15 M.L.W. 427=1922 M.W.N. 213= A.I.R. 1922 Mad. 273=42 M.L.J. 429.**

—Alienation—Guardian—De facto.

———De facto *and* De jure *guardians—Alienations by—Same tests apply.*

A *de facto* guardian is under Hindu Law in the same position as a *de jure* guardian so far at least as acts done by him for the benefit of the minors are concerned and as regards such acts the same test is to be applied as would be applied in case of alienation by a legal guardian : 6 M. I. A. 393, *Foll.*; A. I. R. 1918 P.C. 11, *Dist.*; 37 Mad. 514; 13 M.L.J. 223 and A.I.R. 1926 Mad. 457, *Ref.*

But in the case of *de facto* guardians, alienations by them, would require strict proof not only of necessity but of adequacy of consideration, and it would be dangerous to hold that because there were debts due by the father it is open to anybody who chooses to take upon himself the management of the estate to sell the property of the minors for a price far below the market value of the land. (*Kumaraswami Sastri and Curgenven, JJ.*). RAMASWAMY PILLAI *v.* KASINATHA IYER. **108 I.C. 529=1927 M.W.N. 356= A.I.R. 1928 Mad. 226.**

———*Alienation by* de facto *guardian found partly binding—Course to be followed indicated.*

Where a Court finds that an alienation by *de facto* guardian is not wholly binding on minor plaintiffs, there are three courses open as regards granting relief. The first course is to set aside the sale altogether and direct the plaintiffs to pay the vendee the consideration which is binding on them (plaintiffs) with interest. The second course is to direct the purchasers to pay the plaintiffs the difference between the actual value of the land and the consideration which is binding on them with interest. The third course is to divide the lands in proportion to the value of the lands and the actual consideration found payable :

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A.I.R. 1923 Mad. 120, *Ref.* (*Kumaraswamy Sastri and Curgenven, JJ.*). RAMASWAMY PILLAI *v.* KASINATHA IYER. **108 I. C. 529= 1927 M.W.N. 356=A.I.R.1928 Mad. 226.**

———*Quaere*: Whether a *de facto* guardian is entitled in Hindu Law to sell a minor's property. (*Marten, C. J. and Crump, J.*). HARILAL RANCHOD *v.* GORDHAN KESHAV. **105 I.C. 722= 51 Bom. 1040=29 Bom. L.R. 1414= A.I.R. 1927 Bom. 611.**

———*Alienation is valid only when* de jure *guardian failed to act, much to the detriment of the minor.*

An alienation by a *de facto* guardian may be valid if such an alienation is otherwise justified. But where there is a legal guardian and the alienation is made by a *de facto* guardian, it is the duty of the *de facto* guardian to satisfy the Court that the legal guardian refused to act for the minor and to protect her interest and that unless the *de facto* guardian acted for her, irreparable loss to the minor would have been the result of the inaction of the legal guardian. (*Chakravarti, J.*). BAIKUNTHA NATH *v.* ADHAR CHANDRA. **92 I. C. 727= A.I.R. 1926 Cal. 653.**

———*Alienation not for necessity is only voidable—One for necessity is binding.*

An alienation by a *de jure* guardian or a natural guardian is voidable and as the powers of natural and *de facto* guardians are similar, a transaction entered into by a *de facto* guardian not for necessity is only voidable at the option of the minor on attaining his age. But an alienation for necessity is binding. (*Odgers and Viswanatha Sastri, JJ.*). SEETHARAMMAMMA *v.* APPIAH. **92 I.C 827=49 Mad. 768=23 M.L.W. 285= 1926 M.W.N. 238=A.I.R. 1926 Mad 457= 50 M.L.J. 689.**

———*Natural brother of adopted minor can act as* de facto *guardian.*

A natural brother as *de facto* guardian of an adopted minor can act as such and hence a mortgage effected by him and on attaining majority approved and discharged by the minor cannot be questioned by a complete stranger, and the question cannot be agitated for the first time in second appeal: A. I. R. 1926 Mad. 457, *Foll.* (*Odgers, J.*). ERULANDI THEVAN *v.* S. SUBRAMANIA IYER. **97 I.C. 611=1926 M.W.N. 559.**

———The right of a *bona fide* incumbrancer who had taken from a *de facto* manager a charge on lands created honestly for the purpose of saving the estate or for the benefit of the estate, is not affected by the want of union of the *de facto* with the *de jure* title. (*Campbell, J.*). CHANDULAL *v.* MUKANDI. **87 I.C. 40=26 P.L.R. 120= A.I R. 1925 Lah. 503.**

———A Hindu minor is not entitled to impeach an alienation made during his minority for the benefit of the estate and with due regard to his interests by his *de facto* guardian. (*Martineau, J.*). DADAR SINGH *v.* BANSI. **85 I.C. 741= A.I.R. 1925 Lah. 520.**

———*De facto* guardian can create charge on property *bona fide* for the benefit of the estate in same circumstances as *de facto* and *de jure* manager. (*Kinkhede, A. J. C.*). NARAYAN *v.* DHARMA. **81 I.C. 273=A.I.R. 1925 Nag. 134.**

———Alienation by *de facto* guardian for legal necessity need not be ratified by minor after majority. (*Kinkhede, A.J.C.*). GANPAT SAMBAJI *v.* MAHADEO. **78 I.C. 946=24 N.L.R. 8= A.I.R. 1924 Nag. 354.**

HINDU LAW—Alienation—Guardian—Mother.

—Alienation—Guardian—Mother.

———*Previous mortgage by mother of minor cannot be relied upon as supporting subsequent sale by her.*

Where a sale by the mother of a Hindu minor is alleged to have been effected to pay off a prior mortgage, the previous mortgage, when it is itself effected by the mother, cannot be relied upon as supporting a subsequent sale by her unless the mortgage was for necessity. (*Tek Chand and Agha Haidar, JJ.*). PRABHUDAYAL *v.* RALLA RAM. **31 P.L.R. 198=A.I.R. 1930 Lah. 672.**

———*Mother executing mortgage in satisfaction of debt due by minor's father.*

If a mother, who is a guardian of her minor, executes a mortgage in consideration of money paid by the mortgagee in satisfaction of the debts due by the minor's father on a promissory note, such action of the mother binds the son whether the mother purported to act as guardian or not: 1 N.L.R. 66, *Appl.*; 27 Bom. 390, *Dist.* (*Jackson, A.J.C.*). DAYARAM KUNBI *v.* MOTIRAM. **120 I.C. 415=A.I.R. 1930 Nag. 21.**

———*Mother can bind neither subsisting interest nor the interest to be acquired.*

A Hindu mother acting as guardian for her infant son, cannot possibly bind any interest which the son might acquire in certain property. Even if the infant has any subsisting interest in the property, the mother as guardian cannot enter into any contract on behalf of the infant which would be binding on him: 39 Cal. 1232 (P.C.), *Rel. on.* (*B.B. Ghose and Cammiade, JJ.*). MAHENDRA NATH *v.* KAILASH NATH. **109 I.C. 298=55 Cal. 841= 47 C.L.J. 376= 32 C. W. N. 439= A.I.R. 1929 Cal. 50.**

———*Sale without necessity is not binding on the son.*

While *P*, a Hindu inamdar owning large properties, was a minor, the land belonging to him was sold for Rs. 300 to *K* by the mother as his guardian. In the sale deed the only recital was that the property was sold for "our expenses," *i.e.*, maintenance expense of *P* and his mother. But the evidence showed that *P's* estate was possessed of vast extent of lands worth about seventy to eighty thousand rupees.

Held: that the sale was invalid as there were no legal grounds for upholding it: 6 M.I.A. 393 (P. C.) and A. I. R. 1917 P. C. 33, *Rel. on*; A. I. R. 1922 Bom. 122, *Expl.* and *Dist.*; A.I.R. 1929 Bom. 251 and A.I.R. 1922 Bom. 122, *Ref.* (*Ananthakrishna Ayyar, J.*). SREENIVASA RAO *v.* K. EARAPPA. **122 I.C. 43= A.I.R. 1929 Mad. 856.**

———*Portion of consideration not for legal necessity. —Sale to be set aside on payment of binding portion.*

Where the mother as guardian alienated certain property but only a portion of the consideration for the alienation of the property was for legal necessity

Held, on the paying back to the vendee that part of consideration which was for legal necessity the plaintiffs would be entitled to get back their share in the property alienated. (*Gokul Prasad, J.*). LAKHRAM SINGH *v.* SHEO PRASAD. **82 I.C. 68= A.I.R. 1922 All. 316.**

———Mitakshara joint family—Mother of minor member though guardian of his person, cannot alienate minor's share in joint family property: 25 All. 407, *Foll.* (*Dawson Miller, C. J., Jwala Prasad, Das, Adami and Bucknill, JJ.*). MATHRA PRASAD *v.* RAJKUMAR MISRA. **62 I.C. 132= 2 P.L.T. 407=6 P.L.J. 526= 1921 P.H.C.C. 245=A.I.R. 1921 Pat. 447.**

HINDU LAW—Alienation — Guardian—Paternal uncle.

—Alienation—Guardian—Paternal uncle.

———*Alienation by paternal uncle in presence of minor's mother does not bind minor's estate.*

Paternal uncles are not natural guardians in the presence of the minor's mother and therefore have no power to mortgage minor's share in joint property and therefore a mortgage by paternal uncle is not binding on minor, though he may have derived benefit under the mortgage. (*Le Rossignol, J.*). HARDWARI *v.* CHUNI LAL.

80 I.C. 735=6 L.L.J. 182=
A. I. R. 1924 Lah. 533.

—Alienation—Guardian—Powers of.

———Alienation can be made for necessity or for benefit of estate. (*Shadi Lal, C. J., Broadway and Tek Chand, JJ.*). SHAM DAS *v.* UMER DIN.

A.I.R. 1930 Lah. 497 (F.B.).

———*Gift in excess of guardian's authority binds ward on ratification, after attaining majority.*

The Hindu Law does allow a gift even of immovable property by a guardian, just as much as by a *karta*, for the benefit of the estate or for necessity and that however much a guardian may have exceeded his powers, or otherwise acted improperly in his trusts, his acts will be rendered binding on the ward by being ratified or acquiesced in, by him, after he had attained majority: 8 M.I.A. 319 and 2 Mad. 91 (P.C.), *Ref.* (*Mukerji and Mullick, JJ.*). AMAR CHANDRA *v.* SARODAMOYEE DEBI.

33 C.W.N. 690=57 Cal. 39=
A. I. R. 1929 Cal. 787.

———Alienation by natural managing guardian for necessity or benefit of estate is valid: 45 Cal. 878, *Dist.* (*Campbell, J.*). SURAIN SINGH *v.* BABU. **91 I.C. 1054=26 P.L.R. 781=**
A. I. R. 1926 Lah. 197.

———*Alienation by guardian is binding on minor, if it is for necessity or for his benefit.*

The test with regard to the binding nature of alienation by natural guardian upon the minor as laid down in *Hunooman Persad* v. *Mt. Babooee*, 6 M.I.A. 393 at pages 423 and 424, is that the power must be exercised by the guardian rightly for necessity or for the benefit of the infant. It would be open to the alienee to establish that he had made all proper and necessary inquiries and that he had acted in good faith in advancing the moneys to the natural guardian of the minor. (*Shah and Crump, JJ.*). RAOJI THAKARAM PATIL *v.* HEMRAJ SADARAM. **75 I. C. 561=A.I.R. 1923 Bom. 213.**

—Alienation—Guardian—Sister.

———*Married sister managing minor sister's property—Alienation by her is not binding unless it be for necessity.*

If the person acting on behalf of the minor is the manager of the estate, the alienation is valid and binding as against the minor if it is supported by legal necessity or otherwise beneficial to the minor: A.I.R. 1926 Nag. 81, *Foll.*

Where the minor sister is living with her married sister and the latter is in fact looking after her property as well as her person, it is competent to the latter to alienate a portion of her sister's property as manager and her act will bind the minor or her representatives-in-interest if it is proved to be for legal necessity. (*Kinkhede, Offg. A.J.C.*). PUNJABRAO *v.* RAMKRISHNA. **95 I.C. 553=9 N.L.J. 70=**
A.I.R. 1926 Nag. 332.

———*Manager.*

A sister as a manager of her minor sister must be allowed a reasonable latitude in the exercise of her power to alienate, provided she, as the manager of the minor's estate acts prudently and fairly towards the minor's interest. (*Kinkhede, Offg. A. J. C.*). PUNJABRAO *v.* RAMKRISHNA.

95 I.C. 553=9 N.L.J. 70=
A. I. R. 1926 Nag. 332.

HINDU LAW—Alienation—Guardian—Validity.

———*Married sister is not guardian—She cannot legally sell minor's property.*

Under Hindu Law married sister is not a guardian, and any sale by her of her minor sister's property is absolutely void and can be set aside by the alienee of the minor's heir. The situation of an unauthorized guardian is not bettered by describing him as a *de facto* guardian. He may, by his *de facto* guardianship assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it: 34 All. 213, *Foll.* (*Baker, J.C.*). PUNJABRAO *v.* ATAMARAM.

87 I.C. 1018=A.I.R. 1926 Nag. 124.

—Alienation—Guardian—Specific performance.

———It is not within the competence of a guardian of a minor to bind him with a contract to alienate property and such contract if entered into cannot be enforced against the minor: 39 Cal. 232 (P.C.), *Foll.* (*Graham and Mitter, JJ.*). MONOHAR DAS *v.* TARIM CHARAN.

34 C.W.N. 135=A.I.R. 1929 Cal. 612.

———*Contract of sale by guardian cannot be specifically enforced against the minor even when guardian has placed the other party in actual possession—Doctrine of part performance cannot be invoked.*

The guardian of a Hindu minor cannot enter into a contract on his behalf so as to bind the minor in such a manner as to be capable of being specifically enforced against the minor: 11 Bom. 551 (P.C.) and 39 Cal. 232 (P.C.), *Rel. on.*

The matter cannot be regarded as different even if there was not only a contract by the guardian to convey the property, but, pursuant, to the contract the guardian, by way of partly performing the contract, has placed the other party in actual possession, for the doctrine of part-performance, being an equitable doctrine, can be held to apply to the person concerned, and if the contract is not a contract of the plaintiff who is suing, the equitable principle cannot be invoked against him: A. I. R. 1928 Mad. 407, *Rel. on.* (*Wallace and Srinivasa Ayyangar, JJ.*). NAGESWARA RAO *v.* MANDAVA. **110 I.C. 492=1928 M.W.N. 214=**
A.I.R. 1928 Mad. 830.

—Alienation—Guardian—Step-mother.

———Alienation by widow managing the estate of her son and step-son is binding on step-son, if for necessary purposes: 10 N.L.R. 133; 15 N.L.R. 55; A.I.R. 1923 Nag. 230 and A.I.R. 1925 Nag. 134, *Explained.* (*Findlay, J.C., Hallifax and Kotval, A.J.Cs.*). KESHAO *v.* JAGANATH.

92 I.C. 121=22 N.L.R. 5=
A.I.R. 1926 Nag. 81 (F.B.).

—Alienation—Guardian—Validity.

———A Hindu minor widow's mother who was staying with her effected the sale of her minor daughter's property to pay off the debts of the minor's husband; and the husband's separated step-brother was the purchaser of the property. The property of the minor was being managed by the step-brother of the minor's husband and not by her mother,

Held, that the mother was not the *de facto* guardian of the minor daughter. The husband's step-brother not only had the right under the Hindu Law to be the plaintiff's guardian but by his acts had actually assumed the role

HINDU LAW—Alienation—Lender's (alienee's) duty.

of her guardian. He should not therefore be allowed to deprive the minor of her property by getting a conveyance in his favour from the minor's mother who was not allowed to have anything to do with the minor's estate. The sale therefore was void and not binding on the minor. And the sale being void the husband's step-brother was not entitled to be paid the amount that he spent to to relieve the burden on the estate as he was only a volunteer inasmuch as he had no title to the property: 38 Mad. 1125; 17 Bom. L. R. 1134; 17 M.L.T. 138; 2 I. A. 131 (P. C.) and 27 Bom. 390, *Rel. on.* (*Devadoss and Mackay, JJ.*). ALAGUMPERUMAL KARAYALAR *v.* VINAYAGATHAMMAL.
117 I. C. 731=29 M. L. W. 6=A.I.R. 1929 Mad. 110=55 M.L.J. 861.

—Alienation—Lender's (alienee's) duty.

———*Need not look to application of the surplus.*

Where a purchaser acting in good faith upon due inquiry, is able to show that the sale itself was justified by legal necessity, he is under no obligation to inquire into the application of any surplus and is not bound to make re-payment of such surplus to the members of the family challenging the sale. (*Mirza and Baker, JJ.*). GAJONAN SITARAM *v.* SITARAM LOGHUNATH. **114 I.C. 245=30 Bom. L.R. 1629=A.I.R. 1929 Bom. 55.**

———*Sale by father—Vendee to prove good faith and consideration—He need not enquire how the sale price was utilised.*

Where it has been established that the alienation by father was made for a necessary purpose, *e.g.*, in order to pay off an antecedent debt which was binding upon the sons and recoverable from the joint family property and it is not shown that the vendees knew the father to be an immoral man or that his immorality was so gross and so notorious that they must be presumed to have known of it, the vendees are only bound to show that they acted in good faith and that the sales were made for a necessary purpose and for a fair price. Having done this, they are under no obligation to enquire into the application of any surplus over the sum required to carry out the necessary purpose: A.I.R. 1927 P.C. 37, *Foll.* (*Eforde and Campbell, JJ.*). ULFAT RAI *v.* TEJ NARAIN.
106 I.C. 176=8 Lah. 632=29 P. L. R. 132=A. I. R. 1928 Lah. 83.

———*Purchaser need not enquire about application of surplus if the sale is for necessity.*

Where a certain amount is taken in cash by the vendor without specification of the nature of the necessity and the remaining consideration was legitimately taken in satisfaction of antecedent debts and the purchaser acted in good faith and, after due enquiry, and the sale itself was justified by legal necessity,

Held, that the purchaser was under no obligation to inquire into the application of the surplus and is not bound to make re-payment of such surplus to the members of the family challenging the sale: A.I.R. 1927 P.C. 37, *Foll.* (*Stuart, C. J. and Raza, J.*). NAGESH NATH *v.* RAM JANKI TEMPLE. **4 O.W.N. 1112=A. I. R. 1927 Oudh 590.**

———If it is once conceded that the sale by father was for legal necessity it is not for the vendee to pursue each and every item of the consideration and ascertain how it was applied: A.I.R. 1927 P.C. 37; A.I.R. 1927 P.C. 246; 6 M.I.A. 393 (P.C.), *Rel. on.* (*Sen and Pullan, JJ.*). SHYAM LAL *v.* L. BADRI PRASAD. **1929 A. L. J. 1149=51 All. 1039=A.I.R. 1929 All. 789.**

HINDU LAW—Alienation—Lender's (alienee's) duty.

———*Alienee antecedent creditor—Previous debts must be proved to be just.*

No doubt it is not sufficient for an alienee who is himself an antecedent creditor to prove merely the existence of his debts still it is not necessary for such an alienee to prove "necessity" for the antecedent debts. All that he need prove is that the antecedent debts were "just": 65 P.R. 1900 (F.B.), *Expl.* and *Appl.*; 1 Lah. 472, *Dist.*; 60 I.C. 714 and A.I.R. 1922 Lah. 301, *Cons.* (*Bhide, J.*). WARYAM SINGH *v.* INDAR SINGH. **116 I.C. 306=A.I.R. 1929 Lah. 242.**

———Consideration of mortgage being antecedent debts—Mortgagee need not make further enquiry as to existence of legal necessity. (*Findlay, J. C.*). RAM GOPAL *v.* AMBA PRASAD. **113 I.C. 891=A.I.R. 1929 Nag. 6.**

———*Alienee knowing alienor to be spendthrift—Alienee is bound to see that the money is utilized for the purpose for which it is borrowed.*

It is not generally the alienee's duty to see that the money advanced by him was properly expended for the purpose for which it was advanced. But where the alienee knows the spendthrift character of the vendor and knows that money which he might advance will not be spent for the purpose for which it is meant, and he still advances money, without seeing that it is applied for the purposes for which it is borrowed, the sale is apt to be set aside. (*Zafar Ali and Dalip Singh, JJ.*). NEKI RAM *v.* KURE. **112 I.C. 558=A.I.R. 1928 Lah. 526.**

———Where the borrower is a notorious spendthrift a creditor would not be protected merely by the fact that the money advanced by him was said to be required to pay off antecedent debts, especially when the vendee must have known the character of the vendor: 76 P. R. 1917, *Foll.* (*Addison, J.*). HARNAM SINGH *v.* JAGIR SINGH.
98 I.C. 865=A.I.R. 1927 Lah. 46.

———*Creditor need only make reasonable enquiry as to legal necessity.*

If a creditor, before embarking on transactions has made reasonable and *bona fide* inquiry and has satisfied himself to the best of his knowledge and belief that legal necessity exists, the real existence of such legal necessity in point of fact is not a condition precedent to his success: 6 M. I. A. 393, *Hanuman Prasad's case, Foll.* (*Findlay, Offg. J. C. and Prideaux, A. J. C.*). SHANKAR RAO *v.* PANDURANG. **92 I.C. 646=9 N.L.J. 22=A.I.R. 1927 Nag. 65.**

———*Creditor need not see to the application of the money.*

The creditor has only to enquire into the necessity for the advance, and if he acts honestly he is not bound to see to the application of the money: 6 M. I. A. 393 (P. C.). *Foll.* (*Campbell and Dalip Singh, JJ.*). ICHHAR SINGH *v.* NATHA.
98 I.C. 514=8 L.L.J. 479=27 P.L.R. 623=A.I.R. 1926 Lah. 693.

———Alienation by father for necessity—It is sufficient for vendee to satisfy himself as to the existence of necessity and he need not enquire as to actual application of the money: 65 P.R. 1900, *Foll.* (*Harrison, J.*). IBRAHIM *v.* SHAH MAHOMED. **92 I.C. 263 (Lah.).**

———*Alienation by mother of a minor, to pay prior mortgage—Purchaser is not bound to see that money was properly disposed of.*

Where it was found that the mother of a minor sold minor's property in order to pay off a mortgage,

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and it was desirable in the interests of the minor that the mortgage should be paid off, as the profits of the land mortgaged were more than the interest on the mortgage, but it was contended that the payment made by mother to the mortgagee was excessive.

Held, even though the mortgagee was paid in excess, that would not affect the position of a *bona fide* purchaser for value. It would be sufficient for him to enquire whether there was as a matter of fact a mortgage to be paid off. He would not be bound to follow the purchase money, and ascertain that is was properly disposed of by the plaintiff's guardian. (*Macleod, C. J. and Coyajee, J.*). VISHVANATHBHAT ANNABHAT *v.* MALLAPPA NINGAPPA. **92 I.C. 628=49 Bom. 821=27 Bom. L. R. 1103=A.I.R. 1925 Bom. 514.**

———No enquiry would sustain an alienation of the co-parcenary property unless the facts represented to the alienee were such as if true, would have justified the loan. (*Shadi Lal, C. J. and Malan, J.*). GIRDHARI LAL *v.* KISHEN CHAND.

85 I.C 463=5 Lah. 511= A.I.R. 1925 Lah. 240.

———*Existence of necessity is immaterial if lender has made enquiries and acts honestly—Amount of debt need not be equal to amount required for necessity—Rate of interest higher than Court rate does not vitiate alienation.*

The lender who advances money to a manager on mortgage of family property is bound to inquire into the necessities for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and under such circumstances he is neither bound to see to the application of the money nor need he ascertain that the amount of the money, which he advances, is equal in amount to the entire debt which constitutes the family necessity. The fact that the interest on the mortgage was higher than the Court interest on the decree, does not vitiate the mortgage, nor does the fact that the amount of property mortgaged was larger than the amount which was about to be sold under the decree. (*Simpson, A. J. C.*). SHEO BEHARI *v.* SHEO RATAN SINGH.

90 I. C. 345=A.I.R. 1925 Oudh 740.

———Alienee from widow, should assure himself not only that necessity exists but that it cannot be satisfied without borrowing. (*Dalal, J. C.*). RAMAN *v.* BARATI. **85 I.C. 483=27 O.C. 329=A.I.R. 1925 Oudh 557.**

———Where a person purchases the property of a minor at an auction sale in execution of a decree against a minor,

Held, it was not necessary for the purchaser to enquire whether the decree and the sale thereunder were for valid reasons. (*Walmsley and M. N. Mukerji, JJ.*). UMA CHARAN CHAKRAVARTI *v.* GUIRAM BAG. **83 I.C. 1040=39 C.L.J. 394=A.I.R. 1924 Cal. 1008.**

———*Honest enquiry as to existence of necessity is enough.*

An alienee who pays antecedent debts if he acts honestly and makes proper enquiry whether the debts are actually due is not responsible if he had been deceived. A just debt, incurred for a necessary purpose is always binding irrespective of the income and means of the alienor and just debts are

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debts which are actually due and are not immoral or illegal or opposed to public policy and not contracted as an act of reckless extravagance of wanton waste or with the intention of destroying interests of the reversioners. An alienee discharging an antecedent debt is not required to make an inquiry into the nature thereof. (*Broadway, J.*). ANOKH SINGH *v.* SAPURAN SINGH. **79 I.C. 980=A.I.R. 1923 Lah. 660.**

———Where a mortgagee wishes to enforce a charge against the family property the burden lies on him to satisfy the Court that the mortgage transaction had been entered into for family necessity or in lieu of antecedent debt of the father or with the consent, express or implied of all the members of the family. (*Lindsay and Sulaiman, JJ.*). INAYAT ELAHI *v.* HARDEO SAHAI. **74 I.C. 325=45 All. 692=21 A.L.J. 610=5 L.R.A. Civ. 61=A.I.R. 1924 All. 29.**

———*Purchaser must prove that on a* bona fide *enquiry he satisfied himself as to existence of legal necessity.*

A representation by itself raises no equity in favour of the purchaser or the mortgagee, for the law does not permit him to act upon that representation unless he satisfies himself by an honest and *bona fide* enquiry that the representation is true. Where he so enquires into the necessity for the loan or the sale and satisfies himself by an honest and *bona fide* enquiry that the necessity exists, the law completely protects him ; for it is not a condition for his success in any litigation which may arise out of the transaction that he should prove the existence of the necessity. It is sufficient if he proves that he made an honest enquiry and was satisfied that the necessity existed. The case would stand on a different footing if, in addition to the representation that he had power to charge the joint family property there is a further undertaking that he would make good the representation by partition or otherwise. Where it is proved to the satisfaction of the Court that there was such an undertaking on the part of the Karta of the joint family, the Court has ample power to compel him to do that which he undertook to do, but where there is no such undertaking, it is impossible for the Court to direct that the members of a joint family should hold their properties in definite shares and that the share of one or some of the members should remain charged for the payment of any money to the mortgagee or the purchaser: 20 W.R. 192; 13 C.W.N. 815 ; 14 C.W.N. 552, *Diss.*; 39 All. 500, *Foll.* (*Das and Bucknill, JJ.*). JATA DHARI SINGH *v.* DUKHI SINGH. **72 I. C. 1053=4 P.L.T. 64=A.I.R. 1923 Pat. 197.**

———Bona fide *enquiry made—Creditor is not bound to see to application of money.*

A creditor is not bound to see to the application of money. If a person dealing with the manager of a family or for the matter of that, with the guardian of a minor, does make enquiries and acts honestly, the real existence of an alleged and reasonable necessity is sufficient to validate the debt and he is not bound to see to the application of the money. (*Kanhaiya Lal and Sulaiman, JJ.*). RAGUBANS UPADHYA *v.* INDARJIT SINGH.

69 I.C. 683=45 All. 77=20 A.L.J. 886=A.I.R. 1922 All. 526.

———*Alienee made aware of maintenance claim and not acting* bona fide*—Sale could not defeat claim for maintenance.*

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A Hindu died leaving the plaintiff, his widow, and a son. The latter alienated almost all his father's properties to the defendants. The plaintiff then sued the defendants for recovery of maintenance and declaration of a charge on the said properties. The lower Courts found that the property left by the deceased was only limited ; that the son incurred debts for immoral purposes ; that at the time of purchasing the shops the vendees were warned that the widow had set up a claim for maintenance ; and that therefore they are not *bona fide* purchasers,

Held, the sale was not justifiable and could not defeat the plaintiff's right of maintenance : 2 Bom.494, *Foll.*; 22 All. 326, *Ref.* (*Abdul Raoof and Martineau, JJ.*). BHAGAT RAM *v.* MT. SAHIB DEVI. **67 I.C. 848=3 Lah. 55=21 P.W.R. 1922= A.I.R. 1922 Lah. 273.**

———*Reason given by alienor found to be proper by creditor—No enquiry into all circumstances is necessary.*

Bucknill, J.—When a lender contemplates lending money to a *karta* of a joint family, it is probable that according to the present law, he should make some clear enquiry as to the reason for which the loan is being arranged but provided that he is told that reason and that reason seems to him a proper one, it is not necessary for him to make any further enquiry. A lender need not examine entirely the circumstances of the borrowers or to do more than be assured by him that the money is required for the legal necessity or the family benefit of the family which the borrower represents. (*Dawson Miller, C. J. and Bucknill, J.*). HARI PRASAD SINGHA *v.* SOWRENDRA MOHEN SINHA. **66 I.C. 945=1 Pat. 506= 3 P.L.T. 709=A.I.R. 1922 Pat. 450.**

———*Scope of enquiry by alienee.*

An honest enquiry by the alienee of a joint family property from the Karta, for borrowing money for a lease, does not mean enquiry into the terms of the lease itself which would satisfy the lender that the lease would be beneficial to the family. Honest enquiry as to the purpose for which the money was required is sufficient. (*Das and Ross, JJ.*). SADHU SARAN PRASAD SINGH *v.* BRAHMDEO PRASAD SINGH. **61 I.C. 20= 6 P. L. J. 256=2 P. L.T. 318=A.I.R. 1921 Pat. 99.**

———In order that an alienation should be binding on the family, it must be proved that it was for family benefit and it is immaterial whether the alienation was by *karta* or not. Whether the transaction is a loan for purchase of goods, the creditor must show that he made enquiries and was satisfied that it was for family benefit. (*Jwala Prasad and Das, JJ.*). DEBI SARAN SAHAI *v.* BANKEY BEHARI LAL. **63 I.C. 223 (Pat.).**

—Alienation—Manager—Business.

———*Manager has no authority to bind any portion of family property to enable him to embark on speculative venture.*

The manager of a joint Mitakshara family cannot impose on the minor co-parceners the risk and liability of a new business started by himself and other adult members and has no authority to bind any portion of the joint family property in order to enable him to embark on a speculative venture. The contract for a cattle market and the opening of an Arhat for flour and ghee is business of a speculative character : 8 Bom. 602; 1 P.L.T. 136; 98 I.C. 651, *Ref.*; A.I.R. 1924 All. 379, *Cons.* and *Doubted* ; A.I.R. 1928 All. 403; A.I.R. 1926 Pat. 17,

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Cons. and *Appr.* (*Ross and Chatterji, JJ.*). BISWANATH SINGH *v.* KAYESTHA CORPORATION. **119 I.C. 405=8 Pat. 450=10 P.L.T. 379= A.I.R. 1929 Pat. 422.**

———*Alienation for discharging old debts of family business and to carry it on is justified.*

Where a business is carried on with joint family funds for the benefit of the joint family, the properties of the joint family, both movable and immovable, including the shares of minor members of the family, are liable for debts incurred in carrying on the business, and it is within the powers of the managing member in a proper case to sell immovable as well as the movable property for the purpose of discharging such debts or enabling the business to be carried on.

Where the manager sold family property for Rs. 43,500 to satisfy pre-existing debts to the amount of Rs. 38,000.

Held, that it was enough to support the sale without showing how the balance had been applied: A.I.R. 1927 P.C. 37, *Ref.* (*Sir John Wallis.*) NIAMAT RAI *v.* DIN DAYAL. **101 I.C. 373= 8 Lah. 597=54 I.A. 211=29 Bom. L.R. 886= 25 A.L.J. 599=45 C.L.J. 548=1927 M.W.N. 453= 4 O.W.N. 537=28 P.L.R. 463=8 P.L.T. 647= 26 M.L.W. 442=32 C.W.N. 233=9 L.L.J. 496= 39 M.L.T. 345=A.I.R. 1927 P.C. 121= 52 M.L.J. 729 (P.C.).**

———*Civil P. C., O. 40, R. 1—Mortgage by karta of Hindu joint family—Money used for family business—Receiver can be appointed in mortgage suit.*

Where a mortgage was created by the *karta* of a joint family, on the family properties for securing overdrafts on the banking account of limited company of which the *karta* was a member, and where the adult members of the family were aware of the mortgage and the money advanced was used for the family business.

Held, that in a suit on the mortgage, a receiver could be appointed. (*Sanderson, C. J. and Walmsley, J.*). RAM KUMAR LAL *v.* CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA. **87 I.C. 375=41 C.L.J. 203= A.I.R. 1925 Cal. 664.**

—Alienation—Manager—Consent of co-parceners.

———*Failure to challenge alienation by show or by overt act—Is not binding on co-parcener and is not consent.*

Even if the other co-parcener be a major at the date of the alienation, it cannot be said that he assented to or acquiesced in the alienation merely by his not bringing any action against the purchaser for establishing that the alienation cannot affect his rights in the property, or by his not manifesting by any other overt act that he did not acquiesce in the alienation so far as his interests in the property are concerned, much less such assent or acquiescence can be imputed to him while he is a minor. The maxim *actio personalis moritur cum persona* does not apply to an action by the co-parcener to challenge the alienation. (*Ramesam and Thiruvenkatachariar, JJ.*). *In the matter of* AMIRTHALINGA THEVAN. **112 I.C. 553=1928 M.W.N. 602= 28 M.L.W. 634=A.I.R. 1928 Mad. 986.**

———*Manager can alienate without express consent of other adult co-parceners.*

Ordinarily the *karta* or the recognized head of the family, be he the father or the eldest co-parcener, manages the family affairs. But circum-

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stances do often exist when on account of his incapacity, or temporary or permanent absence, or as in the case of a trading concern on account of a junior member being more competent to look after such affairs, a junior member is required to act as the *de facto* manager, and to deal with the family property. He then acts as the accredited agent of the family property in the same way and subject to the same limitations as the "*karta.*" He has the power as managing co-parcener to alienate family property for legal necessity so as to bind the interests not only of the minors, but of adult co-parceners without the express consent of such adult co-parceners. A general consent of this nature may be deducible in case of urgent necessity, from the very fact of the manager being entrusted with the management of the family. (*Kennedy, J.C. and Rupchand Bilaram, A. J. C.*). NARAINDAS *v.* KHATANMAL. **88 I.C. 916=19 S.L.R. 402= A.I.R. 1926 Sind 22.**

———*General consent by other members, does not authorise alienation beyond his powers.*

General consent given to a manager of joint Hindu family would not include a consent to alienations for value which are not within his province as manager, so that, for other alienations express consent would be necessary. Therefore the consent given to a manager by other members of the family does not necessarily include consent to future alienations. (*Macleod, C. J. and Crump, J.*). BALAPPA GHENAPPA *v.* AKKUBAI RAYAGOUDA. **74 I.C. 220=A.I.R. 1924 Bom. 170.**

———*Mortgage without legal necessity can be only with the consent of co-parceners.*

The head of a joint family cannot mortgage the joint family property without consultation with, and consent of, the other members, but where legal necessity is proved it is unnecessary to prove consent because it will be implied. But where the executor of the mortgage bond executes it as certificated guardian of a person who is really of age the recital in the bond to that effect negatives all idea of consent of such person. (*Coutts and Ross, JJ.*). KAMLA PRASAD *v.* NATHUNI NARAYAN SINGH. **66 I. C. 149=3 P. L.T. 401= 1922 P.H.C.C. 136=A.I.R. 1922 Pat. 347.**

—Alienation—Manager—Debts.

———*Paternal uncle as manager—Sale of nephew's share.*

An uncle acting as Manager of a joint family is not entitled to sell the share of his nephew in the joint family property in order to discharge a debt incurred by his own father even though the father be also the grandfather of the nephew whose property is alienated. (*Mears, C.J. and Piggott, J.*). MT. RAMESHA *v.* KALPOO RAI. **84 I. C. 84= 46 All. 264=22 A.L.J. 159=5 L.R.A. Civ. 112= A.I.R. 1924 All. 538.**

—Alienation—Manager—Extent of validity.

———*Contracts by manager for sale of immovable property, or for family necessity—Not enforceable against minor.*

A contract entered into by the manager on behalf of the joint family at a time when one of the members is a minor cannot be enforced as against the minor. The rule is not limited to contract on behalf of the minor for the purchase of immovable property but also applies to contracts made by managing members of a joint Hindu family for necessities or for the benefit of the family.

Such a contract, if it is not indivisible can, however, be enforced with variation except, with reference to the share of the minor : 39 Cal. 232 (P.C.), *Rel. on* ; A.I.R. 1926 Cal. 445, *Ref.*; 2 P.L.J. 513, *Diss. from.* (*Jack and Mitter, JJ.*). NRIPENDRA CHANDRA SHARKAR *v.* EKHERALI JOARDAR. **34 C. W. N. 272=57 Cal. 268= A. I. R. 1930 Cal. 457.**

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—Alienation—Manager—Gift.

———*Gift to stranger can be only for spiritual benefit.*

A head of a joint Hindu family has no authority to transfer a part of family immovable property by way of gift to a person who is not a near relation of his, the transaction not being for any pious purpose or for spiritual benefit even though he is under obligation to the donee (the donee having educated and helped donor's sons in difficulties.) (*Sulaiman and Pullan, JJ.*). UMA SHANKAR LAL *v.* MAHABIR PRASAD. **118 I.C. 235= A.I.R. 1929 All. 854.**

———*Gift to daughter's son is invalid.*

A gift by a manager of a joint Hindu family in favour of his daughter's son even of a small portion of the ancestral property is invalid : 31 Bom. 373 (P.C.), *Expl.* and *Dist.* (*Gokaran Nath Misra and Raza, JJ.*). BADLOO *v.* MT. BACHCHI. **98 I. C. 1047=3 O.W.N. 916= A. I. R. 1927 Oudh 25.**

—Alienation—Manager—Liability.

———Agra Tenancy Act (1926), S. 45—Grant of permanent lease of agricultural land by manager in excess of his powers—Tenants in possession and paying rent regularly—The tenant cannot be regarded as trespasser and cannot be ousted by a minor member of the family : 28 All. 30 and 3 A.L.J. 517, *Dist.* (*Kendall and Niamatullah, JJ.*). BASDEO *v.* MUHAMMAD YUSUF. **116 I.C. 491= 26 A.L.J. 1313=9 L.R.A. Rev. 321= 51 All. 285=A. I. R. 1928 All. 617.**

———*Benefit resulting from alienation, must be distributed over all the shares.*

If a manager of a Hindu family sells half the family estate for justifiable necessity, the benefit must be distributed over the shares of the various members. At the same time a manager can sell his own share for what he likes. The proper course is to divide the property by metes and bounds and to allot to the other members of the family their shares charged with the amount by which they have benefitted by the liquidation of debts : 37 Mad. 435, *Foll.* (*Jackson, J.*). ADINARAYANA REDDI *v.* SUBBARAYAL REDDI. **104 I.C. 621=A.I.R. 1927 Mad. 1116.**

———*Alienation resulting in benefit is binding.*

A transfer of joint property by the manager can be justified if it is not a mere speculation but results in actual benefit to the estate. The other members of the family cannot retain the benefit and at the same time repudiate the transaction by means of which the benefit has been acquired: 6 M.I.A. 393 (P.C.) and 4 All. 532, *Rel.*; 40 Mad. 709, *Expl.* (*Sulaiman and Banerji, JJ.*). JADO SINGH *v.* NATHU SINGH. **98 I. C. 773=48 All. 592= 24 A.L.J. 633=A.I.R. 1926 All. 511.**

———Manager alienating for legal necessity, as manager—Minor member joining in execution—Minor is bound by the alienation, as much, as he would be, if he had not joined in execution : 34 All. 296 (P.C.), *Dist.* (*Kennedy, J.C. and Rupchand Bilaram, A.J.C.*). NARAIN DAS *v.* KHATAMMAL. **88 I. C. 916=19 S.L.R. 402= A. I. R. 1926 Sind 22.**

———An unauthorised alienation for value by manager of property, effecting the whole interest

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of family property is good only against his share: 49 I.A. 358, *Ref.* (*Macleod, C.J. and Crump, J.*). BALAPPA GHENAPPA *v.* AKKUBAI RAYAGOWDA. **74 I. C. 220=A.I.R. 1924 Bom. 170.**

—Alienation—Manager—Limitation.

———*Unauthorised alienation by manager is void* ab initio *and* in toto.

Where the manager of a Hindu joint family mortgages the family property for purposes not recognised by the law, the mortgage is void *in toto* and *ab initio*. There is no question of the security failing at a subsequent date. Therefore where in a suit on such mortgage the plaintiff prays for an alternative relief that if the property is not liable, he must be given a personal decree against the assets of the mortgagor, Art. 116 and not Art. 97 applies: 27 Cal. 762, *Foll.*; 19 Cal. 123 (P.C.), *Dist.* (*Daniels and Wazir Hasan, A.J.Cs.*). GAJODHAR BAKHSH *v.* GAURI SHANKAR. **61 I.C. 205=8 O.L.J. 81=A. I. R. 1921 Oudh 47.**

—Alienation—Manager—Powers of.

———*Appropriation, for religious charity—If small, can be made without consent of co-parceners, but only by act* inter vivos.

A dedication of a portion of the family property for the purpose of a religious charity may, according to Hindu Law, be validly made without any instrument in writing, even if it be an appropriation of some landed property, and the act of the *karta* of the family would be validly assented to in any way, however informally, by the other members of the family. Such an appropriation may even (if the property allotted be small as compared with the total means of the family) be made by the *karta* without consent. But the appropriation or alienation must be made by the manager by an act *inter vivos* and must not be an alienation *de futuro* by will: 45 Mad. 281, *Reversed.* (*Lord Phillimore.*) GANGI REDDI *v.* TAMMI REDDI. **101 I.C. 79=50 Mad. 421=54 I.A. 136=4 O.W.N. 482=29 Bom. L. R. 856=25 A.L.J. 593=45 C.L.J. 512=31 C.W.N. 799=1927 M.W.N. 502=26 M.L.W. 139=8 P.L.T. 681=A.I.R. 1927 P.C. 80=52 M.L.J. 524 (P.C.).**

———On separation between three brothers the sons of two brothers with the son of the third have no authority to alienate the ancestral property of the joint Hindu families, to which they belong, in absence of necessity or in absence of antecedent debt. (*Stuart, C. J. and Raza, J.*). DY. COMMR., PARTABGARH *v.* SHEONATH. **100 I.C. 689=2 Luck. 459=4 O.W.N. 215=A.I.R. 1927 Oudh 149.**

———Alienation by manager other than father or grandfather cannot be supported unless legal necessity is established—No question of debts being immoral arises in such cases: A.I.R. 1923 All. 591; A.I.R. 1925 All. 169 and A.I.R. 1925 All. 180, *Dist.* (*Sulaiman, J.*). NANAKCHAND *v.* RAM PRASAD. **92 I.C. 316=A.I.R. 1926 All. 250.**

———*Power to mortgage extends only to the extent of legal necessity.*

A manager of a joint Hindu family cannot mortgage his own share in the family property for his own personal debts. His authority to mortgage the family property exists where a debt borrowed by him is justified by legal necessity or, if he happens to be the father of the sons who are also members of the joint family with him, is required for the payment of antecedent debts. Until partition no member of a family governed by the Mitakshara, whether manager or otherwise, can say that a particular

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share in the property belongs to him. The property has to be treated as a whole and undivided. If therefore, a manager executes a mortgage of a family property which is not justified either on the ground of legal necessity or of antecedent debt the transaction cannot affect any portion of the property alleged to have been so transferred. (*Case-law cited*). (*Hasan and Misra, JJ.*). JAI NARAIN *v.* MAHABIR. **95 I. C. 857=2 Luck. 226=13 O.L.J. 574=3 O.W.N. (Sup.) 23=A.I.R. 1926 Oudh 470.**

———*Benefit to estate does not justify manager's alienation.*

It is going too far to say that a manager of a Hindu joint family can justify a sale of joint family property merely on the ground that the sale at the time appeared to be advantageous. It would be going much further than any principle of Hindu Law warrants to hold, that because a manager of joint family considers it advantageous at the time to exchange joint family land for money, such an alienation can be treated as justified and therefore binding on the minor members of the family. (*Macleod, C. J. and Crump, J.*). VISHNU VISHWANATH *v.* RAMACHANDRA SADASHIV. **73 I.C. 1017=25 Bom. L.R. 508=A.I.R. 1923 Bom. 453.**

—Alienation—Manager—Presumption.

———Property mortgaged as self-acquired found to be ancestral.

Held, applying the principle that the Court should incline to the view that a transferor alienated the property in the capacity most favourable to a *bona fide* purchaser, that the defendant must be deemed to have mortgaged the property not only as his self-acquired property, but also as manager of a joint Hindu family to which the property really belonged: (1916) 2 M.W.N. 115, *Rel. on.* (*Phillips and Srinivasa Ayyangar, JJ.*). SEETHARAMAMURTHI *v.* RANGAYYA. **108 I.C. 273=1927 M.W.N. 769=A.I.R. 1928 Mad. 293.**

———Covenant by manager to indemnify vendee against loss if minor members challenged alienation,

Held, that insertion of such a clause is no more than a reasonable precaution against the undoubted risk that the vendors who were majors might afterwards make common cause with the vendors who were minors and endeavour by *suppressio veri* and *suggestio falsi* to get the sale set aside. (*Sir John Wallis.*) NIAMAT RAI *v.* DIN DAYAL. **101 I.C. 373=8 Lah. 597=54 I.A. 211=29 Bom. L.R. 886=25 A.L.J. 599=45 C.L.J. 548=1927 M.W.N. 453=4 O.W.N. 537=28 P.L.R. 463=8 P.L.T. 647=26 M.L.W. 442=32 C.W.N. 233=9 L.L.J. 496=39 M.L.T. 345=A.I.R. 1927 P.C. 121=52 M.L.J. 729 (P.C.).**

———*Manager purporting to mortgage whole property—Presumption as whole was mortgaged.*

Where the manager purported to mortgage the whole property and he was legally competent to do so, there is nothing in the document to repel the natural inference that what was intended to be conveyed was the whole property. It must be held that the mortgage was as to the whole, and the recital that the executant was the owner of only a half of it, may be treated as surplusage: A.I.R. 1924 Mad. 550; 28 I.C. 365, *Foll.* (*Venkatasubba Rao and Madhavan Nair, JJ.*). UNNAMALAI *v.* ABBOY CHETTY. **92 I.C. 524=23 M.L.W. 168=50 M.L.J. 172.**

HINDU LAW — Alienation — Manager — Presumption.

———*Document silent as to quantum of interest—Presumption is of entire family interest.*

Where a vendee purchases property from a *de facto* manager of the joint Hindu family and there is nothing in the document to show that the manager conveys only his share or that he reserves the shares of anybody from being conveyed, both the parties to the conveyance should be presumed to have intended that the whole interest of the family should be conveyed by it, although the vendor does not describe himself as the managing member of the family: 34 All. 296 (P. C.), *Dist.* (*Devadoss and Waller, JJ.*). CHENGAYYA *v.* DEVA SAMBANDHA. **92 I.C. 720=23 M.L.W. 390=1926 M.W.N. 289=A.I.R. 1926 Mad. 406=50 M.L.J. 145.**

—Alienation—Manager—Representation.

———*Family is sufficiently represented when manager is impleaded in mortgage suit.*

Where all the adult members of a family senior to the member not impleaded in the mortgage suit, execute the mortgage deed and are actually impleaded in the mortgage suit, the manager must be one of the senior members and the junior member therefore must be taken to be fully represented. The mere omission of his name from the array of defendants would not make the decree null and void: 34 All. 549, *Ref.* (*Sulaiman, Ag. C. J. and Kendall, J.*). DEO NARAIN *v.* DALIP. **121 I. C. 817=A.I.R. 1930 All. 541.**

—Alienation—Manager—Rights of alienee.

———*Alienee from the co-parcenary body—Can challenge alienations by manager only to the extent of protecting or defining his rights.*

A transferee of any property or interest in property from a co parcenary body acquires along with that property or interest, the right of the co-parcenary body to call in question a previous alienation made by the manager of the family, otherwise than for legal necessity, for the purpose of protecting or defining the property or interest acquired. The power of avoidance in the hands of the transferee cannot be greater than that which would have been exercised by the co-parcenary body at the moment immediately preceding the transfer. The power cannot be used by a mortgagee to resist a suit for redemption by a subsequent alienee of the equity of redemption, since this would be using it for a purpose beyond protection of the mortgagee's interest. Nor can it be used by the transferee of a mere equity of redemption under a voluntary deed of transfer: for in this case the deed would have sufficiently defined the interest acquired. A purchaser, however, at a Court sale in execution of a decree for sale of property subject to a mortgage can use the power to impugn the mortgage unless the validity of the mortgage has been decided by the Court as against the mortgagor, *i.e.*, the co-parcenary body: 33 All. 783 (F.B.), *Cons.* and *Rel. on*; A.I.R. 1924 All. 51, *Expl.* and *Dist.*; A.I.R. 1925 All. 339; A.I.R. 1926 All. 718, *Rel. on*; A.I.R. 1926 P.C. 109, *Cons.*; 42 All. 50, *Dist.* (*Ashworth and King, JJ.*). MADAN LAL *v.* GAJENDRAPAL SINGH. **116 I.C. 436=51 All. 575=1929 A.L.J. 344=A. I. R. 1929 All. 243.**

—Alienation—Manager—Suit against.

———Property proved to be family property—Mortgage by manager—Description in mortgage deed that manager executed the deed as owner does not affect actual character of the deed. The natural and legitimate inference to be drawn should be

HINDU LAW—Alienation—Manager—Validity.

that the defendant has been sued in the capacity of the manager. It is not necessary that the plaintiff should state in distinct terms that he is suing the manager: or that the defendant is being sued as manager: 22 M.L.J. 45 and 1 O. L. J. 456, *Rel. on.* (*Gokaran Nath Misra and Raza, JJ.*). PIRTHIPAL SINGH *v.* RAMESHWAR. **99 I.C. 154=2 Luck. 288=3 O.W.N. 954=A.I.R. 1927 Oudh 27.**

—Alienation—Manager—Validity.

———An exchange of property cannot be inoperative only because of a defect in the title of a party to it.

A manager of joint Hindu family exchanged family property, and the transaction was not challenged by other members,

Held, that the exchange was valid. (*Niamatullah, J.*). GOPI RAM *v.* DURJAN. **113 I. C. 753=A.I.R. 1929 All. 63.**

———*Alienation held binding—Purchaser cannot be required to pay over again the whole or any portion of the purchase money.*

Ananthakrishna Iyer, J.—A sale impugned must either be upheld or held to be not binding. If a sale is held not binding, then questions of equity would crop up. But in cases where the sale is held to be binding, in ordinary cases any question of equity would not arise at all. The finding that a sale is binding implies that either the persons who effected the sale had authority or that having regard to the particular circumstances in which the sale was held authority to sell must be implied in law. Whatever might be the exact ground on which a sale is upheld if a sale is really upheld, the Court is not justified in asking the purchaser to pay again the whole or any portion of the purchase money: A.I.R. 1927 P.C. 37 and A.I.R. 1927 P.C. 121, *Rel. on.* (*Srinivasa Aiyangar and Ananthakrishna Aiyar, JJ.*). SATHYAPPAN AMBALAM *v.* VEDIVELU. **109 I. C. 106=A.I.R. 1928 Mad. 450.**

———*Lease to mortgagee—Interest on mortgage to be deducted out of rent—Rent consequently reduced very much—Lease not binding.*

Where a mortgage and a lease were both contemporaneously executed and the lease provided, that out of the rent payable by the lessee under its terms, the interest that was due to him upon his mortgage-debt should be deducted, the result being that after all the different payments had been made as the lease provided, the gross amount of Rs. 16,775 rent was reduced to Rs. 3,804 per annum,

Held, it must be regarded as it was drawn and so regarding it it is impossible successfully to contend that the lease is of such a character that it would justify the manager of a joint family estate binding the joint family property by means of its terms. (*Lord Buckmaster.*) NARAIN DAS *v.* ABINASH CHANDAR. **69 I.C. 273=31 M. L.T. 217=16 M.L.W. 780=1922 M.W.N. 791=27 C.W.N. 239=21 A.L.J. 201=37 C.L.J. 457=A.I.R. 1922 P.C. 347=44 M.L.J. 728 (P.C.).**

—Alienation—Manager of endowment.

See HINDU LAW—RELIGIOUS ENDOWMENT—ALIENATION.

—Alienation—Necessity.

Benefit to estate.
Burden of proof.
Business.
Consent of co-parceners.
Debts.
Father.

HINDU LAW—Alienation—Necessity—Benefit to estate.

House repairs.
Interest.
Litigation.
Maintenance.
Marriage.
Partial necessity.
Pressure.
Presumption.
Proof of.
Purchase of property.
Purchaser's rights.
Recitals.
Religious ceremony.
Re-purchase of property.
Sale to mortgage.
Test of.
Widow.
Miscellaneous.

—Alienation—Necessity—Benefit to estate.

———Where the adult members of a family purchased their residential house which was also used for carrying on business and it appeared that the purchase was beneficial to their interests,

Held, that a mortgage of the purchased property to raise money towards a portion of the purchase money was binding on the minor members of the family. (*Mukerji and Bennet, JJ.*). GOVINDJI *v.* FIRM LALLAMUL HARDEO DAS.
1930 A.L.J. 1170=A.I.R. 1930 All. 767.

———*Alienation by prudent manager—Justification on the principle of benefit to estate—Degree of prudence.*

In order to sustain an alienation of joint Hindu family property by the managing member of the family (and the same principle would admittedly apply in the case of a guardian of a Hindu minor) the transaction must be one which is for the benefit of the estate and such as a prudent owner would have carried out with the knowledge available to him at the time, and such transactions are justifiable on the principle of benefit to the estate and are not limited to transactions which are of a defensive nature. The degree of prudence, which might fairly be required from a man who was not the sole owner of the property, would naturally be somewhat greater than that which might be expected in the case of a sole owner and might be that demanded in ordinary case from a trustee: A.I.R. 1928 All. 454 (F.B.); A.I.R. 1928 All. 403 and A.I.R. 1925 All. 333, *Rel on*; A.I.R. 1929 Bom. 251, *Diss. from* and A.I.R. 1916 P.C. 110, *Dist.* (*Tek Chand and Agha Haidar, JJ.*). RALLARAM *v.* GOVARDHAN DAS. **A.I.R. 1930 Lah. 679.**

———Any act for which the character of "legal necessity" or of "benefit to the estate" can be claimed must be an act of a defensive character: A.I.R. 1925 All. 333; A.I.R. 1928 All. 403; A.I.R. 1929 All. 139 and A.I.R. 1929 Bom. 251, *Rel. on*; A.I.R. 1928 All. 454 and A.I.R. 1922 Bom. 122, *Expl.* (*Jackson, A.J.C.*). NAGRAJ *v.* GANPAT.
121 I.C. 669=26 N.L.R. 56=A.I.R. 1930 Nag. 86.

———*"Necessity" and "Benefit"—Difference between.*

The benefit to the estate for supporting an alienation must be of a protective character. The necessity involves some notion of pressure from without. The benefit to the estate would not include an alienation of the property for the purpose of investing the proceeds so as to yield a better return, and would not imply vast powers of management

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which might amount to an authorization to embark on speculative ventures. (*Case-law discussed.*)

Son's properties inherited from his maternal grandfather sold by father. Father purchased other properties and paid the sale proceeds towards their price. No sale-deed was executed of the properties purchased by father but he got possession of them, and realised far more income than the original properties of the son yielded.

Held, that the minor lost his absolute property immune from any liability to pay his father's debts and instead, did not even get any sale-deed in his name, but a contract of sale passed in the name of the father. The transaction effected by the father was not for the benefit of the minor, nor was it brought about by any necessity or any pressure on the estate. The alienation was detrimental to the real interest of the minor and was not binding on him. (*Patkar and Murphy, JJ.*). RAGHO TOTARAM *v.* ZAGA EKOBA. **118 I.C. 555=53 Bom. 419=31 Bom.L.R. 364=A.I.R. 1929 Bom. 251.**

———Anything which is for the benefit of a reversionary heir may properly be regarded as necessity. (*Shadi Lal, C.J. and Skemp, J.*). SADHU SINGH *v.* CHIMNA RAM. **116 I.C. 898=30 P.L.R. 267=A. I. R. 1929 Lah. 397.**

———Pre-emption necessary for safeguarding family interests—Money raised for satisfying pre-emption decree is for legal necessity: A.I.R. 1925 All. 333, *Considered.* (*Dalal and Pullan, JJ.*). CHOTKHAN LAL *v.* GANGA SINGH. **99 I.C. 382=A.I R. 1927 All. 219.**

———*Necessity includes benefit of estate.*

The manager of a joint family has an implied authority to do whatever is best for all concerned, the test being whether the transaction was one into which a prudent owner would enter in order to benefit the estate. The word "necessity" includes not only a case of actual pressure on an estate or a danger to be avoided by prompt discharge of liabilities but also an act benefitting the estate. (*Case-law considered*). (*Campbell, J.*). ROSHAN LAL *v.* RUSTOMJI. **92 I. C. 669=A. I. R. 1926 Lah. 249.**

———*Manager purchasing house for benefit of the family—Minors are bound.*

Where the manager of a joint Hindu family mortgages family property in order to raise money for purchasing immovable property for the benefit of the family, for example, to pay off the family debt by the sale of the property so purchased at a higher price, the mortgage is binding on the minor members of the family, being entered into for family necessity: A.I.R. 1923 Bom. 453 and A.I.R. 1925 All. 333, *Dist.*; 6 M.I.A. 393; A.I.R. 1922 Bom. 122 and 42 All. 559, *Rel. on.* (*Raymond, A. J. C.*). RATILAL SON OF MOOLJI *v.* RAGHUNATH MULJI. **92 I.C. 378=A.I.R. 1926 Sind 184.**

———*Benefit and necessity are not convertible terms—Sale to prevent continuous loss is for necessity.*

A sale by the manager of joint Hindu family property will be upheld not only in cases in which the object of the sale is to relieve the estate of any actual pressure or to avert a danger, but also in cases where a benefit is to be conferred upon the estate. The answer to the question what constitutes "benefit to the estate" must vary according to the circumstances of each case: 40 Mad. 709 and 6 M.I.A. 393 (P.C.), *Rel. on.*

Sale intended to avert future and continuous loss to the family is for necessity: 23 C.W.N. 858, *Ref.*

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(*Wazir Hasan, A. J. C.*). SURAJ NARAIN *v.* GURCHARAN PRASAD. **91 I.C. 495=2 O.W.N. 904=A. I. R. 1925 Oudh 743.**

———*Question of benefit to be decided on the circumstances of each case.*

There is no hard and fast rule for determining the question as to what constitutes and what does not constitute "benefit to the estate". What may be regarded such a benefit in one case may not be so regarded in another. The answer to a question as to whether a certain loan falls within the description "benefit to the estate" or it does not fall within that description must depend on a consideration of the entire circumstances of every particular case: 40 Mad. 709, *Foll.*

Where the mother acting as the guardian of her minor son mortgaged the family lands for obtaining a loan for the purpose of re-starting the cultivation of *sir* lands of the family which (cultivation) had been suspended for some time,

Held, that in the circumstances of the case the loan was justifiable and binding. (*Wazir Hasan, A.J.C.*). CHANDRIKA PRASAD *v.* RAMSAGAR. **89 I.C. 567=2 O.W.N. 425=12 O.L.J. 565=A.I.R. 1925 Oudh 459.**

———*Benefit to be determined as at the date of transfer.*

The right way of judging ordinary cases whether a loan on a mortgage of family property for purchasing an estate constitutes a benefit to the family is not by looking at the ultimate result of the purchase many years after. The question of benefit must be determined with reference to the time of the purchase. (*Kotval and Prideaux, A.J.Cs.*). RUKHMABAI *v.* VITHUSA. **78 I.C. 384=A.I.R. 1924 Nag. 398.**

———A mortgage of family property executed for payment of a pre-emption decree is binding on the family. The doctrine of the benefit of the family has been introduced in the Hindu Law: 33 All. 242, *Foll.* (*Gokul Prasad, J.*). SHANKAR SAHI *v.* BAICHU RAM. **74 I.C. 18=A.I.R. 1923 All. 569.**

———Mortgage by manager for paying portion of purchase money for buying lands for family on the mortgage—Purchase not beneficial, not yielding even the interest on the mortgage—Mortgage is not binding on minor's share. (*Sadasiva Iyer and Spencer, JJ.*). SUBRAMANIA CHETTY *v.* CHIDAMBARA MUDALI. **69 I.C. 756=1921 M.W.N. 740=14 M.L.W. 495=41 M.L.J. 459.**

———*Contract by adult members to dispose of dilapidated house—Minors are bound—'Benefit' may sometimes mean 'necessity.'*

The adult co-parceners of a joint Hindu family contracted to sell to the plaintiff a house belonging to the family which was not in good condition and which did not fetch any rent. It was not necessary to sell the house as the family was in good circumstances. When the plaintiff sued for specific performance of the contract to sell, the minor co-parceners objected on the ground that there was no necessity for sale and that therefore the contract could not affect their interest,

Held, as the adult co-parceners very properly decided to dispose of the house which was in dilapidated condition and which the Municipal Committee wanted to pull down the minor co-parceners were bound by the agreement. The term 'necessity' must not be strictly construed. The benefit of the family may under certain circumstances mean a necessity for the transaction.

HINDU LAW—Alienation—Necessity—Burden of proof.

(*Shah and Fawcett, JJ.*). NAGINDAS MANEKLAL *v.* MAHOMED YUSUF MITCHELLA. **64 I.C. 923=46 Bom. 312=23 Bom. L.R. 1094=A I.R. 1922 Bom. 122.**

———*Starting of new business may justify alienation in proper circumstances.*

A benefit to the family is sufficient ground for upholding an alienation: 42 All. 559 and 5 P.L.J. 622, *Foll.* It is undoubtedly good law that a manager of a joint family property is not justified in alienating or pledging that property for purposes of speculative nature, but it cannot be laid down as an invariable rule that in no case can the starting of a new business justify an alienation of joint family property. Here the circumstances of the family have to be taken into account. (*Daniels, A.J.C.*). SHEO RATAN SINGH *v.* DRIGPAL SINGH. **63 I.C. 554=8 O.L.J. 314=A.I.R. 1921 Oudh 163.**

—Alienation—Necessity—Burden of proof.

———When alienees give evidence showing *prima facie* the existence of "just antecedent debts" the onus is on the plaintiff's who challenge the alienation to rebut that evidence: 1 Lah. 472, *Rel. on.* (*Bhide, J.*). KEHR SINGH *v.* GANGA SINGH. **A.I.R. 1930 Lah. 130.**

———*All members joining in the sale is not enough proof of necessity.*

A vendee may be excused from making further detailed enquiries, but to start with there must be certain circumstances in front of him to give him the impression of the probability of the existence of a valid necessity. But where there are no such circumstances, the mere fact that all the major members of the joint family joined in the sale, would not entitle a Court to hold that a valid necessity existed. Nor would it throw the burden of proving want of legal necessity on the minor members challenging the sale: 8 Bom. 602; A.I.R. 1924 Oudh 300; A.I.R. 1925 All. 28 and A.I.R. 1924 All. 912, *Dist.* (*Dalal, J.*). BHAGWAT *v.* SALAMAT KHAN. **114 I.C. 185=A.I.R. 1929 All. 205.**

———*Mortgagee must prove that manager was pressed by legal necessity to borrow money on hard and unconscionable terms.* (*Cf.* A.I.R. 1928 P.C. 64—*Ed.*).

The covenants in a mortgage postponing redemption for a period of 30 years certain and authorizing the mortgagee to spend as much money as he chose over new constructions of the mortgaged premises, which money may far exceed the value of the mortgaged property and entitling the mortgagee to claim interest on the money so spent at the rate of 24 per cent. per annum with the compelling obligation on the mortgagor to keep the interest running for a period of 30 years are on the face of them hard and unconscionable. In such a case it is the obvious duty of the mortgagee to satisfy the Court by the proof of the fact that the mortgagors were pressed by some necessity justifiable in the eyes of the Hindu Law to borrow money on such terms: A. I. R. 1919 P. C. 12 and A. I. R. 1923 P. C. 37, *Ref.* (*Wazir Hasan and Nanavutty, JJ.*). RAM KISHORE *v.* BAIJ NATH. **113 I.C. 410=3 Luck. 598=5 O.W.N. 395=A.I.R. 1928 Oudh 287.**

———Alienee must prove necessity or his belief as to there being necessity—Due enquiry and his *bona fides* are necessary requisites. (*Greaves and Mukerji, JJ.*). SANTOSH KUMAR *v.* GANESH CHANDRA. **98 I.C. 919=31 C.W.N. 65=A.I.R. 1927 Cal. 160.**

HINDU LAW — Alienation—Necessity—Burden of proof.

———*Mortgage by Karta without necessity—Voidability is presumed to be known to the parties—Mortgagee alleging that he discovered it to be void later on must rebut the presumption.*

If the Karta of a joint Hindu family mortgages the joint family property without legal necessity, and not for the purpose of discharging an antecedent debt, the parties to the mortgage must be presumed to know that the mortgage is unenforceable and void. It is necessary for the plaintiff alleging that he discovered it to be void at a later date within S. 65 of the Contract Act to rebut the presumption by proving that in fact he discovered at a later date that the mortgage was void: A.I.R. 1923 P. C. 189, *Foll.*; A.I.R. 1922 P. C. 403; 20 O. C. 306 and A.I.R. 1925 Oudh 212, *Dist.* (*Raza and King, JJ.*). SHAMBHOO SHUKUL *v.* DHANESHAR SINGH. **101 I.C. 265=4 O.W.N. 256=A.I.R. 1927 Oudh 177.**

———*Alienee has to prove necessity.*

The alienee has to prove the existence of necessity in the case of alienation by limited owner. The reversioner is not to prove its absence in the first instance: A. I. R. 1924 P. C. 56 (P. C.); 21 All. 71 (P.C.) 34 Cal. 329 (P.C.), *Foll.* (*Cuming and B. B. Ghose, JJ.*). UPENDRANATH *v.* KIRAN CHANDRA. **97 I.C. 149=43 C.L.J. 562=A. I. R. 1926 Cal. 1046.**

———*Burden is on transferee to prove legal necessity—Long lapse of time will lessen the burden.*

The onus of proving legal necessity lies upon the transferee, but if long time has lapsed since the transaction it will not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the sale as in the case of alienations made at more or less recent dates, and in such circumstances presumptions are permissible to fill in the details which have been obliterated by time. (*Kinkhede, Offg. A. J. C.*). KALOOSINGH *v.* MT. SUNDARABAI. **95 I.C. 707=A.I.R. 1926 Nag. 449.**

———*Burden of proof is on alienee—Quantum of proof depends on circumstances of each case.*

It is well settled that it is for the mortgagee of a joint family property to prove legal necessity. He may either prove as a fact that there was such necessity or prove that he honestly did all that was reasonable to satisfy himself that the required necessity existed. The quantum of proof which is required in any particular case is not capable of a general and inflexible answer and depends on the circumstances of that particular case. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*). NARAINDAS *v.* KHATANMAL. **88 I.C. 916=19 S.L.R. 402=A.I. R. 1926 Sind 22.**

———*Sale in execution of decree against grandfather—Contesting grandson must prove immoral purpose.*

Though primarily the burden of proving that the sale of property belonging to a joint family being valid is on the purchaser, yet in the case of an auction sale the burden is shifted to the contestor. Therefore where in execution of a decree against the grandfather, ancestral property is sold the onus is on the grandson to prove that the transfer was for an immoral purpose. (*Pullan, A.J.C.*). BADRI NATH *v.* RADHABALLABHRAJJI. **80 I.C. 622=A.I.R. 1925 Oudh 199.**

———*Son suing to set aside alienation by father—Necessity to be proved by transferee.*

In every case the burden *prima facie* lies on the plaintiff to establish his case; but where it is either admitted or proved that the plaintiff was a member of a joint Hindu family that the property transferred was an ancestral property, and that it had been transferred without the plaintiff's consent and not apparently in lieu of antecedent debt or at an auction-sale, the burden would lie on the defendant transferee to justify the alienation. (*Lindsay and Sulaiman, JJ.*). BAIJNATH RAI *v.* GOKUL RAI AND AFTER HIS DEATH BRIJ BEHARI RAI AND AVADH BEHARI RAI. **74 I.C. 498=45 All. 718=4 L.R.A. (Civ.). 598=21 A.L.J. 659=A. I. R. 1924 All. 37.**

———*Burden of proving necessity lies on vendee's pre-emptor and not on sons.*

A pre-emptor cannot stand in a better position against the sons than the vendee from the father, except that, being in a less favourable situation than the vendee to prove proper inquiry as to the existence of necessity or of antecedent debts of the father, less strict proof of inquiry may be required of him. The burden of proving their existence however is not shifted by pre-emption from the transferee to the sons, unless the sons were parties to the pre-emption decree: 9 O.L.J. 601, *Rel. on.* (*Dalal, J.C. and Neave, A. J. C.*). AVADH RAM SINGH *v.* MABHUB KHAN. **79 I. C. 725=10 O.L.J. 525=A.I.R. 1924 Oudh 255.**

———*Debts not validly contracted by father cannot be treated as valid after father's death.*

To validate an alienation by father, existence of legal necessity must be proved, even though the father is dead at the date of suit. A transaction otherwise invalid cannot be treated as valid by reason of the father having died prior to the suit: A.I.R. 1922 P. C. 247, *Ref.* (*Daniels, J.*). RAJA SINGH *v.* DURGA SINGH. **73 I. C. 607=A. I. R. 1923 All. 529.**

———*Evidence Act, Ss.* 101, 102, 103—*Alienee preempted by another—Onus of proving necessity is not shifted to sons.*

A pre-emptor cannot stand in a better position against the sons than the vendee from father except that, being in a less favourable situation than the vendee to prove proper enquiry as to the existence of necessity or of antecedent debts of the father, less strict proof of enquiry may be required of him. The burden of proving their existence, however, is not shifted by pre-emption from the transferee to the sons, unless the sons were parties to the pre-emption decree. (*Ashworth, J.C.*). JAMNA PRASAD *v.* BALBHADDAR. **74 I.C. 353=25 O.C. 388=9 O. L. J. 601=A.I.R. 1923 Oudh 147.**

———*Burden of proof of legal necessity on the pre-emptor of the vendee.*

In a suit by the son to set aside a sale by the father and uncle of joint ancestral property, against the pre-emptor of the vendee the burden of proving legal necessity is on the pre-emptor: 8 A.L.J. 1022, *Foll.* (*Rafique and Stuart, JJ.*). RAM SARUP SINGH *v.* RAM SARAN SINGH. **69 I.C. 845=20 A.L.J. 935=A. I. R. 1922 All. 539.**

———*Mortgage by Manager—No suspicious circumstances—Onus is on those who repudiate the transaction.*

Where the father or manager of a joint Hindu family alienates family property, in the absence of evidence tending to shake confidence in the transactions themselves, or in the conduct and care of the manager or of the creditor, the onus is shifted back on to the sons or members of the family who desire to repudiate the transactions, to hold otherwise is to hold out to litigants the deliberate invi-

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tation, one might use the word temptation, to attempt to conform to an impossible standard of evidence by calling direct testimony which must of necessity be valueless and frequently deliberately perjured. Where a mortgage of a joint Hindu property is made and there is nothing to show that the manager went out of his way to borrow money for purposes which he knew to be unlawful or those which could confer no benefit on the family and there are no circumstances raising suspicion the presumption must be in favour of legality of those documents and the burden of proof is shifted to the shoulders of the defendants who desire to repudiate the transaction: A.I.R. 1916 P. C. 110, *Foll.* (*Walsh and Ryves, JJ.*). PEARE LAL *v.* SUNDER SINGH. **68 I. C. 805= 44 All. 756=20 A. L. J. 658= A. I. R. 1922 All. 436.**

———*Mortgage—Plea of absence of necessity for high rate of interest not raised in written statement—Alienee need only prove necessity for loan.*

The facts necessary to prove legal necessity for the execution of the bond may be entirely different from those which are necessary to prove that there was necessity for borrowing money at a particular rate of interest or compound interest, and unless the plea of absence of legal necessity for interest, is specifically taken in the written statement, the only onus which remains upon the plaintiff is that of proving that the bond itself *i.e.*, the borrowing of the money, was justified by legal necessity and not of proving necessity for the rate of interest also. (*Dawson-Miller, C.J. and Adami, J.*). AINTHAN GOPE *v.* KHAKHAR SAHU. **67 I.C. 790=1 Pat. 612=3 P.L.T. 367= A.I.R. 1922 Pat. 356.**

—Alienation—Necessity—Business.

———Father mortgaging ancestral property and spending money borrowed for business which is for benefit of family—Such alienation is for family necessity though business is not ancestral: A.I.R. 1924 All. 379 and A.I.R. 1929 Mad. 153, *Rel. on.* (*Zafar Ali and Jai Lal, JJ.*). MOHAN LAL *v.* DIWAN CHAND. **A.I.R. 1929 Lah. 687.**

———*Money borrowed for speculative purchase, is not for necessity.*

Where money is borrowed merely for a speculative purchase in the commodity market by a person whose occupation was not, and never had been, trading, the debt is not for carrying on a family business or to start any family business. A mere random act of speculation cannot be treated as a legitimate act of borrowing for business purposes: A.I.R. 1928 Lah. 111, *Ref.* (*Broadway and Harrison, JJ.*). THANESHER *v.* RAM CHAND. **119 I.C. 239=11 L.L.J. 85= A. I. R. 1929 Lah. 466.**

———*Mortgage for family trade is binding.*

Where a family shop is being carried on for the benefit of a joint family, the powers of the adult members in charge of such shop to borrow money for purposes of the business and mortgage family properties to secure re-payment of such money are wide, and the minor co-parceners are liable to the extent of their interest in the joint family property for a mortgage executed by the adult members: 34 Bom. 72, *Foll.* (*Fawcett, Ag. C. J. and Mirza, J.*). SHIVLAL *v.* TANNIRAM. **113 I. C. 353= 30 Bom.L.R. 1136=A.I.R. 1928 Bom. 444.**

———Alienation by *de facto* guardian—Investment of proceeds in trading business—Stringent necessity of money for business must be proved. (*Findlay, J. C.*). MAHADEO *v.* SOMAJI. **99 I.C. 1050= A. I. R. 1927 Nag. 145.**

HINDU LAW — Alienation—Necessity—Consent of co-parceners.

———कुटुबार्थे—*Meaning of—Extension of money-lending business is not necessity.*

The original word in the Mitakshara कुटुबर्थे is not easy to render into English, and there may be cases where the benefit approximates so closely to necessity that the transaction may be upheld and even specific performance ordered. Alienation of ancestral property by father to extend his money-lending business cannot be said to be one for necessity. (*Raymond and Madgavker, A.J.Cs.*). RATANSING SULABSING *v.* HANIKRAM CHATOMAL. **20 S.L.R. 220=A.I.R. 1927 Sind 219.**

———*Father—Unyielding property — Difficult to manage—Proceeds applied to extension of existing family business—Sale is binding on sons.*

Under the Hindu Law a transfer can be made by the manager of a family either for legal necessity or for the family benefit. A transaction which is entered into by the father manager of a joint family for the purpose of disposing of property, which yielded a small profit and was difficult to manage, and to apply the sale consideration to the extension of the existing family business, cannot be questioned by the sons. Whether the business was not of a speculative nature, the subsequent failure of that business affords no criterion for determining whether the transaction was originally a prudent transaction which the manager of a Hindu family, and especially a father was entitled to make for the family benefit. (*Lindsay and Kanhaiya Lal, JJ.*). JAGMOHAN *v.* PRAG AHIR. **87 I.C. 27=47 All. 452=23 A.L.J. 209= A.I.R. 1925 All. 618.**

———*Widow can alienate if prudent conduct of business requires it.*

It is a general rule of Hindu Law that a widow in possession of her husband's estate, cannot alienate movable or immovable property inherited from him except for legal necessity. But in the course of management of her husband's business, she can transfer only if the prudent conduct of business requires it, the prudent conduct of business amounting to necessity. The profit or loss on a transfer made by a widow is not a test of necessity. (*Stuart and Ryves, JJ.*). PAHALWAN SINGH *v.* JIWAN DAS. **59 I.C. 162=42 All. 109=18 A.L.J. 41.**

—Alienation—Necessity—Consent of co-parceners.

———*Adult member joining in execution does not supply evidence of necessity.*

Although the fact that all the adult members of a family joined in the execution of a deed of transfer is sufficient to supply any lacuna that may exist in the evidence of legal necessity, that fact alone cannot supply the evidence of legal necessity when there is no evidence of legal necessity on the record: 8 Bom. 602 and A.I.R. 1924 All. 912, *Ref.* (*Mukerji and Bennet, JJ.*). SALAMATKHAN *v.* BHAGWAT. **1930 A.L.J. 634= A.I.R. 1930 All. 379.**

———Legal necessity is not conclusively established by attestation of other members. (*Sulaiman and Kendall, JJ.*). SRI NATH. *v.* JAGANNATH. **A.I.R. 1930 All. 292.**

———One member consenting to sale of family property by another does not make former vendor:

HINDU LAW—Alienation—Necessity—Consent of co-parceners.

42 All. 264, *Not appr.*; 21 Cal. 496 (P.C.), *Ref.* (*Wazir Hasan, Ag. C.J., Misra and Pullan, JJ.*). HIWANCHAL SINGH *v* AJODHYA SINGH.
115 I.C. 433=6 O.W.N. 374=4 Luck. 370= A.I.R. 1929 Oudh 265 (F.B.).

———Where joint family property is alienated assent by other co-parceners is only evidence of justifiable family necessity and is of no avail except by way of estoppel when admittedly there was no family necessity. (*Dalal, J.C. and Wazir Hasan, A.J.C.*). MT. KALKA DEVI *v.* GANGA BAKSH SINGH. **88 I.C. 127=12 O.L.J. 306= A.I.R. 1925 Oudh 435.**

———Where the transaction is entered into by all the adult members of the family it is sufficient to raise a presumption of necessity. An amount payable under a pre-emption decree is a debt for which the manager is justified in borrowing money on the security of the family property: 8 B. 602; 33 A. 242; 12 A.L.J. 641, *Foll.* (*Daniels, A.J.C.*). SHAMSHER DATT SINGH *v.* LALTA SINGH. **72 I.C. 1000=A.I.R. 1924 Oudh 300.**

———It is doubtful whether manager cannot alienate without express or implied consent of adult members: 25 All. 407 (P. C.), *Dist.* (*Macnair, A.J.C.*). GOPAL RAO *v.* NEMICHAND.
61 I.C. 575=A.I.R. 1921 Nag. 129.

—Alienation—Necessity—Debts.

———Grandson and great-grandson are bound by alienation made to pay grandfather's and great-grandfather's debts which are neither illegal nor immoral: 7 A.I.R. 1926 P.C. 105, *Foll.*(*Stuart, C. J. and Wazir Hasan, J.*). JANG BAHADUR LAL *v.* BHAJA RAGHUNAH SINGH. **98 I.C. 1053= 2 Luck. 401=13 O.L.J. 833=3 O.W.N. 930= A.I.R. 1928 Oudh 43.**

———*Alienation by manager other than father for payment of a time-barred debt, is not for legal necessity and hence is not valid.*

A mere manager of a joint Hindu family not the father, has no power to alienate the property in lieu of any antecedent debt of his own. An alienation by a managing member can only be upheld if the transfer is for legal necessity or for the benefit of the family. An alienation by the managing member of the family cannot be said to have been for legal necessity, if the legal remedy to recover the debt has become time-barred: A.I.R. 1924 All. 551 (F.B.), *Dist.*(*Sulaiman and Mukerji, JJ.*). JHABBU RAM *v.* BAHORAN SINGH. **91 I.C. 1023= A.I.R. 1926 All. 243.**

—Alienation—Necessity—Father.

———Where father relinquishes the equity of redemption to the mortgagee in possession and the relinquishment is not for necessity or for the benefit of the family, sons are not bound by it. (*Banerji and King, JJ.*). MANGALI PERSHAD *v.* BABU RAM.
116 I. C. 875=51 All. 659=1929 A.L.J. 393= A. I. R. 1929 All. 365.

———Alienation by father—A very small portion of the consideration not for necessity—Alienation should be upheld. A money-decree should be given to the plaintiff for the amount not covered by necessity: A.I.R. 1925 All. 624 (F.B.); A.I.R. 1925 All. 324 and A.I.R. 1922 P.C. 307, *Foll.* (*Dalal and Pullan, JJ.*). BISHAMBHAR NATH *v.* MADHURI SARAN. **98 I.C. 824 (All.).**

———Minor—Mortgage by father as manager without legal necessity—Subsequent mortgage—Subsequent mortgagee redeeming prior mortgage is not entitled to claim money paid for redeeming prior mortgage, in suit by son to set aside subsequent

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mortgage. (*Wazir Hasan and Neave, A.J.Cs.*). PARTAB SINGH *v.* SHAMSHER BAHADUR SINGH. **87 I.C. 66=A.I.R. 1925 Oudh 708.**

———Mortgage executed by father for legal necessity would be binding on the joint family property in spite of the fact that the son was not properly represented in suit on the mortgage: 37 A. 179, *Foll.*; A.I.R. 1923 Patna 242, *Not foll.* (*Daniels and Dalal, JJ.*). CHANDRADIP ZAVARI *v.* BABU JADUNANDAN. **79 I.C. 1041=5 L.R.A. Civ. 366= A.I.R. 1924 All. 573.**

———Where a Hindu father sells ancestral property for the discharge of his debts, if the application of the proceeds is satisfactorily accounted for, the fact that a small portion is not accounted for will not invalidate the sale. As to what would be a bulk depends on the facts of each case. A sum of Rs. 3,000 out of a total of Rs. 3,500 is a bulk of the consideration. Having regard to decisions it will be difficult to hold that Rs. 500 is a trifling amount. (*Lindsay and Kanhaiya Lal, JJ.*). NATHU RAM *v.* KANHAIYA LAL. **80 I.C. 226 (All.).**

———*Compromise decree is no better than a transfer.*

A compromise decree obtained against the father in a suit on mortgage by father is in reality no better than the transfer itself, and the mere existence of the decree cannot deprive the sons of their rights in the joint family property and therefore the mortgagee-decree-holder must prove that the debt was contracted for valid necessity or for payment of an antecedent debt. (*Dalal, A.J.C.*). RAM DAYAL *v.* NIMAR SINGH. **80 I.C. 492= 26 O.C. 355=11 O.L.J. 360= A.I.R. 1924 Oudh 133.**

———A father, as manager of a joint Hindu family has not a general right to deal with joint family property by way of sale or mortgage, even though the money raised is used by him in some business by which he expects to make more money. Where a mortgage of family property by a father is sought to be enforced the burden lies heavily on the person seeking to enforce it of proving the existence of legal necessity for the transaction. (*Piggott and Gokul Prasad, JJ.*). GANGA PRASAD *v.* RAM SARUP. **60 I.C. 68 (All.).**

———*Money borrowed for paying purchase money under pre-emption decree is not for paying antecedent debt or for legal necessity.*

To find whether a certain transaction is binding on the family or not, its nature must be examined at the date of the transaction and it should not be judged by what happened later. (A.I.R. 1928 All. 403, *Foll.*). A mortgage of ancestral property by a father to pay the purchase money under a pre-emption decree is not for paying an antecedent debt or for legal necessity and is not justified : A.I.R. 1928 All. 454 (F.B.), *Expl.* ; A.I.R. 1925 All. 333, *Appl.* ; A.I.R. 1923 All. 298, *Rel. on* ; 33 All. 242 and 36 All. 17, *Not foll.* (*Mears, C. J. and Mukerji, J.*). KISHEN SAHAI *v.* RAGHUNATH SINGH.
116 I.C. 488=51 All. 473= 1929 A.L.J. 110=A.I.R. 1929 All. 139.

———*Legal necessity does not mean actual compelling necessity.*

Fazl Ali, J.—The term 'necessity' is not to be understood in the sense of what is absolutely indispensable, nor actual compelling necessity is to be the sole test of the validity of an alienation by the manager of a Hindu family. If it can be shown that the transaction as a whole was beneficial to the interests of the family, the transaction will be held to be valid and binding on the other

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members : 5 P.L.J. 622, *Rel. on.* (*Ross and Fazl Ali, JJ.*). JAN MOHAMMED *v.* BIKOO MAHTO.
116 I.C. 33=7 Pat. 798=10 P.L.T. 811= A.I.R. 1929 Pat. 130.

———*Mortgage for entering into a chit fund transaction is not justified.*

The father may mortgage his son's share for necessity or for a benefit to be conferred on the joint family, but a chit fund is not like the ordinary transactions of a Hindu family. It bears no resemblance to money borrowed for maintaining the family, for performing the marriages or upanayanam, or paying the Government revenue, or educating boys in the family, or paying of antecedent debts. There is the possibility that chit fund transaction may end in profit, but it is not a transaction for which the father can mortgage his son's share. (*Ramesam, J.*). NATESA AIYAR *v.* SAHASRANAMA IYER.
103 I.C. 814= A.I.R. 1927 Mad. 773=53 M.L.J. 550.

———*Alienee to prove legal necessity or reasonable enquiry on his part.*

Where property has passed out of the hands of the family either in lieu of an antecedent debt or under an execution sale in respect of a debt of the father the sons can only recover the property by showing that the debt was either illegal or immoral, but this rule does not apply to a sale for cash. When a transaction such as this is impeached by the son it is for the creditor or transferee in the first instance to prove either legal necessity or at least such inquiry as would have satisfied a prudent man that the necessity existed, and the same rule applies where the defendant is not the original transferee but a pre-emptor. (*Daniels, J.*). CHANDRIKA SINGH *v.* BHAGVAT SINGH.
83 I.C. 54=4 L.R.A. Civ. 545= A.I.R. 1924 All. 170.

———*Improvident agreement by father—Sons are not bound by—Existence of antecedent debt does not of itself justify alienation of whole property—All adult members executing mortgage—There is a presumption of necessity.*

Where the father as manager entered into an agreement to sell immovable properties the facts that he himself repented of it, and that his sons begged to be allowed to contest the suit brought with the object of enforcing it, serve to raise a considerable presumption that the agreement was an improvident one. The existence of the antecedent debt cannot of itself be regarded as justifying the father and manager of joint undivided Hindu family, in parting with practically the whole of the immovable property belonging to himself and his sons for inadequate price. In the case of an alienation of joint family property effected by the concerted action of all those members of the joint family who had attained majority at the time, there is a very considerable presumption in favour of such alienation having been made for real family necessity. If the father did what many men in difficulties do, namely, entered into an improvident transaction to rid himself of his immediate embarrassment, without due regard to the necessities of the case and the interests of the minor members of the family, the purchaser must be held, on principle to have taken such risk as was involved in the transaction into which he entered. (*Piggott and Walsh, JJ.*). GOVIND DASS *v.* RAM CHARAN LONIA.
68 I.C. 307= A.I.R. 1923 All. 235.

———The existence of antecedent debts due to third parties constitutes valid necessity. (*Scott-*

HINDU LAW—Alienation—Necessity—Interest.

Smith and Fforde, JJ.). MT. BASANTI *v.* CHANDA SINGH.
77 I.C. 475=A.I.R. 1923 Lah. 502.

—Alienation—Necessity—House repairs.

———*House repair is necessity—Creditor not bound to estimate the sum required.*

Expenses incurred for the repairs to a house would be regarded as "necessity." But in such cases it would be exceedingly difficult for any person advancing money for repairs to a building to be called upon to have an estimate prepared of the sum required for the proposed repairs. It would be sufficient if it is proved that enquiries were made and that it had been discovered that repairs were actually going to be made and that steps were being taken to have the repairs made: A.I.R. 1925 Lah. 240, *Foll.* (*Broadway and Jai Lal, JJ.*). SALIGRAM *v.* MOHAN LAL.
90 I.C. 143=7 L.L.J. 470= 26 P.L.R. 708=A.I.R. 1925 Lah. 407.

—Alienation—Necessity—Interest.

———*Interest at one per cent.—Failure to pay at the end of the year—Interest to be added to the principal—Stipulation not unreasonable.*

If manager mortgagor agrees to pay an abnormally high rate of interest, it is the duty of the mortgagee to satisfy the Court that the mortgagor could not have raised money at a lesser rate of interest or that the rate agreed on was otherwise justified. But if the rate of interest is *prima facie* reasonable it may be considered to be justified.

Where two brothers, who are members of a joint Hindu family between themselves and their sons, mortgage property agreeing to pay interest at 1 per cent. per mensem and further stipulate that if interest is not paid at the end of a year it shall be added to principal, and interest at the contractual rate is to run on the aggregate amount of principal and interest, such stipulation is not unreasonable: A. I. R. 1919 P. C. 12, *Expl.* (*Sen and Niamatullah, JJ.*). BAJRANGI MISIR *v.* PADARATH SINGH.
124 I.C. 759=A.I.R. 1930 All. 504.

———*Necessity for high rate of interest must be proved.*

Fazl Ali, J.—In the case of a mortgage executed by the manager, the mortgagee must prove necessity for borrowing at a high rate failing which the Court has power to award a reasonable rate of interest: A. I. R. 1919 P. C. 12, *Rel. on.* (*Ross and Fazl, JJ.*). JAN MOHAMMAD *v.* BIKOO MAHTO.
116 I.C. 33=7 Pat. 798=10 P.L.T. 811= A.I.R. 1929 Pat. 130.

———Rate of interest for mortgage exorbitant—Mortgagee must prove necessity for loan and also for the rate of interest and terms; A.I.R. 1919 P.C. 12, *Foll.* (*Stuart, C. J. and Raza, J.*). JOTAN SINGH *v.* MAHADEV PRASAD.
100 I.C. 686=A.I.R. 1927 Oudh 574.

———Mortgage of joint property by Manager—Party supporting mortgage must prove that conditions imposed were reasonable under the circumstances in addition to showing necessity for the loan: 41 All. 571, *Foll.*; A.I.R. 1923 P. C. 37, *Ref.* (*Wazir Hasan, J.C.*). MANNU LAL *v.* BISHAMBAR NATH.
79 I.C. 35=11 O.L.J. 415= A.I.R. 1924 Oudh 378.

———*Antecedent debts do not bind sons and grandsons only if they are illegal or immoral—Exorbitant ruinous rate of interest is not illegal or immoral.*

It is only in cases where elements of justifying necessity or benefit are lacking that the doctrine of antecedent debt becomes important and the only exceptions relieving the sons and grandsons from the pious obligation are where illegality or immorality is proved. It is now established that the

HINDU LAW—Alienation—Necessity—Interest.

exception only exists in cases where the debt was contracted for an illegal or immoral purpose or where the obligation arises from some illegal or immoral transaction. An exorbitant rate of interest ruinous to the joint family should not be regarded as an immoral transaction. (*Dawson-Miller, C.J. and Foster, J.*). KULDIP SAHAY *v.* RAM BUJHAWAN MAHTO. **83 I.C. 385= 3 Pat. 425=5 P.L.T. 115= A.I.R. 1924 Pat. 454.**

———*Manager—Legal necessity for rate of interest must also be proved by creditor.*

It is incumbent on those who support a mortgage made by the manager of a joint family to show, not only that there was necessity to borrow, but that it was not unreasonable to borrow at some high rate and upon hard terms and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage, that rate and those terms cannot stand. But the Court should reduce the interest only by the extent to which the authority is exceeded. (*Simpson and Wazir Hasan, A.J.Cs.*). BASANT RAI *v.* KESHO RAM. **74 I.C. 346=9 O.L.J. 612= A.I.R. 1923 Oudh 139.**

———*Necessity both for loan and the rate of interest must be proved.*

It is incumbent on those who support mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that there was necessity to borrow at a rate of interest in excess of the ordinary commercial rate and upon hard terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage, that rate and those terms cannot stand.

Simple interest at the rate of 1 per cent. per annum is a fair commercial rate in absence of special circumstances justifying a higher rate where the security is ample. (*Lord Parmoor.*) RAM BHUJAWAN *v.* V. NATHU RAM. **71 I.C. 933= 2 Pat. 285=25 Bom.L. R. 568= 1923 M.W.N. 382=38 C.L.J. 25= 4 P.L.T. 29=32 M.L.T. 129=50 I.A. 14= 28 C.W.N. 446=18 M.L.W. 767= 1 Pat.L.R. 445=4 L.R.P.C. 75= A.I.R. 1923 P. C. 37=44 M.L.J. 615 (P.C.).**

———*Alienation by manager—High rate of interest—Creditor must prove necessity for the loan as well as for the high rate of interest.*

But when a contract entered into by a head member or a Karta of a joint Hindu family is sought to be enforced against the other members on the ground of necessity, it must be shown not only that there was the necessity, to borrow the principal sum but that the rate of interest agreed upon was also a necessity ; in other words, that it was impossible for the *Karta* or the head member to obtain the loan for family necessity except at the rate of interest agreed upon. The creditor in such a case has not only to show that there was a family necessity so as to bind the members of the family on behalf of the parties to the contract with respect to the loan advanced but that the rate of interest was the market or commercial rate. He will not be entitled to enforce a higher rate of interest against the other members and to make the joint family properties liable for interest higher than the current market rate of interest: A.I.R. 1923 P. C. 37 *Foll,* (*Jwala Prasad and Ross, JJ.*). MAHADEO PRASHAD *v.* BISSESSAR PRASHAD. **74 I.C. 695= 2 Pat. 488=4 P.L.T. 707=A.I.R. 1924 Pat. 71.**

HINDU LAW — Alienation—Necessity—Litigation.

———The interest on a debt is nothing but a portion of the debt itself. (*Hallifax, A.J.C.*). ANAND RAO *v.* SARASWATIBAI. **71 I.C. 532= 6 N. L. J. 115=A.I.R. 1923 Nag. 125.**

———In the case of a mortgage, interest at 9 per cent. compound interest is excessive and would not, in any event be enforced by Court. (*Piggott and Walsh, JJ.*). GOVIND DASS *v.* RAM CHARAN LONIA. **68 I.C. 307=A.I.R. 1923 All. 235.**

—Alienation—Necessity—Litigation.

———*Debts incurred by a female heir for frivolous litigation are not for legal necessity.*

A female heir is not justified in jeopardizing the reversion by incurring debts for the prosecution of a frivolous litigation affecting the estate and cannot be allowed to saddle the reversion with the risks of a speculative venture. Debts incurred for the purpose of prosecuting such litigation will bind only her life-interest and will not affect the interest of the reversioners. (*Sen and Niamatullah, JJ.*). RAGHUBIR SARAN *v.* RAM SARAN. **114 I.C. 33=26 A.L.J. 825=A.I.R. 1928 All. 651.**

———*Alienation by widow—Costs of litigation—When "necessity."*

Costs of litigation are not always legal necessity. If the costs had been incurred for the purpose of protection of the estate and the limited owner had incurred debts for the purpose of meeting these costs then only the costs of the litigation could be considered as legal necessity. (*Cuming and B. B. Ghose, JJ.*). UPENDRA NATH *v.* KIRAN CHANDRA. **97 I.C. 149=48 C.L.J. 562=A. I. R. 1926 Cal. 1046.**

———*Widow—Alienation for expenses of litigation—Must not be a decree to raise more money than necessary—Reversioner's act necessitating loan—Reversioner should not complain of rate of interest.*

Where money is borrowed for meeting expenses of litigation it is impossible for a widow to satisfy the creditor as to the actual amount she must borrow for meeting the future expenses of litigations. In a case like this the Court should be satisfied that legal necessity existed and that the sum lent was not unreasonably large. The transaction should be shown to be genuine and free from doubts of collusion between the creditor and the widow for raising a larger sum than was really needed. The interest of the reversioner should no doubt be protected but at the same time the widow should not be hampered by unreasonable restrictions in raising money when legal necessity exists. When the main necessity for the loan is brought about by the wrongful act of the reversioner himself he should not be heard to complain of the high rate of interest more especially when he made no attempt to show that money was available to the widow at a lower rate of interest than was charged in the bond. In such cases the amount of costs actually awarded to the widow should not be taken as basis because every one acquainted with the costs of litigation in this country knows that the actual amount which a successful litigant gets as costs allowed by the Courts is much less than the actual amount spent by him. (*Cuming and Chakravarti, JJ.*). TARAPRASAD SAW *v.* MADHUSUDAN GIRI. **91 I.C. 12=42 C.L.J. 269=30 C.W.N. 204= A.I.R. 1926 Cal. 283.**

———*Alienation by manager—Cost of necessary litigation is legal necessity.*

A manager can alienate joint family property by way of sale or mortgage in order to meet the costs of litigation which became imminent and absolutely necessary in the circumstances then existing:

HINDU LAW — Alienation—Necessity—Litigation.

44 Cal. 186 (P.C.); 40 All. 171 (P.C.) and 43 Mad. 541 (P.C.), *Rel. on.* (*Kinkhede, Offg. A.J.C.*). KALOOSINGH *v.* MT. SUNDERABAI. **95 I.C. 707= A.I.R. 1926 Nag. 449.**

———*Alienation by widow—Defending title to property no longer hers is no legal necessity.*

Where the widow was uncertain as to what property was in her possession but filed a suit for certain property as being in her possession.

Held, that in the circumstances of the case it was impossible to say that she had legal justification for spending money in defence of property which at the time of the expenditure had ceased to be hers. (*Dawson-Miller, C. J. and Foster, J.*). RAM KARAN MAHTO *v.* DAHUR MAHTON. **96 I.C. 231=A.I.R. 1926 Pat. 490.**

———*Pre-emption is not legal necessity.*

Any act for which the character of 'legal necessity' or 'benefit to the estate' can be claimed must necessarily be a defensive act, something undertaken for the protection of the estate already in possession, not an act done with the purpose of bringing fresh property in possession and which may or may not be successful under the chances attending upon litigation. So, a Hindu father cannot encumber joint ancestral property to acquire the necessary funds to pre-empt other property. (*Mears, C.J. and Piggott, J.*). SHANKAR SAHI *v.* BAICHU RAM. **86 I.C. 769=47 All. 381= 23 A.L.J. 204=6 L.R.A. Civ. 214= A.I.R. 1925 All. 333.**

———*Money borrowed by member to defend himself from criminal charge, is necessity.*

If a member of a joint undivided Hindu family is standing his trial on a serious charge of murder and wants funds to defend himself and raises funds by creating a charge on the family property, he does so under necessity which may be called legal necessity under the Hindu Law. There is no difference in principle whether a *karta* of the family or a younger member of the family borrows money by hypothecating the family property in case he is in trouble in order to defend himself. (*Rafique and Piggott, JJ.*). RAM RAGHUBIR LAL *v.* DIP NARAIN SINGH. **71 I.C. 749= 21 A.L.J. 169=45 All. 311=4 L.R.A. Civ. 380= A.I.R. 1923 All. 287.**

———Expenses of litigation in respect of abduction of alienor's wife is a necessity—An alienee who pays antecedent debts, if he acts honestly and makes proper enquiry whether the debts are actually due is not responsible if he has been deceived. A just debt incurred for a necessary purpose is always binding irrespective of the income and means of the alienor and just debts are debts which are actually due and are not immoral or illegal or opposed to public policy and not contracted as an act of reckless extravagance or wanton waste or with the intention of destroying interests of the reversioners. An alienee discharging an antecedent debt is not required to make an inquiry into the nature thereof. (*Broadway, J.*). ANOKH SINGH *v.* SAPURAN SINGH. **79 I.C. 980= A.I.R. 1923 Lah. 660.**

———Money borrowed by a sonless proprietor on the security of ancestral land to enable him to reap the benefit of a decree for pre-emption is an act of good management and the loan must be held to have been raised for valid necessity: 17 I.C. 235; 165 P. W. R. 1912; 192 P.L.R. 1912, *Foll.*; 65 P.R. 1907; 203 P. L. R. 1908; 146 P.W.R. 1907, *Distinguished.* (*Scott-Smith and Fforde, JJ.*). PRATAB SINGH *v.* HAKIM SINGH. **75 I.C. 87=4 Lah. 171=6 L.L.J. 99= A.I.R. 1923 Lah. 480.**

—Alienation—Necessity—Maintenance.

———The rule that alienation for future maintenance is not allowed by Hindu Law is not an inflexible rule: 9 S.L.R. 69 and A. I. R. 1929 Lah. 317, *Rel. on.* (*Tek Chand and Agha Haidar, JJ.*). RALLA RAM *v.* GOVARDHAN DAS. **A. I. R. 1930 Lah. 679.**

———*Alienation for future maintenance.*

An alienation by widow for her own maintenance is justified but she cannot anticipate wants by raising money in order to meet the expenses of her future maintenance. (*Shadi Lal, C. J. and Broadway, J.*). BALI RAM *v.* DAYA RAM. **119 I.C. 417= A.I.R. 1929 Lah. 678.**

———Alienation by father to provide funds for maintenance of family—Son's share can be sold. (*Devadoss, J.*). SRINIVASA AIYANGAR *v.* ALAMELU AMMAL. **101 I.C. 571=A.I.R. 1927 Mad. 715.**

———*Maintenance of widowed sisters of husband is legal necessity.*

Debts contracted to maintain widowed sisters of husband who was maintaining them in his lifetime are for legal necessity justifying alienation by widow. (*Greaves and B.B. Ghose, JJ.*). SAILABALA DEBI *v.* BAIKUNTHA NATH. **91 I.C. 186= A.I.R. 1926 Cal. 486.**

———*Sale by widow for future maintenance—When valid.*

There is no hard and fast rule that a widow cannot alienate property for future maintenance. Each case would depend upon its circumstances. If there is no other property and the only property is not capable of yielding any appreciable income she is entitled to sell it for maintaining herself: 9 M. L. T. 307, *Dist.* (*Devadoss, J.*). KUTHALINGA MUDALIAR *v.* SHANMUGA MUDALIAR. **92 I. C. 989=23 M.L.W. 373= 1926 M.W.N. 274=A.I.R. 1926 Mad. 464= 50 M.L.J. 234.**

———The support of dependent relations in the family would be a part of the family necessity. (*Mukerji and Dalal, JJ.*). DARBARI LAL *v.* GOBIND SARAN. **80 I.C. 31=46 All. 822=22 A.L.J. 753= 5 L.R.A. Civ. 556=A.I.R. 1924 All. 902.**

———*Widows—Sale for maintenance.*

Where the husband left a large area of land which was not very productive and the widows did not appear to have been able to live on it without becoming involved in debt, the charge created by the mortgages cannot be regarded as being without necessity. (*Le Rossignol and Wilberforce, JJ.*). ARURA *v.* SHIVDEO SINGH. **4 L. L. J. 45= A.I.R. 1922 Lah. 61.**

—Alienation—Necessity—Marriage.

———Expenses for sister's marriage of minor are a valid necessity. (*Tek Chand and Agha Haidar, JJ.*). PRABHU DAYAL *v.* RALLA RANI. **31 P.L.R. 198= A.I.R. 1930 Lah. 672.**

———*Mortgage debt incurred by father for his fourth marriage is not for family necessity—Debt is not binding on son.*

In order that any purpose should be regarded as a legitimate family purpose it must be felt as such by every member of the family.

The fourth marriage of a father cannot be a legitimate family purpose.

Where a Hindu father, who was between 40 and 45 years of age, and had a minor son nine years old, mortgaged the entire family property for a con-

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sideration of Rs. 4,000, borrowed in connexion with his fourth marriage for payment to the bride's mother as bride's price,

Held, that the mortgage debt was not incurred for a legitimate family purpose and that the minor's share of the mortgaged property was not liable for the debt: 32 All. 575, *Diss. from*; 32 Bom. 81 and 34 Mad. 422, *Dist*; 22 Bom. 658; 23 All. 495 and 32 Mad. 185, *Ref.* (*Niyogi, A. J. C.*). ONKAR *v.* KISANSINGH. **A.I.R. 1930 Nag. 282.**

———*Widow—Divorce by daughter is not legal necessity.*

Under the Hindu Law, no doubt, the marriage of a daughter would be a legal necessity justifying the alienation of property by a widow. A divorce, however, is against the policy of Hindu law, and there is no precedent which would justify the Court in holding that a divorce may be regarded as a legal necessity. (*Fawcett, Ag. C. J. and Mirza, J.*). TANGEVA *v.* GOVINDAPPA.

113 I.C. 42=30 Bom.L.R. 1145=
A.I.R. 1928 Bom. 495.

———A son who succeeds his father must maintain his unmarried sister and marry her. A sale of ancestral property by a son on his father's death to marry his sister is for legal necessity. (*Addison, J.*). MOKHA *v.* ALFA. **110 I.C. 432 (Lah.).**

———Widow—Alienation to meet marriage expenses of the nearest reversioner— Alienation is justified unless contrary is proved : 20 C.W.N. 734, *Dist.* (*Devadoss, J.*). SEVU VANDAYAN *v.* NARAYANASWAMI IYER.

97 I.C. 774=1926 M.W.N. 706=
A.I.R. 1926 Mad. 1078.

———*Alienation by widow to provide for dowry of daughter is for necessity—Reasonableness of dowry amount.*

A widow is not only entitled, but is bound to arrange for the marriage of a daughter who was unmarried at the time of the husband's death, to arrange as good a marriage as the father would have wished to arrange had he been alive, and that she is justified in making substantial alienations of the family property for the benefit of the daughter, as, according to the Hindu Law the arranging of a suitable marriage for a daughter would confer religious benefit upon the deceased husband.

In a case in which there are no sons, there cannot be any hard and fast rule as to the proportion of the estate which may fairly be alienated to provide a dowry for such a daughter, and the reasonableness of the dowry can only be decided on the circumstances of each particular case: A. I. R. 1924 All. 23, *Appr.* (*Stuart, C. J. and Hasan, J.*). MADHO PRASAD *v.* MT. DHEMRAJ KUAR.

95 I.C. 574=1 Luck. 477=
13 O.L. J. 627=3 O.W.N. 529=
A.I.R. 1926 Oudh 425.

———Widow—Daughter's marriage—Widow is not bound to spend her private funds—She may alienate her husband's property. (*Suhrawardy and Cuming, JJ.*). SATISH CHANDRA NAG *v.* HARIPADA DE.

87 I.C. 43=41 C.L.J. 209=
A.I.R. 1925 Cal. 689.

———Expenses for marriage of daughter of a separate co-parcener are not "necessity." (*Lindsay and Sulaiman, JJ.*). BENAIK RAO *v.* PULAIN SINGH.

79 I.C. 69=5 L.R.A. Civ. 335=
A.I.R. 1924 All. 929.

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—Alienation—Necessity—Partial necessity.

———*Substantial portion for necessity—Due enquiries made—Consideration adequate—Sale should be upheld.*

The mere fact that a part of the consideration, however small, is not substantiated by legal necessity would not necessarily nullify a deed or show that there was no justification for its execution. The material question that has to be considered is whether the sale itself was for the legal necessity. And if on such consideration it is found that the substantial portion of the consideration was for legal necessity, that due enquiries as to legal necessity were made by the purchaser, and that the consideration was adequate, even though the purchaser may not be in a position to prove how the surplus was applied, the sale-deed can be upheld: A. I. R. 1927 P.C. 37, *Foll.*; 1 I.A. 321 (P.C.) and A.I.R. 1927 P.C. 246; A.I.R. 1929 P.C. 143, *Ref.* (*Sulaiman and Kendall, JJ.*). SRI NATH *v.* JAGANNATH.

A.I.R. 1930 All. 292.

———*Alienation of several plots of land—Only some plots covering amount of legal necessity—Court can release rest of property.*

Where legal necessity has not been shown for the entire sum borrowed in consideration of transfer but for the part only and the property is composed of several separate plots of land out of which some one or more can be sold for the amount of legal necessity the Court can while maintaining the alienation of such plots return the others to the sons. (*Dalal, J.*). RAM KARAN SINGH *v.* SHIV HARAKH SINGH. **A.I.R. 1930 All. 95.**

———Mother sold son's property for purchase of some other property, marriage of her daughter and for maintenance. A person was added as surety to the sale-deed. Necessity was proved only for a portion of the consideration (for Rs. 1,600 out of Rs. 2,500).

Held, that the insertion of the surety's name was by no means a suspicious circumstance. It might have been no more than a reasonable precaution against the undoubted risk that the minor might later on repudiate the sale as being for want of necessity.

Held, further that the proper course under the circumstances was to allow the vendees to retain the property on condition of paying back the sum for which necessity had not been proved with interest from the date of the sale up to hearing of the appeal : A. I. R. 1927 P. C. 121 and A. I. R. 1928 Mad. 226, *Rel. on.* (*Tek Chand and Agha Haidar, JJ.*). RALLARAM *v.* GOVARDHAN DAS.

A.I.R. 1930 Lah. 679.

———Father—Due enquiry by vendee as to necessity—Sale for adequate consideration—Legal necessity proved as to three-fourths of consideration—Mere fact that vendee could not prove after 14 years the manner of application of one-fourth consideration by vendor, was held not sufficient to set aside sale : 6 M.I.A. 393 ; A.I.R. 1926 P.C. 105; A.I.R. 1927 P.C. 37, *Rel. on* ; 25 All. 330 ; 27 All. 494 ; A.I.R. 1923 All. 248 and A.I.R. 1925 All. 324, *held disapproved by* A.I.R. 1927 P.C. 37. (*Sir Lancelot Sanderson.*) RAM SUNDAR LAL *v.* LACHHMI NARAIN.

116 I.C. 605=1929 A.L.J. 561=
33 C.W.N. 699=31 Bom.L.R. 803=
30 M.L.W. 24=6 O.W.N. 510=
1929 M. W. N. 463=51 All. 430=
A.I.R. 1929 P.C. 143=57 M.L.J. 7 (P.C).

———Manager—Sum not proved for legal necessity not exceeding one-third—Sale is valid. A.I.R. 1927

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P.C. 37; A.I.R. 1927 P.C. 121 and A.I.R. 1927 P.C. 246, *Foll.* (*Mirza and Baker, JJ.*). GAJANAN SITARAM *v.* SITARAM RAGHUNATH. **114 I.C. 245= 30 Bom. L.R. 1629= A.I.R. 1929 Bom. 55.**

———When the sum for which no valid necessity is proved is only a small portion out of the consideration, the criterion for determining whether the sale should be set aside and decree for possession should be granted conditionally on payment of sum constituting valid charge is whether the sale .transaction was necessary. (*Bhide, J.*). WARYAM SINGH *v.* INDAR SINGH. **116 I C. 306= A.I.R. 1929 Lah. 242.**

———Widow selling husband's property—Part of consideration only for legal necessity—Real question on which validity of sale will depend is whether it was for a necessary purpose—Proportion between the two parts of consideration will only be one of the items to be considered, in determining the validity : A.I.R. 1927 P.C. 37, *Ref.* (*Phillips J.*). KRISHNAYYA *v.* KOTTAYYA. **119 I.C. 717= A.I.R. 1929 Mad. 449.**

———Decree—Form of—Suit by two sons to recover possession of joint family field, sold by father—Finding that part only of consideration for sale binding on sons—Decree should be passed directing delivery of possession of whole field by vendee on payment of 2/3rd consideration found proved for necessity, and should contain declaration that vendee has acquired 1/3rd share of father and is entitled to obtain possession thereof in suit for partition : A.I.R. 1929 Nag. 60, *Rel. on* ; A.I R. 1924 Nag. 109, *Ref.* (*Subhedar, A.J.C.*). SURAJ MAL *v.* BAPURAO. **121 I.C. 43= A.I.R. 1929 Nag. 311.**

———*Necessity found as to 9/10 of the value of property sold—Widow acting fairly and purchaser acting honestly—Sale is binding on reversioner.*

In such a case the question to be considered is whether the widow has acted fairly towards the expectant heirs and whether the person who dealt with her, also acted honestly and in good faith, when he entered into the transaction in question after making due enquiry, or under the *bona fide* belief that an accredited necessity did exist, and whether the price offered by him was "adequate and not unreasonably low." If the answer to this question is in the affirmative, the transaction has to be upheld as binding as against the persons at whose option it is liable to be affirmed or disaffirmed after the death of the widow : A.I.R. 1927 P.C. 37 ; A.I.R. 1927 P.C. 121 ; A.I.R. 1927 P.C. 246, *Foll.* ; 18 Bom. 534 ; 11 Bom. 320 : A. I. R. 1918 P. C. 118, *Ref.* (*Kinkhede, A.J.C.*). KISAN *v.* TUKARAM TIDEN. **A. I. R. 1929 Nag. 180.**

———Where the bulk of the money is undoubtedly raised for justifiable necessities the whole transaction should be affirmed. (*Das and Ross, JJ.*). AMBICA PRASAD *v.* CHANDRAMANI KUER. **117 I.C. 867=8 Pat. 396=10 P.L.T. 607= A.I.R. 1929 Pat. 289.**

———*Necessity proved for a large portion—Whole transaction should be upheld.*

Where inquiry is made and it is established that there is a valid necessity in respect of a very large portion of the money raised, there is a presumption that the portion not accounted for has been spent for proper purposes and for the benefit of the family. The principle applies to mortgage as well as to a sale: A.I.R. 1927 P. C. 37 and 6 M.I.A. 393 (P.C.), *Foll.* (*Das and Adami, JJ.*). HITENDRA *v.* SUKHDEB. **115 I.C. 886=8 Pat. 558= 10 P.LT. 79= A. I. R. 1929 Pat. 360.**

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———Widow selling husband's property—Part of sale-proceeds found for legal necessity but not rest —Court cannot set aside sale on condition that the amount for legal necessity should be paid to purchaser for real question to be decided is whether the sale was justified by legal necessity : A. I. R. 1927 P. C. 37, *Foll.* (*Das and Fazl Ali, JJ.*). RAM ASRE *v.* AMBICA LAL. **119 I.C. 547=11 P.L.T. 6= A.I.R. 1929 Pat. 216.**

———*"Voidable", meaning of—Alienation supported by necessity is valid in its entirety—If no necessity it is totally void.*

The term "voidable" as used with reference to alienations of property by the manager of Hindu joint family or by female owners possessing only a limited interest therein, is not used in the sense in which it is used in the Contract Act, as meaning that the transaction is binding on the co parceners or on the reversioners until it is set aside by them and that the person who seeks to set it aside has to establish that the transaction was vitiated, by fraud, undue influence, misrepresentation or any other circumstances which would entitle a party to a contract to avoid it. It has invariably been accepted as a sound canon of the Hindu Law that where the alienation is not for justifiable necessity it is void and not only voidable as regards the shares of the other members of the family and, where such necessity exists, it is valid in its entirety : 35 Mad. 177, *Foll.* (*Ramesam and Thiruvenkatachariar, JJ.*). *In the matter of* AMIRTHALINGA. **112 I.C. 553= 28 M.L.W. 634=1928 M.W.N. 602= A.I.R. 1928 Mad. 986.**

———*Sale substantially for necessity—No necessity for small portion—Sale is not affected—Test for upholding such alienation laid down.*

If a sale is found to be substantially for purposes binding on the family, the mere fact that in respect of a small portion of the consideration no necessity has been proved or shown cannot affect the sale or the exercise of the power of sale in such a case. Each case has got to be determined on its own facts. The principle on which Courts of law can hold whether or not in particular cases alienations were substantially for necessity is, that if a man of ordinary prudence, who is the ideal of the law in respect of his own property, or in respect of property which he is in charge of as manager of the family, would in those circumstances have alienated the 'property for the purpose of raising the amount required for the interest of the family, then it follows that it must be considered as a case where the sale was substantially for necessity. If the facts, however, should turn out to be that the sale or transaction was obviously so imprudent that no man of ordinary prudence would have entered into such a transaction in respect of any such property, then it follows that it was a case in which the power was wrongly exercised or purported to be. (*Srinivasa Aiyangar and Anantha-krishna Ayyar, JJ.*). SATHAPPAN AMBALAM *v.* VADIVELU. **109 I.C. 106= A.I.R. 1928 Mad. 450.**

———Where the proportion of the consideration not required for necessity was about one-fifth, sale by father was not upheld : A.I.R. 1924 Nag. 109, *Dist.* (*Kinkhede, A.J.C.*). MAMUJI *v.* DALPAT. **104 I.C. 569 = A. I. R. 1928 Nag. 37.**

———*The principle of upholding sale if bulk of consideration is for necessity—When not applicable.*

The principle that if a sale-deed is found to have been executed for necessity and the bulk of its

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consideration consists of antecedent debt or was justified by family necessity, it should not be set aside because no legal necessity in respect of a minor portion of the sale price has been proved is not applicable in the case of a mortgage where the father can borrow the precise amount required to meet the family necessity. If he borrows more money than is required, the sons cannot be made liable for the sum in excess of the family necessity: 19 O.C. 122; 22 O.C. 84; 23 O.C. 204 and A.I.R. 1927 P. C. 37, *Ref.*; 15 All. 75 and A. I. R. 1926 Cal. 283, *Dist.* (*Gokaran Nath Misra and Srivastava, JJ.*). JAI INDRA *v.* KHAIRATILAL.
113 I.C. 489=4 Luck. 107=5 O.W.N. 836=A.I. R. 1928 Oudh 465.

———*Small part of consideration not proved for necessity—Sale should be upheld.*

A sale of joint property will not be set aside merely because a part of the proceeds is not proved to have been applied to purposes of necessity. The real question that has to be considered is this: Whether the sale itself was justified by necessity. If the purchaser has acted honestly, if the existence of a family necessity for sale is made out, and the price is not unreasonably low, he (the purchaser) is not bound to account for the application of the price: A. I. R. 1927 P. C. 37, *Ref.* (*Lord Shaw.*) GAURI SHANKER *v.* JIWAN SINGH. **107 I.C. 4=25 A.L.J. 967=47 C.L.J. 7=1928 M.W.N. 1=4 O.W.N. 1192=32 C.W.N. 257=30 Bom. L.R. 64=27 M.L.W. 203=A.I.R. 1927 P.C. 246=53 M.L.J. 786 (P.C.).**

———Alienation by widow—Very small portion of consideration found not for necessity—Sale was upheld: A. I. R. 1927 P. C. 37 and 121, *Appl.* (*Lord Blanesburgh.*) SURAJ BHAM SINGH *v.* SAH CHAIN SUKH. **105 I.C. 257=29 Bom. L.R. 1385=32 C.W.N. 117=46 C.L.J. 291=A.I.R. 1927 P.C. 244=53 M.L.J. 300 (P.C.).**

———Where the manager effected an alienation of the joint family properties and his self-acquired property, and the proportionate amount found to be for legal necessity is in excess of the proportion that the joint family property bears to the self-acquired property, the other members who challenge the alienation cannot recover any portion from the alienee. (*Iqbal Ahmad, J.*). LACHMAN DUBE *v.* AMBIKA DUBE. **100 I. C. 444=A.I.R. 1927 All. 366.**

———Alienation by widow—Greater portion of consideration for necessity—Alienation cannot be challenged: A.I.R. 1924 Nag. 109, *Foll.* (*Findlay, J. C.*). MT. JANI *v.* BAHU. **102 I.C. 888=A.I.R. 1927 Nag. 362.**

———*Small portion not for necessity—Sale when avoided.*

Even if any small sum of money out of the large sale consideration has not been required for any legal necessity, the sale cannot be avoided unless it were shown that the money was not at all paid, and that the consideration which was actually paid was not equal to the real value of the property: A.I.R. 1925 All. 624 (F.B.), *Ref.* (*Sulaiman and Banerji, JJ.*). JADO SINGH *v.* NATHU SINGH. **98 I.C. 773=48 All. 592=24 A.L.J. 633=A.I.R. 1926 All. 511.**

———Alienation by a widow—Sum not required for legal necessity being comparatively small—Sale should be upheld—No rule exists that a particular arithmetical proportion of consideration should be found to be for necessity, to uphold sale: A.I.R. 1925 All. 624 (F.B.), *Rel. on*; A.I.R. 1925 All. 324, *Ref.* (*Dalal and Pullan, JJ.*). BHAGWANT BHARTI *v.* RAJPAT KURMI. **98 I.C. 809=25 A.L.J. 104.**

———*The question is if the part unsupported by necessity is insignificant.*

When the sale is only in part supported by legal necessity, the proper principle to be applied is not whether the bulk of the sale consideration was taken for legal necessity, but whether the portion which was not taken for the said purpose was such a small fraction of the total consideration that it might reasonably be left out of account: A.I.R. 1922 All. 321; A.I.R. 1924 All. 708 and A.I.R. 1924 Nag. 109, *Ref.* (*Findlay, Offg. J.C.*). GOVINDA *v.* KRISHNAJI. **94 I.C. 1002=A.I.R. 1926 Nag. 341.**

———*Alienation by father—One-sixteenth of the total consideration found to be not for legal necessity—Sale was upheld.*

It is not correct to say that if any part of the consideration, however insignificant, was invalid and not binding on the plaintiff, as not being incurred for legal necessity, the plaintiff is entitled to have the sale set aside. On the contrary there is plenty of authority for the proposition that where the portion of the consideration for which no legal necessity can be proved is insignificant the sale will stand.

Where, out of the total consideration, about Rs. 6,000 was found to be for legal necessity and about Rs. 250 was not, but it was found that these Rs. 250 were actually paid to plaintiff's father.

Held: that the sale should be upheld and the defendant should not be made to refund the sum of Rs. 250 and odd: A.I.R. 1922 All. 321, *Appr.* (*Lindsay, Kanhaiya Lal and Daniels, JJ.*). BAHADUR LAL *v.* KAMLESHAR NATH.
90 I.C. 988=48 All. 183=24 A.L.J. 52=6 L.R.A. Civ. 591=A.I.R. 1925 All. 624 (F.B.).

———Necessity proved for a very large part of sale consideration—Sale was upheld. (*Ryves and Daniels JJ.*). DAULAT *v.* SANKATHA PRASAD.
86 I. C. 91=47 All. 355=23 A.L.J. 55=6 L.R.A.Civ. 167=A.I.R. 1925 All. 324.

———Co-parcener—Sale of ancestral property—Three-fourths of the consideration found to be for necessity—Sale impugned after 20 years—Sale should be upheld. (*Shadi Lal, C.J. and Le Rossignol, J.*). JAI SINGH *v.* DARBARE SINGH.
89 I.C. 302=6 Lah. 137=7 L.L.J. 354=26 P.L.R. 329=A.I.R. 1925 Lah. 396.

———*Sale is set aside where no legal necessity is proved for considerable portion.*

Where the defendants have succeeded in establishing necessity or antecedent debt with respect to a part of the consideration the difficulty often arises whether the sale-deed should or should not be upheld. It is impossible to lay down any hard and fast rule which could apply equally to every case: for every transaction has to be considered on its own merits and the Court has to come to a finding on the merits of every case. Where the balance which is not proved to have been for valid necessity or antecedent debt is not so insignificant as to be ignored.

Held: the sale-deed should be set aside on payment by the plaintiffs of the sum which has been found to be a good consideration: 25 All. 330; 27 All. 494; 32 All. 392; A.I.R. 1922 All. 321, *Foll.* (*Sulaiman and Mukerji, JJ.*). SANMUKH PANDE *v.* JAGANATH PANDE AND RAMSARAN PANDE.
83 I. C. 838=46 All. 531=22 A.L.J. 417=5 L. R. A. Civ. 289=A.I.R. 1924 All. 708.

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———*If the part of consideration not supported by necessity is not trifling will be set aside.*

Where necessity for a portion is proved, the Court should look to the amount of the consideration to which no legal necessity has been established. If this amount was so trifling that it could be left out of account the sale should be upheld, otherwise it should be set aside. In this case legal necessity was proved for Rs. 1,780 out of Rs. 2,500 but the sale was set aside: 41 All.3 38, *Dist.*; A.I.R. 1922 All. 321, *Foll.* (*Daniels, J.*). CHANDRIKA SINGH *v.* BHAGWAT SINGH. **83 I.C. 54= 4 L.R.A. Civ.545=A.I.R. 1924 All. 170.**

———*Alienation by widow—Necessity for major portion proved—Sale should be upheld.*

Two properties were mortgaged with onerous conditions as to interest. After the death of the mortgagor, his widow sold one of the properties for the amount of the mortgage amount to the mortgagee. The sale was impeached as being for 2/3 of the real price.

Held: that the sale was for necessity. Where there is necessity for the sale, unless the difference between the true price and the actual price paid is particularly inadequate, the sale ought not to be set aside. Reasonable allowance ought to be made for the difference in price in favour of the alienation. (*Shah and Coyajee, JJ.*). CHANBASAPPA PUTTAPPA *v.* CHANBASAWA MALLAPPA. **77 I.C. 336=25 Bom. L.R. 1078= A.I.R. 1924 Bom. 176.**

———*Small portion not covered by legal necessity—Sale is not invalidated.*

Unless the portion not covered by legal necessity is really large the fact that small portion (in this case 1/8th) of the consideration was not for legal necessity cannot affect the validity of the sale itself. (*Case-law referred to.*) (*Prideaux, A.J.C.*). BHADAJI *v.* GANESHRAO. **83 I.C. 70= 20 N.L R. 4=A.I.R, 1924 Nag. 109.**

———*Alienation by manager—Rs. 80 out of Rs. 400 found not to be for necessity—Deed was set aside.*

It is not always possible for a manager to sell or mortgage a property for the exact amount required for family necessity but that would not justify him to mortgage or sell property for a larger amount than is absolutely necessary. Rs. 80 out of the total consideration of Rs. 400 was held not to be such a small amount as might be neglected in considering the question of the valid necessity for the alienation. The deed was set aside and plaintiff was made to pay Rs. 320 to the purchaser: A.I.R. 1922 All. 321; 27 All. 494 and 25 All. 330, *Foll.* (*Gokul Prasad, J.*). MATADIN TEWARI *v.* SURAJBALI SINGH. **83 I. C. 32= A.I.R. 1923 All. 522.**

———*Small portion of consideration not for necessity—Sale will not be set aside—Sale to discharge an usufructuary mortgage over the property sold, cannot be a necessity.*

If in the case of a sale by a widow a small portion of the purchase money was not required for urgent necessity, it does not follow that the sale itself was not due to necessity, unless it could be reasonably presumed or unless it is proved that the sale of a lesser area for the exact amount required for necessity was feasible. (*Case-law discussed*). The principle is applicable with all the more force to the case of an alienation by a male proprietor. A sale of properties to discharge an usufructuary mortgage over the very property sold cannot be held to be for necessity and must be set aside.

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(*Martineau and Brasher, JJ.*). GOKHA RAM *v.* SHAM LAL. **77 I.C. 174=3 Lah. 426= A.I.R. 1923 Lah. 268.**

———The sale of immovable property by a limited owner ought not to be converted into a mortgage merely because a trifling portion of the consideration was paid in cash for current expenses and was not proved to have been for necessity. (*Scott-Smith and Brasher, JJ.*). HASSAN MUHAMMAD *v.* MAHANDA. **81 I.C. 331=5 L.L.J. 292= A.I.R. 1923 Lah. 245.**

———*Widow—Payment of husband's debts is legal necessity—A small portion of consideration for alienation not supported by necessity—Sale is valid—Delay on reversioner's part not excusable.*

Defendant (1) a widow sold her share for Rs. 5,300 to satisfy a decree on a mortgage executed by her husband, for Rs. 4,588-2-2 and the balance Rs. 711-13-10 was appropriated to reimburse herself for expenses of her husband's brother's daughter's marriage. The plaintiff, the nearest surviving agnate, brought a suit after a long delay for a declaration that the sale was void against him as a reversioner.

Held: the husband of defendant (1) died leaving his debts unpaid and it was to satisfy the debts secured by mortgages that the defendant 1 sold her moiety of the property; there was therefore necessity in law and in fact for the sale of the moiety of property. The sale would not be invalid no matter what may have been the purpose to which the defendant 1 applied the balance of Rs. 711-13-10. The purchasers were not bound to see that the defendant 1 applied it to any particular purpose. Further,

Held, that the delay, on the flimsy ground that the plaintiff was not aware of the sale, was inexcusable. (*Sir John Edge.*) MEDAI DALEVOI *v.* NAINAR TEVAN. **74 I.C. 604=16 M. L.W. 478= 31 M.L.T. 149=1922 M.W.N. 804=27 C.W.N. 365= 21 A.L.J. 282=A.I.R. 1922 P.C. 307 (P.C.).**

———Sale by manager—Legal necessity in part—Questions for determination is whether non-binding portion is so small as not to entail the setting aside of the sale and not if the binding portion formed the bulk of the consideration. (*Lindsay and Kanhaiya Lal, JJ.*). JAI NARAYAN *v.* BHAGAWAN PANDE. **80 I.C. 1006=20 A.L.J. 621= A.I.R. 1922 All. 321.**

———Where in particular the vendees take advantage of the youth and inexperience of the vendor and all the transactions are suspicious, the Court would not uphold the sale merely because it is held to be good in respect of a major portion of the consideration. There is however no hard and fast rule: 33 P.R. 1911 (F.B.) and 6 I.C. 984, *Ref. to.* (*Wilberforce and Abdul Qadir, JJ.*). BEN SINGH *v.* HAZARA SINGH. **63 I.C. 760=3 Lah. 99= A.I.R. 1922 Lah. 275.**

———Where it is found that a portion of the sale consideration was taken by a father for legal necessity and that the family benefitted by the transaction to that extent, the sons can recover the property sold only by re-paying the said portion of the sale consideration. (*Daniels, J.C.*). MT. MANZURAN BIBI *v.* JANKI PRASAD.

66 I.C 930=9 O.L J. 35=A.I.R. 1922 Oudh 50.

———No legal necessity for portion of consideration—Sale must be set aside on payment of binding portion. (*Dawson-Miller, C. J. and Mullick, J.*). BISHUN PRASAD SINGH *v.* NARSINGH DAS.

68 I.C. 663=3 P. L.T. 550=A.I.R. 1922 Pat. 555.

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———*Sale upheld if invalid—Part of consideration is small—Sale avoided if valid part is small.*

If only a very small part of the consideration found invalid, the sale will be upheld if the purchaser pays to the plaintiff, the part of the consideration which is not binding on him. In raising equity in favour of the purchaser adequacy of the price paid, and necessity for sale are relevant considerations: 46 Cal. 566 (P. C.), *Foll.* But when the consideration found to be valid is only a small portion of the whole, there is no equity in favour of the purchaser. (*Spencer and Krishnan, JJ.*). VISVANATHA SASTRIGAL *v.* VALAM BAL AMMAL.

62 I.C. 701=30 M.L.T. 14 (Mad.).

———Alienation by manager—Large portion of consideration for legal necessity—Transfer is not void: A. I. R. 1921 Oudh 47, *Dist.* (*Dalal, A. J. C.*). GAJADHAR BAKHSH SINGH *v.* BAIJNATH.

65 I.C. 967=8 O.L.J. 605= A.I.R. 1921 Oudh 220.

———Alienation by father—Legal necessity for 9/10ths is found—Transaction is justified. (*Daniels, and Lyle, A. J. Cs.*). CHOKHEY SINGH *v.* HARDEO SINGH. **64 I.C. 757=24 O.C. 330=8 O.L.J. 667= A.I.R. 1921 Oudh 196.**

—Alienation—Necessity—Pressure.

———Property had been mortgaged by the father. After his death, one of his sons, who had attained majority, sold the property with the consent of his mother because the amount payable to the mortgagee was to become payable five days after the date of the sale,

Held, that there was a legal necessity to sell the property in order to pay off the mortgagee. (*Mirza and Baker, JJ.*). GAJANAN SITARAM *v.* SITARAM RAGHUNATH. **114 I.C. 245=30 Bom. L.R. 1629. A.I.R. 1929 Bom. 55.**

———Where a Hindu widow fails to pay her share of the Government revenue and her co sharer brings a suit for contribution and attaches her dwelling house in execution of the decree, any alienation made by the widow for satisfying the decree is binding on the reversioners: 25 Cal. 565, *Dist.* (*Mr. Ameer Ali.*) GANESH LAL PANDIT *v.* KHETRAMOHAN MAHAPATRA.

93 I.C. 839=5 Pat. 585=53 I.A. 134= 24 A.L.J. 615=28 Bom. L.R. 931= 43 C.L.J. 545=24 M.L.W. 50= 1926 M.W N. 535=3 O.W.N. 591= 7 P.L.T. 501=31 C.W.N. 25= A.I R. 1926 P.C. 56=51 M.L.J. 82 (P.C.).

———Where the demand for land revenue was so pressing that the moveable property was actually under attachment on the date when the mortgage was executed,

Held: that the mortgage was for legal necessity. (*Daniels, J.C.*). SAGAR SINGH *v.* MATHURA PRASAD. **87 I.C. 1033= A.I.R. 1925 Oudh 750.**

———*Alienation by father—Mere existence of debts is not sufficient—Proof of pressure is necessary.*

In order to justify an alienation made by the father it is not sufficient in law to show that at the time of the alienation debts binding upon the family were outstanding. It must further be shown that the alienation had to be undertaken under the pressure of a present necessity for the discharge of the debts, *i.e.*, that there was any immediate pressure upon the alienor at the time he executed the sale-deeds. In the absence of proof of any compelling necessity for these transfers by sale it must be held that they were not alienations which could be justified under the Hindu Law. *Hanuman Prasad Pande's case Foll.* (*Rafique and Lindsay, JJ.*). BANDHU RAM *v.* RAM KISHUN SONAR.

73 I.C.1010=21 A.L.J. 354= 4 L.R.A. (Civ.) 406= A. I. R. 1923 All. 535.

———If the transaction was in the main for legal necessity it would not be impeachable on the ground that a smaller sum might have been sufficient to remove the pressure at the time. (*Mookerjee and Rankin, JJ.*). CHANDRA KISOR DATTA MAJUMDAR *v.* KUMAR UPENDRA CHANDRA CHAUDHRI. **74 I.C. 612=37 C.L.J. 319= A. I. R. 1923 Cal. 563.**

—Alienation—Necessity—Presumption.

———Widow—Negotiations for mortgage opened, by possible reversioner—Immediate reversioner assenting—Mortgagee's pleader advising that legal necessity existed—Mortgagee can assume legal necessity. (*Jackson and Mohiuddin, A.J.Cs.*). MT. MANKARNIKABAI *v.* NANDLAL ACHALDAS.

122 I.C. 371=A. I. R. 1930 Nag. 220.

———Necessity for Rs. 9 800 proved—Necessity for balance of Rs. 200 should be assumed: 40 Cal. 342, *Rel. on.* (*Mukerji and Niamatullah, JJ.*). ANGAN LAL *v.* SURAN BEHARI.

123 I.C. 221=1929 A.L.J. 526=51 All. 799= A.I.R. 1929 All. 503.

———The concurrence of all the adult members of family in a transaction is sufficient to raise a presumption of legal necessity where the other members are living away and the property is managed by such adult members: 8 Bom. 602, *Foll.* (*Daniels, J.*). B. BHAGWAN DAS *v.* ALLAN KHAN.

78 I. C. 649=A.I.R. 1925 All. 28.

———Where the deed was executed by the representatives of all branches of the family and by all the adult male members of the family living at the time,

Held: each of these circumstances separately is sufficient to raise a presumption of legal necessity: A.I.R. 1922 Pat. 450; 22 A.L.J. 182; 8 Bom. 602; 8 A.L.J. 15, *Foll.* (*Daniels, J.*). DHANRAJ RAI *v.* RAM NARESH RAI. **79 I.C. 1019= 5 L.R.A. Civ. 325=A.I.R. 1924 All. 912.**

———Suit to set aside sale by manager of joint family—Nine tenth of consideration found binding—Court can presume the binding nature of the balance also. (*Schwabe, C. J.*). KUTTUVA MEENATCHI AYYAN *v.* DARMIAH RANGA CHARULU.

1922 M.W.N. 719=A.I.R. 1923 Mad. 120= 16 M. L. J. 595.

———An alienation 13 years old major portion of the consideration for which has been allowed by the Court, must be held to be made for legal necessity where the remaining portion of the consideration was taken an account of famine. (*Harrison, J.*). RAMJI LAL *v.* RAM GARUP. **72 I.C. 448= 48 P.L.R. 1922=A.I.R. 1922 Lah. 368.**

—Alienation—Necessity—Proof of.

———The recitals in an instrument of sale to which the reversioner is not a party should not ordinarily be admitted as evidence. Where evidence has not been given by people who might have deposed with regard to legal necessity and it is not shown that they had passsd away or that their evidence was not available, the presumption as to ancient alienations is inapplicable. (*Graham and Mitter, JJ.*). GOPAL JANA *v.* BROKA MOHANSWAMI. **34 C.W.N. 945.**

———*Expenses alleged to justify sale not contemplated at the date of sale—Widow possessing other funds as well—Necessity not proved.*

At the date when the sale-deed was executed by the widow she had admittedly in her possession

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Rs. 1,600, and the expenses, which it was alleged justified the sale on the ground that there was necessity, might not even then have been in contemplation, and certainly so far as the evidence went had not been incurred,

Held, that the necessity had not been established upon the facts as shown by the purchaser upon whom the burden lay. (*Lord Buckmaster.*) BALKISAN DEVCHAND *v.* KUNJALAL HIRALAL AGARWALA. **122 I.C. 1=32 Bom.L.R. 365=51 C.L.J. 237=31 M. L. W. 625=A.I.R. 1930 P.C. 133=58 M.L.J. 358 (P.C.).**

———*Transaction old—Presumptions are permissible to fill in obliterated details.*

Where a sale-deed is of a very old date, it is not reasonable to expect that full and detailed evidence would be forthcoming as to the state of things which gave rise to the sale deed. In such circumstances presumptions are permissible to fill in the details which have been obliterated by time: A.I.R. 1916 P.C. 110; A.I.R. 1914 P. C. 38 and A.I.R. 1920 P.C. 64, *Foll.* (*Sulaiman, Ag. C.J. and Kendall, J.*). RAM NARAIN *v.* MT. NANDRANI KUNWAR. **114 I.C. 368=50 All. 823=A.I.R. 1929 All. 128.**

———*Legal necessity has to be proved for the transfer as a whole.*

Legal necessity has to be proved for the transfer and not for each rupee of the consideration. The necessity for the transfer can in most cases be established only by proving necessity in respect of the consideration, but ordinarily proof in respect of the greater part of the consideration is quite sufficient: A.I.R. 1925 Nag. 302; A.I.R. 1927 P.C. 37 and A.I.R. 1927 P.C. 246, *Ref.* (*Hallifax and Mohiuddin, A.J.Cs.*). KHUSHAL *v.* LABHAN RAO. **110 I.C. 351=A.I.R. 1928 Nag. 232.**

———Where a substantial portion of the consideration for sale of joint family property was proved to be for legal necessity, while it was not established that the remaining small portion was not for legal necessity, and the transaction took place 55 years ago, the sale was a good transfer: A. I. R. 1927 P.C. 37, *Foll.* (*Stuart, C. J. and Nanavutty, J.*). KAILASH SINGH *v.* BALBHADDAR SINGH. **112 I.C. 151 (Oudh).**

———Alienation by father—Mere existence of family business is not sufficient to show necessity. The lender must also show that the money was required for the family business. (*Shadi Lal, C. J. and Malan, J.*). GIRAHARI LAL *v.* KISHEN CHAND. **85 I.C. 463=5 Lah. 511=A.I.R. 1925 Lah. 240.**

———*Old transactions—Presumptions as to details.*

In the case of old transactions full and detailed evidence is not to be expected and it is permissible to fill in the details by reasonable presumptions: 47 I. A. 6; 20 A. L. J. 658; 44 All. 756, *Foll.* (*Daniels, J.*). ISH DAT TEWARI *v.* TAMESHAR, **79 I.C. 296=5 L.R.A. Civ. 357=A.I.R. 1924 All. 916.**

———*Alienee need only prove that substantial part of the consideration was for necessity—Maxim*—De minimis non curat lex *applies.*

Where the creditor proved that almost the whole amount was expended for necessity,

Held: where nothing is shown adverse to the character or mode of livelihood of a Hindu father Courts ought not to be astute to find objections or highly artificial conclusions as to the absence of legal necessity in transactions which took place long ago and which are necessarily difficult to

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establish in all their details by clear verbal proof in a Court of law.

The transaction cannot be interfered with even *pro tanto.*

Some margin must be allowed for incidental expenses and the task imposed on the creditor of proving the intended and actual destination of each Rupee is, humanly speaking, an impossible one and for Courts of Justice to impose that duty on a creditor as a matter of principle is to invite him to commit and suborn perjury in the Trial Courts. The failure to prove a small margin in a large sum is covered by the maxim *de minimis non curat lex.* (*Walsh and Piggott, JJ.*). SURAJ PRASAD *v.* MUKHANLAL. **66 I.C. 134=44 All. 382=20 A.L.J. 236=A.I.R. 1922 All. 51.**

———*Old transaction—Proof of inquiry, by creditor and of necessity for major portion of debt, let in—Court may presume necessity for the balance also.*

Whilst it is true that the onus of proving necessity rests upon the mortgagees, if they have the assurance of the borrowers that the debts incurred were for family necessity and they made exhaustive enquiries as to the existence of debts which amounted to a very large sum and even if a few small items out of the total might appear to be doubtful, the Court should not scrutinize with meticulous care after a lapse of twenty years each small item about which the existence of family necessity is doubtful so as to give to the mortgagors the benefit of the doubt when the enquiries made by the mortgagees showed that the vast bulk of the debt appeared to have been incurred for family necessity and was subsequently acknowledged as a joint debt by the responsible heads of the different branches of the family. (*Dawson-Miller, C. J. and Bucknill, J.*). HARI PRASAD SINGH *v.* SURENDRA MOHAN SINGH. **66 I.C. 945=1 Pat. 506=3 P.L.T. 709=A.I.R. 1922 Pat. 450.**

———*Probability of family necessity—Absolute proof is not required but should be presumed after 20 years.*

If 20 years later it should appear that in a few instances there is no conclusive proof that the debts were actually incurred for family necessity or with the active participation of all the adult members of the family still if the circumstances show that the needs of the family were such that it is probable that the money even in those cases were required for family necessities, a Court should not require absolute proof in every case but may presume that the lender satisfied himself at the time that the debts were of such a nature as had been represented to him and as appear from the recitals in the bond. (*Dawson-Miller, C. J. and Bucknill, J.*). HARI PRASAD SINGHA *v.* SOURENDRA MOHAN SINGHA. **66 I.C. 945=1 Pat. 506=3 P.L.T. 709=A.I.R. 1922 Pat. 450.**

———*Representations by transferees is not enough enquiry by the alienee.*

In a case of transfer by the father of a joint Hindu family the transferee may prove the existence of an antecedent debt of the father or of some other form of legal necessity, or he may prove that he was reasonably satisfied of that existence after sufficient enquiry. The proof of enquiry may be a part of that of the existence of the legal necessity or may stand by itself, and the sufficient enquiry can be established at least in part by proof of representations made by transferors. But ordinarily something more than the mere representation of the borrower is necessary to constitute reasonable enquiry on the part of the lender. *Case-law*

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discussed. (*Hallifax, A. J. C.*). GANBA *v.* SHRI VISHVESHWAR DEOSTHAN. **64 I.C. 268=17 N.L.R. 194=4 N.L.J. 26=A.I.R. 1921 Nag. 14.**

—Alienation—Necessity—Purchase of property.

———A Hindu father is not entitled to sell joint ancestral property in order to get a better for himself in addition to one already possessed unless necessity for getting a new house is established. (*Dalip Singh, J.*). LAJJA RAM *v.* ABDUL RAHIM KHAN. **109 I.C. 448=29 P.L.R. 222=A.I.R. 1928 Lah. 437.**

———Alienation to purchase new property is not necessarily unjustified. (*Sulaiman and Banerji, JJ.*). JADO SINGH *v.* NATHU SINGH. **98 I.C. 773=48 All. 592=24 A.L.J. 633=A.I.R. 1926 All. 511.**

—Alienation—Necessity—Purchaser's duty.

———If the lender is shown to have acted *mala fide*, he cannot ask the Court to uphold the charge in his favour against the heir, grounded on a necessity which his wrong has helped to cause. The lender cannot act merely upon the representation made to him by the manager but he is bound to make an honest enquiry into the necessity of the loan with reference to the parties with whom he is dealing, that is to say, with reference to the representation made to him by the parties with whom he is dealing. The necessity for the enquiry, is an equitable rule framed for the protection of the lender, does so enquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of the charge and the lender is not bound to see to the application of the money. A complete codification of the evidence that would, in all cases, establish a case of *mala fides* against the lender is impossible. (*Das and Bucknill, JJ.*). KUMAR KALIKNAND SINGH *v.* SHIVA NANDAN PRASAD SINGH. **63 I. C. 625=3 P.L. T. 149=A.I.R. 1922 Pat. 122.**

—Alienation—Necessity—Purchaser's right.

———Mortgage of joint family property—Purchaser of equity of redemption can raise pleas of want of legal necessity and unconscionable nature of terms in his redemption suit. (*Wazir Hasan and Nanavutty, JJ.*). RAM KISHORE *v.* BAIJNATH. **113 I.C. 410=3 Luck. 598=5 O.W.N. 395=A.I.R. 1928 Oudh 287.**

———Alienation by widow—Transferee from reversioner can raise the plea as to legal necessity: A.I.R. 1923 Pat. 122, *Expl.* (*Kotval, A.J.C.*). (HAJI) SHEIKH MOHAMED *v.* RAMCHANDRA. **90 I.C. 74=A.I.R. 1926 Nag. 179.**

—Alienation—Necessity—Recitals.

———*Recital in deed may form evidence after long interval.*

Recitals in documents executed by Hindu ladies are by themselves no proof of the existence of legal necessity. But in cases where there has been a long interval of time and the surrounding circumstances support the inference, the recitals in such deeds would be evidence of representation having been made to the transferees to that effect: A.I.R. 1916 P.C. 110, *Foll.* (*Sulaiman and Sen, JJ.*). MUHAMMAD ABDUL KARIM KHAN *v.* BISHAN SAHAI. **121 I.C. 387=1929 A.L.J. 741=A.I.R. 1930 All. 9.**

———Legal necessity recited in document and both parties dead—Presumption is that there was legal necessity, unless rebutted. (*B. B. Ghose and S.K. Ghose, JJ.*). UPENDRA NATH MUKHERJEE *v.* GURUPADA HALDER. **34 C.W.N. 404=A.I.R. 1930 Cal. 508.**

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———*Deed—Recital.*

A recital in a deed of recent date executed by a Hindu widow is no evidence of the fact recited. (*Sen and Niamatullah, JJ.*). GAJE SINGH *v.* MT. UCHHABA. **119 I.C. 514=1929 A.L.J. 309=10 L.R.A. Rev. 138=A.I.R. 1929 All. 223.**

———*Proof of enquiry not possible—Proof of* bona fide *belief in alienor's representations and recitals in the deed are enough evidence.*

It is not absolutely necessary for a transferee to establish the actual existence of family necessities, or to show that the money advanced by him was utilized for such purposes. It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made proper enquiry to satisfy himself or its existence. The recital in the document is clear evidence of a representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible the recital coupled with such circumstances would be sufficient evidence to support the deed. (*Sulaiman, Ag. C.J. and Kendall, J.*). RAM NARAIN *v.* MT. NANDRANI KUNWAR. **114 I.C. 868=50 All. 823=A.I.R. 1929 All. 128.**

———Recitals in a deed of sale with regard to the existence of legal necessity for an alienation by a Hindu widow are not in themselves evidence of such necessity without substantiation by evidence *aliunde*. (*Sulaiman, Ag. C. J. and Kendall, J.*). RAM NARAIN *v.* MT. NANDRANI KUNWAR. **114 I.C. 868=50 All. 823=A.I.R. 1929 All. 128.**

———Recitals in a sale-deed are ordinarily insufficient in the absence of other independent evidence to establish that the vendee made sufficient enquiries into the existence of legal necessity: A.I.R. 1921 Nag. 14, *Rel. on.* (*Macnair, A.J.C.*). KANTAPRASAD *v.* MADHAORAO. **116 I.C. 648=12 N.L.J. 1=25 N.L.R. 28=A. I. R. 1929 Nag. 60.**

———Recitals in mortgage bond with regard to the existence of legal necessity for an alienation are not of themselves evidence of such necessity without substantiation by evidence *aliunde*: A.I.R. 1914 P.C. 38, *Rel on.* (*Ross and Chatterji, JJ.*). BISWANATH SINGH v. KAYESTHA CORPORATION. **119 I.C. 405=8 Pat. 450=10 P.L.T. 379=A.I.R. 1929 Pat. 422.**

———The principle that when a sale by a Hindu widow is old enough, a presumption ought to be made in favour of the transaction being supported by legal necessity, does not apply where the sale-deed contains no recital as regards the existence of any legal necessity for the transaction: A.I.R. 1916 P.C. 110, *Appl.* (*Kinkhede, A.J.C.*). ATMA RAM *v.* UMED SINGH. **102 I. C. 32=A.I.R. 1927 Nag. 383.**

———*Widow—Mortgage by widow and sale under it—Suit by reversioner challenging necessity for mortgage after a long-time—Recitals in mortgage-deed about necessity ought not to be disregarded.*

In cases where sales by widows have been questioned after long lapse of time the recitals in the document as regards necessity ought not to be disregarded even though they are not strictly evidence; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have

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been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with circumstances, would be sufficient evidence to support the deed. But it does not follow from the above principles that all ancient transactions ought to be upheld; where the circumstances tend the other way it will be reasonable not to apply these principles: 44 Cal. 186 (P.C.); 43 Mad. 541 (P.C.) and A. I. R. 1925 Mad. 673, *Foll.* (*Ramesam and Venkatasubba Rao, JJ.*). SANYASI *v.* RAMCHANDRA RAO.

95 I.C. 691=1926 M.W.N. 319=A.I.R. 1926 Mad. 692=51 M.L.J. 73.

———*Widow—Recital in ancient deed—Probability—Recital may be acted on.*

In respect of ancient alienations the amount of evidence that should reasonably be demanded is not the same as in the case of recent transactions. Full and detailed evidence which may otherwise be forthcoming will not, owing to lapse of time be available and, in such circumstances, presumptions are permissible to fill in the details which have become obliterated by time. (*Venkatasubba Rao, J.*). A. SOMAYYA *v.* A. VENKAYYA.

86 I.C. 483=22 M.L.W. 81=A.I.R. 1925 Mad. 673=48 M.L.J. 224.

———In the case of a mortgage of joint family property executed by the father a mere recital in the mortgage bond may be evidence but not sufficient proof of legal necessity. (*Dalal, A.J.C.*). MT. RAJAVANTA *v.* RAMESHAR. **87 I.C. 180=12 O.L.J. 235=2 O.W.N. 225=28 O.C. 393=A.I.R. 1925 Oudh 440.**

———*Alienation by widow—Recitals do not prove necessity but recitals in old deed cannot be lightly set aside.*

Recitals cannot by themselves be relied upon for the purpose of proving the assertion of fact which they contain for if such proof were permitted the rights of reversioners could always be defeated by the insertion of carefully prepared recitals. But where all the original parties to the transaction are dead, and all those, who could have given evidence on the relevant points have grown old, or passed away, a recital consistent with the probability and circumstances of the case has greater importance and cannot be lightly set aside. (*Kanhaiya Lal, J. C.*). QUAMAR JEHAN BEGAM *v.* BANSIDHAR. **72 I.C. 1046=A.I.R. 1924 Oudh 162.**

———*Alienation by widow—Legal necessity, inquiry as to, coupled with recitals in a deed are sufficient to support the deed.*

A recital in a deed is clear evidence of the representation, (that legal necessity existed on the part of the alienor) and where it is found that the alienee acted honestly and made all proper inquiries and satisfied himself of the truth of such representation, the recital coupled with the representation and the inquiry is sufficient evidence to support the deed: 43 I.A. 249 (252), *Ref.* (*C. C. Ghose and Panton, JJ.*). BANKU BEHARI DE *v.* BISSEHWAR LAL MARWARI. **76 I.C. 598=A.I.R. 1923 Cal. 575.**

———*They are not by themselves evidence—Lapse of time raises presumption and saves alienee from adverse inference.*

HINDU LAW—Alienation—Necessity—Religious ceremony.

In the application of this rule, it is to be borne in mind that recitals in conveyance or mortgages of the existence of legal necessity are not by themselves evidence of the fact, and there must ordinarily be some evidence *aliunde* to substantiate the allegations: 19 C.L.J. 469 P.C., *Foll.*

Though lapse of time does not affect the question of onus of proof regarding legal necessity, it may give rise to a presumption of acquiescence or save the alienee from adverse inference arising from the scantiness of the evidence offered on his behalf. In other words when by efflux of time direct evidence independent of the recital becomes unavailable, a recital of necessity, consistent with probability and the circumstances, assumes greater importance: it is clear evidence of a representation to the purchaser, and when evidence of actual enquiry by him has become impossible, the recital coupled with circumstances which justify a reasonable belief that an enquiry would have confirmed its truth is sufficient evidence to support the transaction: 22 C.L.J. 180, *Foll.* (*Mookerjee and Rankin, JJ.*). CHANDRA KISOR DATTA *v.* UPENDRA CHANDRA. **74 I.C. 612=37 C.L.J. 319=A.I.R. 1923 Cal. 563.**

———Mere recitals in bonds are not presumptive proof of the necessity for the debts borrowed thereunder. (*Jwala Prasad and Adami, JJ.*). KAROO *v.* RAMESHWAR SAO. **62 I.C. 905=3 P.L.T. 43=6 P.L.J. 451=A.I.R. 1923 Pat. 143.**

———*Recital is evidence of representation—Recital without any other circumstances is not sufficient to support deed.*

In the case of a document of considerable antiquity, a recital in the document is clear evidence of representation to the lender and if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed the truth of the representation, then, when proof of actual inquiry had become impossible, the recital coupled with the circumstances, would be sufficient evidence to support the deed. But if other circumstances, besides recitals, are wanting, it must be held that the party on whom the burden of proof lay has failed to discharge the burden of proof of the legal necessity. (*Lindsay and Stuart, JJ.*). SURJU PRASAD *v.* MD. SHAKUR. **66 I.C. 564=A.I.R. 1922 All. 126.**

———*Purpose of mortgage recited in the deed coupled with circumstances is sufficient evidence to support the deed.*

The recital in a deed of mortgage may not by itself be sufficient to prove the purpose for which the money was borrowed against third parties, but it is clear evidence of the representation made to the creditor, and if the circumstances are such as to justify a responsible belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible the recital coupled with the circumstances will be sufficient evidence to support the deed: 44 Cal. 186 (P.C.), *Foll.* (*Daniels, A.J.C.*). RAM SARAN *v.* DAWAN SINGH. **66 I.C. 36=24 O.C. 386=A.I.R. 1921 Oudh 214.**

—Alienation—Necessity—Religious ceremony.

———Daughter inheriting estate of her mother—Expenses for barkhi ceremony of mother can be met by her out of mortgage of such property. (*Sulaiman and Kendall, JJ.*). MAQBUL AHMAD *v.* BRIJDEO TEWARI. **122 I.C. 751=1930 A.L.J. 765=A.I.R. 1930 All 529**

HINDU LAW—Alienation—Necessity—Religious ceremony.

———Two members of joint Hindu family between themselves and their sons occupying respectable positions in their society and village, borrowed Rs. 70 on mortgage of joint family property and spent the same on Gauna ceremony of daughter of their family—Money spent is warranted by legal necessity : 37 Cal. 1, *Rel. on.*

While considering legal necessity for a mortgage social considerations cannot be ignored. If, having regard to what is customary in the society to which the family belongs, a certain expenditure is reasonable such that a prudent man similarly situated would incur or such that other members, if adult, are likely to sanction, it may well be regarded as money spent on legal necessity. The circumstances of the particular family, such as its means, social customs and sentiments, the purpose on which the sum in question is to be spent, its adequacy or otherwise are some of the considerations which will determine the propriety of the expenditure in a given case. (*Sen and Niamatullah, JJ.*). BAJRANGI MISIR *v.* PADARATH SINGH.
124 I.C. 759=A.I.R. 1930 All. 504.

—Alienation—Necessity—Re-purchase of property.

———The re-purchase of property sold by a separated brother is not however the purpose which constitutes legal necessity under Hindu Law. (*Daniels, J.*). SHEO DEN *v.* HABHI ULLAH KHAN.
75 I.C. 872=A.I.R. 1924 All. 721.

———Father as manager of the joint family property is not entitled to encumber it for the purpose of acquiring ancestral estate belonging to a near relative. The duty of the father or other manager is to manage the property of the joint family to which he himself belongs for the benefit of that family. (*Batten, J.C. on difference between Drake-Brockman, J.C. and Hallifax, A. J. C.*). GANPAT RAO *v.* LAXMI CHAND. **77 I. C. 640= 6 N. L.J. 239=A. I. R. 1924 Nag. 1.**

—Alienation—Necessity—Sale to mortgage.

———Sum for necessity forming substantial portion of whole consideration—Land value not much in excess of amount for necessity—Sale should not be changed into mortgage. (*Tek Chand and Hilton, JJ.*). LAHNU *v.* BAKHSHI.
A.I.R. 1929 Lah. 875.

———Necessity proved—Sale not below market value—Vendor could not raise sum by mortgage—Sale cannot be converted into mortgage: A.I.R. 1919 P.C. 12 ; A.I.R. 1923 P.C. 37 and 20 P.W.R. 1911, *Dist.* (*Tek Chand and Hilton, JJ.*). ISHAR DAS *v.* BHIKU. **120 I. C. 541= A. I. R. 1929 Lah. 809.**

—Alienation—Necessity—Test of.

———*Sale—Setting aside—Tests—If necessity could be met from other parties or otherwise met.*

Where in a suit by members of joint Hindu family for setting aside the sale of a house the Court finds the legal necessity to be proved only in respect of a certain sum and decrees the plaintiff's claim on condition that they re-pay the sum, the finding is not in accordance with law. The sale is either wholly valid or invalid according as it is found to have been made for necessity or the reverse. Considerations that would be of importance in order to decide whether it was necessary to sell the house in suit to raise the particular sum would be whether the parties concerned had any other property out of which they could meet the necessary expenditure, whether it would not have been possible to raise the sum by mortgage and matters of a like nature: A. I. R. 1927 P. C. 37 and 246, *Ref.* (*Kendall and Niamatullah, JJ.*). MURLI *v.* GHAMAR. **121 I.C. 385=51 All. 61= A.I.R. 1930 All. 22.**

HINDU LAW—Alienation—Necessity—Widow—Burden of proof.

———*Proportion of price to the amount of actual necessity is an important factor but not the sole test.*

Ananthakrishna Iyer, J.—In deciding whether a particular sale should be ultimately held to be binding or not the proportion of the price to the amount of actual necessity is no doubt a factor ordinarily an important factor, but that is not the sole test to be taken into account in adjudicating on such matters. (*Srinivasa Aiyangar and Ananthakrishna Ayyar, JJ.*). SATHAPPAN AMBALAM *v.* VADIVELU. **109 I.C. 106= A.I.R. 1928 Mad. 450.**

—Alienation — Necessity — Widow — Benefit to estate.

———*Acts in ordinary course of management are binding—Alienation without necessity—Validity of.*

A Hindu widow in possession is undoubtedly entitled to do ordinary acts of management, but whether in a particular case, a particular action of the widow was in the ordinary course of management or not must be decided with reference to the circumstances of that case: 33 Cal. 842 and 25 I. C. 280, *Rel. on.*

Where a transaction though not in the form of a sale, was in reality a permanent alienation by a limited owner without any legal necessity for doing so, it could only hold good for her life time. (*Iqbal Ahmad, J.*). RAM SINGH *v.* BRIJ RAJ SARAN SINGH. **99 I.C. 548= A.I.R. 1927 All. 283.**

—Alienation — Necessity — Widow — Benefit to reversioners.

———*Alienation by limited owner is justified if made for maintenance but not if made for comforts or to purchase another better property.*

A daughter is not bound to sell her father's property to the prejudice of her son's interest for the purpose of putting the family in comfortable circumstances. If she has no other income and if the family was really starving and without selling the property she would starve she would be justified in selling the property inherited from her father to the prejudice of the reversioners, but it is not open to a widow or a limited owner, such as daughter, to sell the property in her possession because she could not manage the property or that it is beneficial to her as well as to the reversioners to sell it and buy some other property. (*Devadoss, J.*). SRINIVASA AIYANGAR *v.* ALAMELU AMMAL.
101 I.C. 571=A.I.R. 1927 Mad. 715.

—Alienation — Necessity — Widow—Burden of proof.

———*Burden of proof lies on alienee to prove that alienation was made for necessity.*

The burden of proof lies on the decree-holder as alienee from a widow, who had only a widow's interest in the property to prove that the alienation, *viz.*, the charge made in the decree, was made for any necessity which could legally extend its validity beyond the widow's life, or that the decree-holder took this alienation in good faith after making the necessary inquiries. (*Reilly and Cornish, JJ.*). C. MEENAMBAL AMMAL *v.* ABURHUBAMMAL. **1930 M.W.N. 337= A.I.R. 1930 Mad. 688.**

———Widow mortgaging property—Mortgagee suing to enforce mortgage against reversioner—

HINDU LAW—Alienation—Necessity—Widow—Burden of proof.

Mortgagee must prove that mortgage was of nature binding on reversioner. (*Jackson and Mohiuddin, A. J. Cs.*). MT. MANKARNIKABAI *v.* NANDLAL ACHALDAS. **122 I.C. 371=A.I.R. 1930 Nag. 220.**

———Land mortgaged by widow for debts due by husband to third parties—If it is shown that debts were actually paid by mortgagee, *onus* is on reversioner suing for declaration to prove that debts were tainted with immorality: 65 P. R. 1900 and 1 Lah. 472, *Rel. on.* (*Shadi Lal, C.J. and Skemp, J.*). MANGAL SINGH *v.* DEVA SINGH.
116 I.C. 891=A.I.R. 1929 Lah. 848.

———*Mortgage by widow—Mortgagee must prove consideration independently of recitals.*

Recitals in a deed, though binding on the parties to that deed, cannot be considered to be binding upon third parties, who are not in any way connected with the deed.

Where creditor seeks, under a mortgage executed by a widow, to recover money from the reversioners, it is necessary for him to establish the passing of consideration independently of the recitals contained in the deed itself. (*Misra, J.*). JAGANNATH SINGH *v.* GURCHARAN SINGH. **114 I.C. 783=4 Luck. 279=5 O.W.N. 1097=A.I.R. 1929 Oudh 422.**

———*Sale by widow to discharge a mortgage—Vendee to prove that sale is justified—Failure to make enquiries—Absence of good faith.*

In the case of alienation by a widow the *onus* lies heavily on a vendee to prove that a certain mortgage transaction for discharge of which the sale is effected, is a genuine and *bona fide* one and the discharge of this debt constitutes legal necessity.

Where a vendee fails to prove what inquiry was made and how he was satisfied as to the genuineness or good faith of that transaction, though the fact was peculiarly within his knowledge, this omission must be taken as the strongest indication of the absence of good faith on his part: A.I.R. 1927 P.C. 230, *Foll.* (*Shadi Lal, C. J. and Bhide, J.*). AHMAD DIN *v.* TULSA SINGH.
113 I.C. 292=A.I.R. 1928 Lah. 875.

———*Alienation by widow to satisfy a decree against her for husband's debt—When valid.*

A mortgage of ancestral land by a widow to satisfy a decree for a debt contracted by her deceased husband is not binding on the reversioners unless it is shown that she had no other means to satisfy the decree. The burden of proving the necessity lies heavily on the mortgagee: 39 P. R. 1915, *Dist.* (*Harrison, J.*). PUR SINGH *v.* NAZAR SINGH.
91 I. C. 479=26 P.L R. 15=A.I.R. 1926 Lah. 208.

———*Alienee must prove necessity—Burden is not shifted though sale effected with minor reversioners' consent.*

The principle of law is that in the case of purchase from a limited owner, it is for the alienee to make out that the sale is good or to show the circumstances which would give the limited owner right to convey full title to the properties sold and the mere fact that the minor reversioner as represented by his father joined in the sale-deed along with his grandmother would not shift the burden of proof from the shoulders of the alienee to those of the minor reversioner. (*Devadoss, J.*). SULEMAN SAHEB *v.* P. VENKATRAJU. **86 I.C. 195=21 M.L.W. 115=A.I.R. 1925 Mad. 670.**

———*Alienee to prove necessity or* bona fide *enquiry.*

When a person claims title under an alienation effected by a Hindu widow in respect of the estate

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of her husband, the burden lies upon him to establish either that there was a legal necessity in fact which justified the alienation or that he made proper and *bona fide* enquiries and did all that was reasonable to satisfy himself as to the existence of such necessity: 35 Cal. 420, *Foll.* (*Mookerjee and Rankin, JJ.*). CHANDRA KISOR DATTA *v.* UPENDRA CHANDRA. **74 I. C. 612=37 C. L. J. 319=A.I.R. 1923 Cal. 563.**

———*Widow—Mortgage—Necessity for borrowing, and on the particular terms—*Onus *is on alienee to make out both.*

A person who deals with a Hindu widow having a limited estate is bound to establish the facts, which justified the transaction under which he claims.

In the case of a mortgage, made by a widow, it is incumbent on the mortgagee to show not only that there was a necessity to borrow, but also that it was not unreasonable to borrow at a high rate and upon the particular terms, and, if this is not shown the rate and terms would not stand even though the charge may be upheld. (*Kanhaiya Lal, J. C.*). DARYAO SINGH *v.* KALI SINGH. **68 I.C. 164=9 O.L.J. 213=A.I.R. 1922 Oudh 175.**

———A person who deals with a Hindu widow having a limited estate must be aware that he may be called upon to establish the facts which justify the transactions under which he claims.

It is sufficient to say that the mere fact that the rent reserved was a fair market rent or the price, obtained was a fair market price, cannot alone and in themselves be regarded as sufficient. (*Lord Buckmaster.*) NABA KISHORE MANDAL *v.* UPENDRA KISHORE MANDAL. **65 I.C. 305=20 A.L.J. 22=35 C.L.J. 116=1922 M.W.N. 95=26 C.W.N. 322=3 P.L.T. 311=24 Bom. L.R. 346=15 M. L. W. 417=30 M. L.T. 234=A.I.R. 1922 P.C. 39=42 M. L. J. 253 (P.C.).**

———In an action against the widow on a contract made by the widow, a compromise, by which she makes over the estate stands on no different footing from a conveyance by her of the property and the alienee must prove legal necessity. (*Schwabe, C.J., Coutts-Trotter and Kumaraswami Sastri, JJ.*). NALLA TIRUPATIRAJU *v.* NANDIKOLLA VENKAYYA. **67 I.C. 479=45 Mad. 504=1922 M. W. N. 207=15 M. L. W. 395=30 M.L.T. 181=A.I.R. 1922 Mad. 131=42 M.L.J. 392 (F.B.).**

———*Loan for litigation expenses—Creditor to prove absence of funds.*

Where a widow purports to alienate a portion of her husband's property in order to meet expenses of litigation incurred for the protection of the estate against a hostile attack, necessity is not established unless it is proved that at the time the money was actually advanced there was no money in the offer sufficient for the protection of the estate and it is for the creditor to establish that there were no funds in the hands of the widow sufficient for the protection of the estate against the hostile attack. (*Das and Ross, JJ.*). BALU SUDARSHAN PRASHAD NARAIN SINGH *v.* SARJUG SINGH. **60 I.C. 486 (Pat.).**

—Alienation—Necessity — Widow — Daughter's marriage.

———A married woman who had inherited her father's property, alienated a portion of it to pay off a prior debt incurred for the marriage expenses of her daughter. Her husband being poor could not afford to have his daughter married.

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Held, that the transaction was for legal necessity: 18 All. 474 and 50 M. L. J. 221, *Foll.*; 1 Pat. L.J. 81, *Dist.* (*Ross and Wort, JJ.*). KAMLA PRASAD SINGH *v.* LALJI PRASAD. **9 Pat. 721.**

———The widow can make a gift of landed property to her daughter or son-in-law on the occasion of her marriage or any ceremonies connected with the marriage and that the promise made may be fulfilled afterwards; and it is not essential to make a gift at the time of the marriage but that it may be made afterwards, upon the ground that the gifts when made fulfil the moral and religious obligation of giving a portion of the property for the benefit of the daughter and the son-in-law. The only limitation placed upon this power of making a gift is that it should bear a reasonable proportion to the entire property of the deceased father and that it should be justifiable in the circumstances of the case. (*Case-law fully discussed.*) (*Jwala Prasad and Bucknill, JJ.*). RAM SUMRAN PRASAD *v.* GOVIND DAS. **99 I.C. 782=5 Pat. 646=7 P.L.T. 821=A.I.R. 1926 Pat. 582.**

———Where the marriages of the other daughters of the widow's husband which took place before the Great War cost Rs. 800,

Held, that the widow was justified in spending out of her husband's estate Rs 1,400 for her daughter's marriage which was celebrated after the war. (*Suhrawardy and Cuming, JJ.*). SATISH CHANDRA NAG *v.* HARIPADA DE. **87 I.C. 43=41 C.L.J. 209=A.I.R. 1925 Cal. 689.**

—Alienation — Necessity—Widow — Dowry for daughter.

———*Alienation by widow for providing reasonable dowry for her daughter is valid.*

There can be no question as to the right of a Hindu widow of a separated Hindu governed by the Mitakshara Law to make an alienation to provide a dowry for her daughter provided it is a reasonable alienation in the circumstances of the case and it is immaterial whether the deed was executed before or after the marriage ceremony: A.I.R. 1926 Oudh 425, *Rel. on.* (*Stuart, C.J. and Raza, J.*). UDAI DAT *v.* AMBIKA PRASAD. **100 I.C. 503=2 Luck. 412=4 O.W.N. 133=A.I.R. 1927 Oudh 110.**

—Alienation — Necessity — Widow—Husband's debts.

———*Payment of barred debts of husband is legal necessity—Widow can alienate whole property for that purpose.*

Payment of barred debt left by her husband is a pious duty on the part of the widow and amounts to legal necessity. It is not necessary that there should be any danger to the estate in order to entitle the widow to incur debt or alienate the property of her husband in order to pay off barred debts. She may alienate the whole of the estate inherited if she cannot raise sufficient money for the purpose by alienating a part: 21 Cal. 190; 21 Cal. 190-*n* and 6 M. I.A. 393 (P. C.), *Ref.* (*B. B. Ghose and S. K. Ghose, JJ.*). ASHUTOSH SIKDAR *v.* CHIDAM MONDAL. **34 C. W. N. 153=A. I. R. 1930 Cal. 351.**

———*Widow can alienate property to save her life-estate being sold for debts legally due from her husband.*

It is legal necessity for the widow to discharge her husband's just debts, *i.e.*, debts legally due not necessarily for legal necessity by alienation of the ancestral property. Where the widow finds herself

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in the position of having the whole estate attached and sold to the detriment of her life-interest, for the debts incurred by the husband, she is justified in alienating the property in order to save her life-estate which is given to her really for the purposes of maintenance. The case of a widow is distinguishable from the case of person who himself incurred the debt: A.I.R. 1923 Lah. 245, *Rel. on.* (*Dalip Singh, J.*). SUNDAR SINGH *v.* JIVAN SINGH. **118 I. C. 899= A.I.R. 1930 Lah. 249.**

———*Widow is justified in selling property for payment of mortgage debts incurred by her husband and shortly to become due.*

A widow must be allowed some latitude in the exercise of her powers of alienation and she is right in providing beforehand for payment of the mortgage debt incurred by her husband shortly to become due and she cannot be blamed for making at the same time a comprehensive arrangement for the settlement of all the mortgage debts on the property of her husband in her hands, even though some of them did not require to be paid for a year or so: 20 C.W.N. 210; A.I.R. 1922 P. C. 356 and 18 Bom. 534, *Rel. on*; A. I. R. 1925 Bom. 91 and A.I.R. 1928 Oudh 287, *Dist.* (*Jackson, A.J.C.*). YASODA *v.* SHAMJI. **123 I. C. 899=A.I.R. 1930 Nag. 218.**

———A widow is entitled to sell a portion of her husband's property to discharge a debt created by the husband in the security of a *zarpeshgi* mortgage, although the mortgagee is in possession and under the terms of the contract precluded from bringing a suit to recover his debt: 18 Bom. 534, *Rel. on.* (*Das and Fazl Ali, JJ.*). RAM ASRE *v.* AMBICA LAL. **119 I.C. 547=11 P.L.T. 6=A.I.R. 1929 Pat. 216.**

———Where the husband has left debts his widow is perfectly entitled to acknowledge them and charge her husband's land with those debts: 17 P. R. 1919 (F.B.), *Foll.* (*Addison, J.*). ABDUR RAHMAN *v.* RURA. **114 I.C. 52=A.I.R. 1928 Lah. 962.**

———*Widow can alienate to pay debts of the last male holder or interest thereon—Enquiry by transferee about the pressure on the estate is sufficient—Interest on debts has prior claim to maintenance—Transferee has to see that alienation is not unfair to reversioners.*

Per *Kanhaiya Lal, J.*—Under the Hindu Law a widow is entitled to the beneficial enjoyment of the entire estate for her life; but if there are debts due by the estate, it is to her interest to pay the debts or the interest accruing due, lest she may lose the corpus or a portion of the estate by an enforced sale in satisfaction of those debts and her means of maintenance may thereby be affected. A widow is under a pious obligation to pay the debts of the last male-holder even though they may be barred by time.

A creditor is not affected by any precedent or subsequent mis-management of the estate, unless he has been a party to it. The immediate pressure on the estate and the danger to be averted are the principal matters about which he is bound to enquire, and if he acts in good faith, he is protected and can enforce the transaction as much against the widow as against her reversionary heirs.

Per *Ashworth, J.*—A widow is only entitled to the usufruct of the property less reasonable interest on debts against the property which it is not possible or convenient for her to discharge. The widow is bound to keep down interest on her husband's

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debts and is only entitled to enjoy the real net income of her husband's properties: 1913 M.W.N. 275, *Ref.* The interest on a debt on the estate in possession of a widow is a prior claim on the income of the estate. An alienee from the widow has to see that the alienation does not operate unfairly against the reversioners. (*Kanhaïya Lal and Ashworth, JJ.*). GAURI SHANKER *v.* KAMALA PRASAD. **95 I.C. 869=A.I.R. 1926 All. 645.**

——Where a widow mortgaged property to pay off an earlier mortgage by her husband and she covenanted in the deed to pay enhanced revenue as was covenanted in the deed by her husband.

Held, that there was no reason to hold that the widow was not justified in making that covenant. (*Simpson and Gokaran Nath Misra, A.J.Cs.*). THAKUR BISHU NATH *v.* RAM RATAN.
89 I.C. 581=12 O.L.J. 406=2 O W.N. 522=A.I.R. 1925 Oudh 529.

——Under the Hindu Law a widow is bound to pay the debts due by her husband, such payment being conducive to the spiritual benefit of the deceased and therefore if she alienates the property inherited by her from her husband in order to pay off the debts due by him, no question of any pressure or necessity arises : 51 I.A. 145, *Expl.* (*Simpson and Gokaran Nath Misra, A.J.Cs.*). THAKUR BISHU NATH *v.* RAM RATAN. **89 I. C. 581=12 O. L. J. 406=2 O. W. N. 522=A. I. R. 1925 Oudh 529.**

——*Sale for amount not exactly covering the debt cannot be set aside.*

A sale by a Hindu widow cannot be set aside upon payment of the amount which it was necessary for the widow to raise to pay off a legal debt, simply because the property sold was not sold for a sum which *exactly* covered that debt. It would manifestly be impossible, and possibly prejudicial to the interest of the estate, if the widow were to be bound in every instance to sell property for payment of a debt due from her husband for exactly the sum due to the creditor : 14 C.W.N. 895, *Foll.* ; 29 All. 331 (P.C.), *Expl.* (*Hallifax, A.J.C.*). ANAND RAO *v.* SARASWATIBAI. **71 I. C. 532=6 N. L. J. 115=A. I. R. 1923 Nag. 125.**

——Mother succeeding to son's estate cannot alienate for debts of her husband unless charged on the estate, though son was under pious obligation to pay. (*Gokul Prasad and Stuart, JJ.*). SHEO RAM PANDE *v.* SHEO RATAN PANDE.
63 I. C. 279=43 All. 604=19 A. L. J. 613=A.I.R. 1921 All. 163.

—Alienation—Necessity—Widow—Interest.

——Alienation by widow for interest in excess of what is allowable under the rule of *Damdupat*, is not justified in Berar : 10 N.L.R. 91, *Foll.* (*Baker, J.C.*). RAJRAM *v.* RAMCHANDRA. **89 I. C. 944=A. I. R. 1926 Nag. 33.**

——*Sale to discharge mortgage and interest thereon —When not valid.*

J originally mortgaged the land for Rs. 1,500 on the 20th of November, 1903. The mortgage was converted into a sale by the widow in 1910, the consideration being Rs. 1,500 due on the mortgage, Rs. 1,221-13 due as interest and Rs. 24 spent on repairing a well and due from the mortgagor under the terms of the deed of mortgage.

Held, that the widow had no necessity to sell the equity of redemption, the debt being a charge only on the mortgaged land and not being recoverable from the person or other property of the mortgagor, and that the interest due under the mortgage was not a just debt : 65 P. R. 1900 (F.B.), *Ref.* (*Scott-Smith, J.*). BODH RAJ *v.* RAJA SINGH. **77 I.C. 906=A.I.R. 1923 Lah. 668.**

HINDU LAW—Alienation—Necessity—Widow—Maintenance.

—Alienation—Necessity—Widow — Land Revenue.

——*Arrears of land revenue is not legal necessity if occasioned by imprudence.*

It is not open to the life-tenant to imperil the reversion by extravagance, imprudence and wanton neglect to pay the Government revenue where funds were available to her. In the absence of evidence to prove that the usufruct of the property was not sufficient to meet the Government revenue, the mere fact of allowing the revenue to fall into arrears will not put upon herself created liability, the impress of necessity, as would legalise the conveyance of the absolute title to the property in execution of the decree against her : 5 Pat. 585, *Dist.* (*Sen and Niamatullah JJ.*). RAGHUBIR SARAN *v.* RAM SARAN. **114 I.C. 33=26 A.L.J. 825=A.I.R. 1928 All. 651.**

——*Arrears of revenue is necessity.*

The existence of arrears of revenue for which the estate is liable to be sold up is at least presumptive evidence of necessity, even though when the loan is incurred, the Government may not have taken measures to enforce the liability. This presumed necessity may no doubt be repudiated by showing that the widow had sufficient income to enable her to pay the revenue without the necessity of borrowing. (*Ryves and Daniels, JJ.*). LALTA PRASAD *v.* DARSHAN SINGH.
74 I.C. 839=A.I.R. 1924 All. 149.

—Alienation—Necessity—Widow—Maintenance.

——*Alienation by widow for the maintenance of daughter's son, is not justifiable.*

Under Mitakshara, the daughter's son is not a member of the last male holder's family, he belongs to the family of the daughter's husband. Nor could the daughter's son, be a dependent member of the last male holder's family when his father is living and able to maintain him. Therefore the last male holder is not bound to maintain the daughter's son, and on his death his estate in the hands of his widow is not liable for the maintenance, education, upanayanam and marriage. Any alienation by the widow for such purposes is not justifiable. (*Case-law discussed.*) (*Ananthakrishna Iyer, J.*). ANANDARAO *v.* VENKATASUBBA RAO.
123 I. C. 812=1930 M W N. 40=31 M.L.W. 692=A.I.R. 1930 Mad. 287=58 M.L.J. 127.

——Balance from income after paying interest payable on previous mortgage of property sufficient for her maintenance—Sale of property is not for necessity: A.I.R. 1927 P.C. 37, *Expl.* and *Dist.* (*Shadi Lal, C.J.* and *Bhide, J.*). AHMAD DIN *v.* TULSA SINGH. **113 I. C. 292=A.I.R. 1928 Lah. 875.**

——Where a woman inherits considerable property as a limited owner she is not entitled to charge the reversion with debts contracted by her when she could have met those debts from the income of the property. But where the income is not sufficient for her own maintenance or for other purposes, such as pilgrimage to holy places, etc., a limited owner can alienate the property to the prejudice of the reversion. (*Devadoss, J.*). RAJAGOPALACHARIAR *v.* SAMI REDDI.
93 I.C. 49=1926 M.W.N. 266=A.I.R. 1926 Mad. 517=50 M.L.J. 221.

HINDU LAW—Alienation—Necessity—Widow—Maintenance.

———Where the estate does not yield sufficient income for the widow's maintenance and she therefore sells it in order to invest it in purchasing a house which fetches more rent,

Held, that if by first selling the land, a widow can so improve the estate as to provide sufficient for her own maintenance this must be regarded not merely as a prudent arrangement but also as a necessary arrangement, and it is therefore binding on the reversioners. (*Chevis and Campbell, JJ.*). RADHA RAM *v.* KHUSHI RAM. **66 I.C. 343= A.I.R. 1922 Lah. 204.**

—Alienation—Necessity—Widow—Management.

———*If a prudent act of management, sale is upheld.*

A Hindu widow enjoys the same latitude in the exercise of her powers as the manager, of a joint family, or of an infant's estate, possesses, provided "she acts fairly to her expectant heirs." In such a case all that one has therefore to see is whether the widow acted fairly towards her expectant heirs or prejudicially to their interest: 11 Bom. 320 and 18 Bom. 534, *Appl.*

Even though there is no absolute legal necessity, a sale by widow can be upheld, on the ground of its being a prudent and beneficial act of management: A. I. R. 1925 Nag. 302, *Foll.* (*Kinkhede, A.J.C.*). SUMITRABAI *v.* HIRBAJI. **97 I.C. 983= A.I.R. 1927 Nag. 25.**

———*Private sale to avoid Court-sale as an act of good management—Sale need not be exactly for amount of legal necessity.*

Where a widow sold property by a private sale to save it from being sold at a much less price at an auction sale,

Held, it was an act of good management and prudence on her part that she executed the sale-deed to save the property from being sold for an inadequate price. A widow is not always bound to sell exactly for the amount for which there is legal necessity. It is to be seen in each case whether having regard to the circumstances the alienation was a proper one, and the widow has dealt fairly towards the expectant heir. (*Abdul Raoof and Martineau, JJ.*). NAMAN MAL *v.* HAR BHAGWAN. **66 I. C. 362=2 Lah. 357= A. I. R. 1922 Lah. 317.**

—Alienation—Necessity—Widow—Meaning of.

———The power of the widow in respect of alienation for legal necessity is the same as that of the manager of the family property; and it can only be exercised in the case of need or for the benefit of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred on it, in the particular instance, is the thing to be regarded: 6 M.I.A. 393 (P.C.), *Appl.*

There can be no question that she may make alienations to procure maintenance for herself or to defray the expenses of her own religious ceremonies, such as may be necessary, for the salvation of her husband's soul; but she is not at liberty to anticipate her wants.

The word "necessity" has a somewhat special, almost a technical meaning. Necessity, does not mean compulsion, but the kind of pressure which the law recognizes as serious and sufficient. (*Greaves and Mukerji, JJ.*). SANTOSH KUMAR *v.* GANESH CHANDRA. **98 I.C. 919=31 C.W.N. 65= A.I.R. 1927 Cal. 160.**

———*Necessity does not mean actual compulsion, but pressure which the law deems sufficient.*

A widow can alienate, if there are no other means available, for the obligatory ceremonies to secure the repose of the soul of her husband. She can, in some circumstances, alienate immoveable property to pay the last owner's debts, or (if there is no other available source of supply) for her own or infant children's maintenance. Necessity does not mean actual compulsion, but the kind of pressure which the law recognises as serious and sufficient. (*Lord Phillimore.*) RAMSUMRAN *v.* MT. SHYAMKUMARI. **69 I. C. 71=4[illegible] I A. 342= 31 M. L. T. 200=1 Pat. 741=27 C.W.N. 269= 3 P.L.T. 749=21 A.L.J. 18=16 M.L.W. 956= 37 C.L.J. 356=25 Bom. L.R. 634= 4 L.R.P.C. 17=A.I.R. 1922 P.C. 356= 44 M L.J. 751 (P. C.).**

HINDU LAW—Alienation—Necessity—Widow—Presumption.

—Alienation — Necessity — Widow — Mother's debts.

———Alienation by daughter to pay off mother's debts is not binding on reversioners. (*Stuart, J.*). SITA RAM *v.* REWA RAM. **71 I.C. 390= A.I. R. 1923 All. 366.**

—Alienation — Necessity — Widow — Obsequial ceremonies.

———Payment of husband's debt and performance of his obsequial ceremonies are a legal necessity. (*Coyajee and Fawcett, JJ.*). BAI SURAJ *v.* JIJIBHAY BHAVSANG. **86 I.C. 196= A.I.R. 1925 Bom. 38.**

—Alienation—Necessity—Widow—Pilgrimage.

———*Pilgrimage not conducive to husband's spiritual welfare is not necessity.*

According to Hindu Law only those pilgrimages which conduce to spiritual welfare of the husband constitute a valid necessity for an alienation by a widow. A pilgrimage to Gaya for performance of the husband's Shradha has been held to constitute such necessity but not pilgrimages to places like Benares, Muttra, Brindaban, etc.: A.I.R. 1924 All. 902 and 3 C. W. N. 544, *Ref.* (*Shadi Lal, C. J. and Bhide, J.*). AHMAD DIN *v.* TULSA SINGH. **113 I.C. 292=A.I.R. 1928 Lah. 875.**

———Widow is competent to alienate her husband's estate for expenses in connexion with a feast given to Brahmins after return from pilgrimage to Gaya. The feast to Brahmans, after performance of the sradh ceremony at Gaya, is an essential incident which justifies reasonable expenditure: 18 C.W.N. 1303, *Foll.*; A. I. R. 1921 All. 109 and 43 Cal. 574, *Ref.*; 33 All. 255, *Not foll.* (*Raza and Nanavutty, JJ.*). SAMRATH SINGH *v.* RAM MIT. SINGH. **110 I.C. 531=5 O.W.N. 510= A.I.R. 1928 Oudh 353.**

———There is no authority for the view that a Hindu widow's pilgrimage to Dwarkaji or Jagannathji is necessarily conducive to her husband's spiritual benefit: A.I.R. 1922 P.C. 261 and 43 Cal. 574, *Dist.* (*King, J.*). RAMLAL *v.* KUNWAR RACHPAL. **102 I. C. 275=4 O. W. N. 498= A.I.R. 1927 Oudh 231.**

—Alienation—Necessity—Widow—Powers of.

———Widow has no power to alienate husband's property even in absence of blood relation except for necessary purposes unless such authority is conferred by husband by will. (*Addison and Bhide, JJ.*). BALAK RAM, HIGH SCHOOL, PANIPAT *v.* NANU MAL. **31 P.L.R. 509=A.I.R. 1930 Lah. 579.**

—Alienation—Necessity—Widow—Presumption.

———*Alienation challenged 49 years afterwards—Conduct of the parties who could have objected should be looked to.*

In a suit to challenge alienation by a Hindu widow 49 years after its date, it was found that the

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sister of the last male owner had attested the deed, that two reversioners had attested a sale-deed by the alienee, and in a partition among the reversioners they had agreed not to challenge the alienation and during the widow's lifetime the alienation was not challenged by the reversioners,

Held, that these circumstances lead to the inference that the alienation was for necessity: A.I.R. 1922 P.C. 163 and 43 Mad. 541, *Ref.* (*Spencer, J.*). NATESA AIYAR *v.* PANCHAPAGESA AIYAR.

93 I.C. 684=22 M.L W. 874=A. I. R. 1926 Mad. 247.

———Where a famine year is followed by several years of scarcity and the widow makes the alienations soon after that period, alienation can be said to have been made for necessity: A.I.R. 1917 P.C. 6, *Ref.* (*Phillips and Srinivasa Ayyangar, JJ.*). NATESA PILLAI *v.* MEENAKSHISUNDARA MUDALIAR. **109 I.C. 96 (Mad.).**

—Alienation—Necessity —Widow — Purchaser's rights.

———The purchaser from widow is not bound by any previous act of mis-management by the widow so long as he is satisfied that there was a pressing necessity for the sale. (*Greaves and B. B. Ghose, JJ.*). SAILABALA DEBI *v.* BAIKUNTHA NATH.

91 I.C. 186=A.I.R. 1926 Cal. 486.

———A transferee from a Hindu widow cannot be permitted to plead against the reversioner the bar of S. 41, Transfer of Property Act: A.I.R. 1925 All. 79, *Rel. on.* (*Misra and Raza, JJ.*). KHUSHWAQT RAI *v.* JAGANNATH PRASAD TANDAN.

119 I C. 872=A.I.R. 1930 Oudh 184.

———*Sale by widow of her absolute estate—Recital of necessity in the deed does not make it a limited estate.*

In cases where a widow or daughter has an absolute estate and where she purports to sell the property absolutely, the purchaser is entitled to rely upon the title she had and there is no reason to cut down the estate intended to be sold by presuming that the parties intended only to have a widow's estate in spite of the fact that the sale-deed purports to be an absolute sale-deed conferring full title, necessity being set out only as enabling the widow to confer such title. (*Kumaraswami Sastri and Reilly, JJ.*). PALANIYANDI *v.* VEYILAMUTHU PILLAI. **112 I.C. 320= 52 Mad. 6=28 M.L.W. 530=1928 M W.N. 723=A.I.R. 1929 Mad. 93=55 M.L.J. 579.**

———*Daughter can alienate only for necessity—But alienation of her life-interest can be given effect to by partition at the instance of the alienee.*

A daughter is a limited owner and therefore not entitled to alienate the property inherited from her father absolutely without there being legal necessity therefor. She cannot bind the inheritance for her own personal debts or private purposes as against reversioners, but she can do so only for her own life. She can alienate her own life-interest and effect can be given to such alienation by partition sought at the instance of the alienee. (*Adami and Sen, JJ*). SAHDEO SINGH *v.* KISHUN BEHARI. **90 I.C. 559=7 P.L.T. 47=1925 P.H.C.C. 292=A.I.R. 1925 Pat. 820.**

———*Consideration applied to pay debt—Limited or absolute interest passes as the debt is the widow's or her husband's.*

In the case of voluntary as well as involuntary alienations of the estate of a Hindu widow, where the consideration has been applied to pay off a prior debt the same principles will apply. If the prior debt was in the nature of a personal claim

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against the widow, only her interest will pass to the alienee. But if the debt was binding on the husband's estate as well then the alienee will get an absolute estate in the property: 10 Cal. 985 (P. C.), *Foll.* (*Mears, C. J. and Piggott, J.*). B. ISHWARI PRASAD *v.* BABUNANDAN.

88 I.C. 193=47 All. 563=6 L.R.A. Civ. 291=A.I.R. 1925 All. 495.

———*Alienee* benamidar *can't sue for declaration of title on widow's death.*

An alienation by a Hindu widow is not void but merely voidable. Transferees of widow who are *benamidars* for her, have no title whatever after the death of the widow whom alone they represented, to sue for declaration of title. (*Dawson Miller, C. J. and Mullick, J.*). BHIKARI BEHARA *v.* SRIMATI SITAMONI DEVI. **78 I.C. 467=A.I.R. 1924 Pat. 706.**

———*Improvement by alienee—Reversioner is bound to pay value of improvements.*

In a suit by reversioner, after widow's death to recover property mortgaged by the wido without necessity, the reversioner ought, on principles of equity, to compensate the mortgagee for what he has spent on the property. But if the successful reversioner is not prepared to compensate either wholly or in part, the mortgagee for what he has spent on the property, then the mortgagee is entitled to remove what he has placed on the property at his own expense: 40 C. 555 (P. C.), *Foll.*; 32 B. 32, *Dist.* (*Macleod, C. J. and Crump, J.*). SIDDAPPA BIN MAHALINGAPPA *v.* PANDURANG WASUDEO. **72 I C. 626=25 Bom. L.R. 395=47 Bom. 696=A.I.R. 1923 Bom. 385.**

———*Purchaser is entitled to interest on consideration found binding—Increased rent from improvements must be set off against mesne profits.*

Where an alienation by a Hindu widow is set aside, the person dispossessed is entitled to the sum paid out of the purchase money towards the incumbrances binding on the estate with interest that would run concurrently with mesne profits.

Where the purchaser from a Hindu widow causes permanent improvements to be made whereby the Jama of the property is increased, the increased rent that is properly attributable to the improvements can be set off against the mesne profits, even although it was not actually executed by the person in possession at the moment when the decree for possession was made. (*Lord Buckmaster.*) RAJA RAI BHAGWAT DAYAL SINGH *v.* RAM RATAN SAHU. **65 I. C. 69=26 C. W.N. 257=35 C. L.J. 121=15 M.L.W. 481=24 Bom. L.R. 336=1922 M W.N. 102=20 A L.J. 26=3 P.L.T. 229=A.I.R. 1922 P C. 91=42 M L J. 243 (P.C.).**

———Life-estate—Alienation by life-tenant of property acquired with estate money—Property in alienee's hands is not subject to any charge. (*Wallis, C. J. and Oldfield, J.*). RAMAYYA *v.* MAHALAKSHMI. **64 I.C. 481=14 M.L.W. 33=1921 M.W.N. 434=A.I.R. 1922 Mad. 357.**

———*Transferee not liable for mesne profits till transfer is repudiated.*

A transfer by a Hindu widow is only voidable and until the reversioner signifies his intention to avoid it, the transferee cannot be deemed to be in wrongful possession. So, the transferee is not liable for any mesne profits or to pay any compensation for the use of the land until the transfer is

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repudiated: 34 Cal. 329 (P.C.), *Foll.*; 14 C.P.L.R. 129, *Dist.* (*Kotval, A. J. C.*). MT. RAIJI *v.* SHRIRAM. **59 I.C. 368=A.I.R. 1921 Nag. 133.**

—Alienation—Necessity—Widow—Refund.

———*Amount borrowed disproportionate to necessity—No collusion proved—Reversioner should be made to pay the amount found to be for necessity.*

Where it is shown that the money borrowed was more than the necessity justified, then the Court should find whether the creditor knew or could have known by means of enquiries then available that the money was in excess of the necessity; and if the finding is in the affirmative then the Court should allow the reversioner to recover the property on payment of the sum really justified by the necessity. If on the other hand the finding of the Court is in the negative, the transaction should be upheld in its entirety: 29 All. 331; 31 Mad. 153 and 27 All. 494, *Ref.* The mere fact that the amount borrowed is to some extent larger than the sum actually needed ought not to vitiate the mortgage. It is impossible to draw a line as to what extent an excess should be held not to vitiate the transaction. When the excess is disproportionately large, that itself is evidence of collusion and then the Court should not uphold the transaction. In cases where the Court finds that the necessity was inadequate for a part of the entire loan, the reversioner should be put to terms. The decree for possession should be subject to payment of the sum paid to the widow without interest, the usufruct of the property being set off against the interest. (*Cuming and Chakravarti, JJ.*). TARAPRASAD SAW *v.* MADHUSUDAN GIRI. **91 I.C. 12=42 C.L.J. 269=30 C.W.N. 204=A.I.R. 1926 Cal. 283.**

—Alienation — Necessity — Widow — Religious ceremony.

———Construction of a ghat on a river is a charitable and religious act justifying debt or alienation by widow. (*Baker, J.C.*). THAKUR KALLU SINGH *v.* BHURAJI. **79 I.C. 633=A.I.R. 1924 Nag. 384.**

———A contribution by a Hindu widow to the expenses of the Sradh of a near relation of her husband, half of whose property was in her possession is a valid legal necessity especially when her obligation to contribute half the expenses was admitted by one of the next reversioners. (*Dawson-Miller, C.J. and Mullick, J.*). RAMSUNDER KUER *v.* SATRUHAN PRASAD CHAUDHRI. **75 I.C. 846=A.I.R. 1924 Pat. 591.**

—Alienation—Necessity—Widow—Rent.

———A widow is entitled to sell her husband's estate to satisfy a rent decree for, although a liability to pay rent is a personal liability, still the necessity to pay off decrees for rent constitutes a legal necessity within the meaning of that term in Hindu Law: 19 C.W.N. 313, *Foll.* (*Das and Fazl Ali, JJ.*). RAM ASRE SINGH *v.* AMBICA LAL. **119 I. C. 547=11 P. L. T. 6=A. I. R. 1929 Pat. 216.**

———The payment of a decree for arrears of rent cannot by itself be considered to be legal necessity, unless there is evidence to show that the widow had no means to pay that decree: 19 C.W.N. 313; 11 M. I. A. 241 (P.C.); 30 Cal. 550 (P. C.); 16 C.W.N. 1070 and 17 C.W.N. 337, *Foll.* (*Misra, J.*). JAGANNATH SINGH *v.* GURCHARAN SINGH. **114 I. C. 783=4 Luck. 279=5 O.W.N. 1097=A.I.R. 1929 Oudh 422.**

———Payment of arrears of rent, for lease taken by widow for her own benefit is not legal necessity.

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(*Mears, C.J. and Piggott, J.*). B. ISHWARI PRASAD *v.* BABUNANDAN. **88 I.C. 193=47 All. 563=6 L.R.A. Civ. 291=A.I.R. 1925 All. 495.**

———*Payment of arrears of rent for ex-proprietary tenancy is not legal necessity.*

Where the holder of a widow's estate sells zamindary property, the ex-proprietary tenancy which comes into existence cannot be said to constitute a portion of the estate as it devolved upon her. Hence it cannot be said that in paying off a decree for arrears of rent in respect of such ex-proprietary tenancy, the limited owner is saving a portion of the family estate in her hands. Therefore the payment of such arrears of rent is not legal necessity capable of supporting an alienation of the family estate. (*Mears, C.J. and Piggott, J.*). B. ISHWARI PRASAD *v.* BABUNANDAN. **88 I. C. 193=6 L. R. A. Civ 291=47 All. 563=A.I.R. 1925 All. 495.**

—Alienation — Necessity — Widow — Spiritual benefit.

———Alienation by widow of small portion for spiritual benefit of husband is valid—Excavation and consecration of tank are acts of high spiritual benefit—What constitutes reasonable portion depends on facts: A.I.R. 1922 P.C. 261; 43 Cal. 574 and 37 Cal. 1, *Rel. on.* (*Mohiuddin, A.J.C.*). FATTESINGH CHATRI *v.* SARHA. **122 I. C. 437=13 N.L.J. 41=A.I.R. 1930 Nag. 198.**

———*Construction of temple and ghats is conducive to spiritual benefit of husband.*

The construction of a temple and ghats is regarded by Hindus as an act of high religious merit and that the constructions if made by a Hindu widow with that object, would be conducive to the spiritual benefit of her deceased husband's soul: 2 Luck. 713, *Ref.* (*Pullan and Srivastava, JJ.*). BISHESHWAR BUKSH SINGH *v.* JANG BAHADUR SINGH. **122 I. C. 614=7 O. W. N. 173=A. I. R. 1930 Oudh 225.**

———Transfer made for the spiritual benefit of the widow and not for the benefit of the husband, does not bind the husband's estate after the death of the widow.

An act done by a widow supposed to conduce to the spiritual benefit of her husband would confer spiritual benefit on herself, but an act done by the widow supposed to conduce to the spiritual benefit of herself would not confer spiritual benefit on her husband: A. I. R. 1921 All. 178 and A. I. R. 1927 Oudh 450, *Appl.* (*Stuart, C.J. and Nanavutty, J.*). HAR MITRA *v.* RAGHUBAR PRASAD. **110 I.C. 618=3 Luck. 645=5 O.W.N. 538=A.I.R. 1928 Oudh 342.**

———Widow has power to alienate husband's estate for conducing benefit on her husband's soul, but it must be within proper and reasonable limits: 8 M.I.A. 508 (P.C.); 42 Bom. 136; (1908) A.W.N. 202; 8 Mad. 552 and 22 Cal. 506, *Rel. on.* (*Wazir Hasan and Gokaran Nath Misra, JJ.*). INDAR BUX SINGH *v.* SHEO NARESH SINGH. **104 I. C. 676=4 O.W.N. 820=A.I.R. 1927 Oudh 450.**

———A Hindu widow is not competent to alienate her inherited property for her own spiritual benefit as the acts conducive to her own spiritual benefit are not necessarily conducive to her husband's spiritual benefit: 4 All. 482; 22 Cal. 506 and 33 All. 255, *Ref.* (*King, J.*). RAMLAL *v.* KUNWAR RACHPAL. **102 I. C. 275=4 O.W.N. 498=A.I.R. 1927 Oudh 231.**

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———The money advanced for building a house necessary for the purposes of education of children does not fall within the doctrine of legal necessity. (*Greaves and Cuming, JJ.*). JOGESH CHANDRA GHOSE *v.* CHAPALA SUNDARI BASU.

90 I.C. 594=A.I.R. 1926 Cal. 383.

———Within a proper limit a widow can alienate her husband's property for the performance of religious acts which are supposed to conduce to his spiritual benefit: 43 Cal. 574 and 11 Ben. L.R. 418, *Rel. on.*

If the property sold or gifted by the widow bears a small proportion to the estate inherited and the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioners: 34 Mad. 288, *Rel. on.* (*Jwala Prasad and Bucknill, JJ.*). RAM SUMRAN PRASAD *v.* GOVIND DAS. **99 I.C. 782=5 Pat. 646=7 P.L.T. 821=A.I.R. 1926 Pat. 582.**

———Alienation of small portion of husband's estate for act, conducing to benefit of his soul is allowed—Alienation of whole estate where income is not sufficient may be allowed for an object regarded as essential for salvation of the husband's soul. (*Martineau and Campbell, JJ.*). MT. TEHL KUAR *v.* AMTAR NATH. **79 I.C. 670=17 P.W.R. 1923=A. I. R. 1925 Lah. 2.**

———Caste feasts are not "charitable or religious purposes" within the meaning of Hindu Law. (*Madgavkar, A.J.C.*). THAOOMAL PANJOOMAL *v.* SOMIMAL CHELLA RAM. **84 I.C. 685=A.I.R. 1924 Sind 140.**

———*Alienation for performing optional ceremonies is allowed if it is of a small portion.*

The Hindu system recognizes two sets of religious acts, one is in connection with the actual obsequies of the deceased, and the periodical performance of the obsequial rites prescribed in the Hindu Religious law, which are considered as essential for the salvation of the soul of the deceased; the other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. With reference to the first class of acts, the powers of the Hindu female, who holds the property, are wider than in respect of the acts which are simply pious and if performed are meritorious, so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case she can alienate a small portion of the property for the pious or charitable purpose she may have in view. If the property sold or gifted bears a small proportion (which it is impossible to define more exactly) to the estate inherited and the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioner. (*Mr. Ameer Ali.*) SARDAR SINGH *v.* KUNJ BIHARI LAL. **69 I. C. 36=37 C. L. J. 383=27 C. W. N. 653=25 Bom. L. R. 648=2 P.W.R. 1923=44 All. 503=16 M. L. W. 871=49 I.A. 383=31 M. L. T. 253=A.I.R. 1922 P.C. 261=44 M.L.J. 766 (P.C.).**

———*Widow's spiritual benefit is no necessity.*

Under the Mitakshara Law in order to justify an alienation by a widow of a portion of her husband's property for religious or charitable purposes, it must be established that the alienation is supposed to conduce to the spiritual welfare of her husband, even if the portion of the property alienated be not excessive. An act done by the widow supposed to conduce to the spiritual benefit of herself would not confer benefit on her husband: 4 All. 482, *Foll.*; 8 M.I.A. 529 (P.C.) and 43 Cal. 574, *Ref.* (*Rafique and Stuart, JJ.*). SHAM DEVI *v.* BIRBHADRA PRASAD. **62 I. C. 432=43 All. 463=19 A.L.J. 312=A.I.R. 1921 All. 178.**

—Alienation—Necessity—Widow—Test applicable.

———*When all facts are not within lender's knowledge, test to be applied must be less strict.*

It is difficult for a lender to know the exact extent of the legal necessity in respect of which he advances the money on the security of the family property, and different test would be applied in a case when all the facts are not within the lender's knowledge than the strict test that would be applied if all the facts are necessarily within the lender's knowledge. (*Greaves and Cuming, JJ.*). JOGESH CHANDRA GHOSE *v.* CHAPALA SUNDARI BASU. **90 I.C. 594=A.I.R. 1926 Cal. 383.**

—Alienation — Necessity—Widow — Miscellaneous.

———A permanent lease by widow in consideration of the lessee looking after her in her old age is for legal necessity. (*Cuming and B.B. Ghose, JJ.*). RAJENDRA NATH *v.* PEYARI MOHAN. **94 I. C. 321=A.I.R. 1926 Cal. 854.**

———*Alienation by limited owner for clearing debts binding on estate—Transferee—Burden of proof.*

A sale by a female owner to pay outstanding debts which are a charge on the estate and which bind the estate and which could not be got rid of by the reversioners without payment is one for necessity and it is not incumbent on the transferee to establish that some dire consequences would have ensued if those debts had not been discharged: A. I. R. 1923 All. 535, *Dist.* (*Sulaiman, J.*). AMBIKA PRASAD *v.* MADHO PRASAD. **85 I.C. 868=A.I.R. 1925 All. 621.**

———*Adequacy of consideration is immaterial unless fraud or collusion is proved.*

Per *Ashworth, J.*—When once it is shown that a sale by a Hindu father and manager is necessary, no suit will lie against the vendee in the absence of fraud or collusion being proved against him, on the ground of insufficiency of price inasmuch as the father is empowered to make arrangements for the sale and the vendee can scarcely be expected to see that the price is inadequate. (*Sulaiman, J., contra.*) (*Sulaiman and Ashworth, JJ.*). BANKEE LAL *v.* NATHA RAM. **107 I.C. 576=A.I.R. 1929 All. 199.**

———*Alienation by manager—"Excess of necessity" explained* (obiter).

"Excess of necessity" relates to terms that are available because, if you must borrow and therefore must pay interest, it cannot be in excess of the authority on that occasion to pay the terms that are necessary, when more moderate terms are not available: A. I. R. 1919 P. C. 12, *Expl.* (*Viscount Sumner.*) SUNDER MULL *v.* SATYAKENKAR SAHANA. **108 I.C. 337=7 Pat. 294=55 I.A. 85=26 A.L.J. 364=9 P.L.T. 203=27 M.L.W. 461=1928 M.W.N. 242=5 O.W.N. 400=47 C.L.J. 403=30 Bom. L. R. 793=32 C.W.N. 657=A.I.R. 1928 P.C. 64=54 M.L.J 427 (P.C.).**

HINDU LAW—Alienation—Necessity—Widow—Miscellaneous.

———*Deed — Construction "Commercial terms," meaning explained.*

The expression "commercial terms," as used in a deed is relative to the time and the place, the country and part of the country where the money is borrowed, the kind of security that is offered for the loan, the possibilities of realising the security, the supply of capital and the opportunity of persons willing to lend for possibly a considerable time, it cannot be confined, as in England, to something connected with a publicly announced and official rate of interest for loan generally or to a current rate generally allowed upon the highest security in financial transactions, such as an issue of debentures or something regulated by the day to day supply of money and by facilities for short loans. The word "commercial" must be understood of a community which is not a commercial community and of transactions which no one would call mercantile, as a comprehensive but convenient term for such terms as can be arranged freely between borrower and lender under the circumstances of the particular case: A.I.R. 1919 P.C. 12, *Expl.* (*Viscount Sumner.*) SUNDER MULL *v.* SATYA KINKAR SAHANA.
108 I.C. 337=26 A.L.J. 364=9 P.L.T. 203=55 I.A. 85=27 M.L.W. 461=1928 M.W.N. 242=5 O.W.N. 400=47 C.L.J. 403=30 Bom. L.R. 793=32 C.W.N. 657=7 Pat. 294=A.I.R. 1928 P.C. 64=54 M.L.J. 427 (P.C.).

———Discharge of debt by father or manager not made a ground for sale—Mere subsequent discharge cannot support the sale.

In all the cases, in order to determine whether an alienation is for necessity or not, what the Court has to see is the state of things when the alienation was made and the purpose for which the alienation was made or stated to be made. (*Srinivasa Aiyangar and Ananthakrishna Ayyar, JJ.*). SATHAPPAN AMBALAM *v.* VADIVELU.
109 I.C. 106=A.I.R. 1928 Mad. 450.

———Where the property mortgaged forms the separate or self-acquisition of the mortgagor no question of benefit or legal necessity strictly arises. (*Kinkhede, A.J.C.*). GOPAL RAO *v.* BABU.
107 I.C. 903=A.I.R. 1928 Nag. 273.

———*Practice of settling cases by accounting not approved.*

The practice of the Allahabad High Court of investigating and settling the cases of alienation of family property upon the principles of accounting, imperils transactions of sale, which, in their real essence and substance, are sales made for family necessity. (*Lord Shaw.*) GAURI SHANKAR *v.* JIWAN SINGH. **107 I.C. 4=25 A.L.J. 967=47 C.L.J. 7=1928 M.W.N. 1=4 O.W.N. 1192=32 C.W.N. 257=30 Bom. L.R. 64=27 M.L.W. 203=A.I.R. 1927 P.C. 246=53 M.L.J. 786 (P.C.).**

———Finding as to existence of legal necessity can be examined in second appeal: 9 A.L.J. 63, *Foll.* (*Kinkhede, A.J.C.*). MOTIRAM *v.* TUKARAM.
96 I.C. 1006=A.I.R. 1926 Nag. 486.

———*Plea.*

It is open to a subsequent transferee to take the plea that the prior mortgage was without legal necessity: 33 All. 783 (F. B.), *Foll.* (*Lindsay and Sulaiman, JJ.*). INAYAT ELAHI *v.* HARDEO SAHAI. **74 I.C. 325=45 All. 692=21 A.L.J. 610=5 L.R.A. Civ. 61=A.I.R. 1924 All. 29.**

HINDU LAW—Alienation—Recitals.

———*Purpose mentioned in the deed must be examined.*

Where a sale-deed, jointly executed by the heads of all the branches of a family, mentions the purpose for which the sale was made, the Court has merely to examine whether that purpose is one which Hindu Law recognizes as valid. There is no room for raising any presumption with regard to legal necessity for the transaction. *Balvant Santaram* v. *Babaji bin Sambhapa*: referred to. (*Daniels, J.C.*). MT. MANZUREN BIBI *v.* JANKI PRASAD. **66 I.C. 930=9 O.L.J. 35=A.I.R. 1922 Oudh 50.**

—Alienation—Partial enforcement.

———*Transfer not justified—Cannot be partially enforced.*

An alienation or transfer of the joint family property by a manager (otherwise than for legal necessity and otherwise than for an antecedent debt) if avoided by other co-parceners, is entirely ineffectual and will not operate to transfer his own share: A.I.R. 1917 P.C. 41; A.I.R. 1917 P.C. 61, *Rel. on.* (*Ashworth, J.*). MT. ASHRAFUNNISSA BEGAM *v.* SAHDEO PANDE. **117 I.C. 609=A.I.R. 1929 All. 479.**

———Alienation otherwise invalid cannot be enforced even against the father's own share in the joint family property in U.P: 6 I.A. 88; 39 A. 497, *Foll.*; A.I.R. 1924 P.C. 50, *Expl.*; A.I.R. 1924 All. 24, *Foll.* (*Daniels, J.*). MANESHER LAL *v.* AMAR NATH. **78 I.C. 626=5 L.R.A. Civ. 286=A.I.R. 1924 All. 493.**

———*Sale by father set aside—Vendee not entitled to charge even on father's share.*

Where in a suit by a son, an alienation by an undivided Hindu father was set aside on the ground that no legal necessity was proved and it was found that the vendor had not misled the vendee that he (the vendor) was the sole owner,

Held, that the vendee was not entitled to any charge for the purchase money even on the vendor's share. (*Lindsay and Kanhaiya Lal, JJ.*). RAM SAHAI *v.* PRABU DAYAL. **63 I.C. 358=43 All. 655=19 A.L.J. 687=A. I. R 1921 All. 137.**

———*Unauthorised alienation by Karta does not bind even his share.*

A mortgage executed by the Karta of the family without the consent of the other members and executed without family necessity or in payment of an antecedent debt, is invalid and gives the mortgagee no charge upon the family property or even upon the undivided share of the mortgagors themselves: 39 All. 500 (P.C.), *Foll.* (*Dawson-Miller, C. J. and Mullick, J.*). BANKHUNDI RAI *v.* KESHORI MANDAL. **61 I.C 102=6 P.L.J. 72=2 P.L.T. 17=1921 P.H.C.C. 113=A.I.R. 1921 Pat. 18.**

—Alienation—Recitals.

———*Not of much evidentiary value—Effect of.*

The recital by a father in a mortgage deed to the effect that the deed is executed for family necessity is an admission by him as a manager of the Hindu family, but is of little evidential value as it may have been a false recital made by him for his own purposes, except when under circumstances they amount to a representation of the need of the family or owing to length of time it is impossible to produce other evidence: A.I.R. 1914 P.C. 38 and A.I.R. 1916 P.C. 110, *Expl.* and *Foll.* (*Ashworth and Sen, JJ.*). PADAM SINGH *v.* REOTI SARAN. **118 I.C. 372=1929 A.L.J. 873=A.I.R. 1929 All. 481.**

HINDU LAW—Alienation—Recitals.

———*Recitals are no evidence—In old deeds they are presumptive evidence.*

Recitals in deeds cannot by themselves be relied upon for the purpose of proving assertion of facts that they contain. They are certainly some kind of evidence and if the recitals happen to be in a document sufficiently old they become more and more weighty as time goes on. But such recitals can never be conclusive evidence. In the case of recitals found in old documents they can be used as presumptive evidence but the presumption that can arise from them cannot be said to be one which is unrebuttable: A.I R. 1916 P.C. 110, *Foll.* (*Mullick, J.*). ADHAR CHANDRA BHATTACHARYA *v.* SUSHILA SUNDARI PAL. **109 I. C. 35 (Cal.).**

———*Lapse of time—Value of recitals.*

When proof of actual enquiry has become impossible by lapse of time, the recital of necessity and its representation to the purchaser would be sufficient evidence to support an alienation of joint family property by the manager, but this rule would not apply where there is no lapse of time: A.I.R. 1916 P.C. 110 (P. C.), *Ref.* (*Jai Lal and Fforde, JJ.*). AMAR NATH *v.* KISHEN CHAND. **103 I.C. 224=A.I.R. 1927 Lah. 629.**

———*Recital as to necessity is not by itself evidence.*

The mere recital in the deed as to necessity is no evidence of such necessity so as to bind minor members, where it is not shown that any enquiry was made at all, nor is it shown that proof of that enquiry was not forthcoming owing to lapse of time: 36 All. 187 (P.C), *Foll.*; 44 Cal. 186 (P. C.), *Dist.* (*Harrison and Dalip Singh, JJ.*). MUNI LAL *v.* KISHORE CHAND. **103 I.C. 742=9 L.L.J. 157=28 P.L.R. 325=A.I.R. 1927 Lah. 373.**

———Recitals in deeds as to existence of necessity are not evidence without substantiation, by evidence, *aliunde*: A. I. R. 1914 P.C. 38, *Foll.* (*Madhavan Nair, J.*). VEGE RAMAYYA *v.* SURYANARAYANAMURTHI. **105 I. C. 150=A.I.R. 1927 Mad. 890=53 M.L.J. 464.**

———*Recitals as to necessity—Lapse of time—Value of.*

Recitals in deeds cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. They can only be evidence as between the parties to the conveyances and those who claim under them, yet after a long period has elapsed, between the alienation and the suit to set it aside, when all those who could have given evidence on the relevant points have grown old or have passed away, a recital consistent with the possibilities and circumstances of the case assumes greater importance and cannot lightly be set aside. The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth then, when proof of actual enquiry has become impossible the recital coupled with such circumstances would be sufficient to support the deed: A.I.R. 1916 P. C. 110, *Foll.* (*Raza, J.*). MT. MENDA *v.* LACHMAN PARSHAD. **101 I.C. 769=A.I.R. 1927 Oudh 566.**

———*Lapse of time—Value of recitals.*

After lapse of many years' recital, coupled with circumstances, may be sufficient evidence to support the deed of alienation; therefore inquiry should be made by Court as to the nature of the recitals and the circumstances existing at the time those recitals were made: 44 Cal. 186, *Expl.* and

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Appl. (*Mukerji and Dalal, JJ.*). MAHOMED NUH *v.* BRIJ BEHARI LAL. **82 I.C. 5=46 All. 656=22 A.L.J. 650=5 L.R.A. Civ 424=A.I.R. 1924 All. 939.**

———*Father—Recitals as to necessity in, do not bind sons, though they may be evidence of representation.*

A recital in a deed by a manager will not bind other members of the family in respect of an alienation by him which they are impugning; but it may be evidence of a representation made as to necessity which coupled with proof showing that actual enquiry has become impossible, and coupled with circumstances justifying reasonable belief that an enquiry would have confirmed the truth of the recital, would be sufficient evidence to support the necessity stated. (*Ashworth, J.C.*). JAMNA PRASAD *v.* BALBHADDAR. **74 I.C. 353=25 O C. 388=9 O.L.J. 601=A.I.R. 1923 Oudh 147.**

—Alienation—Refund.

——— *Necessity not proved as to small portion—Order for re-payment by purchaser to reversioner of amount not for necessity cannot be sustained* (*obiter*).

Where the major portion of the consideration of the sale effected by a Hindu widow of her husband's estate is found to be supported by legal necessity and the sale is on that ground sustained, an order for re-payment by the purchaser to the reversioners who had sued to set aside the sale, of the small and insignificant portion of the consideration not proved to have been supported by legal necessity is opposed to the whole current of authority and cannot be sustained: A.I.R. 1927 P.C. 37, *Ref.* (*Kinkhede, A.J.C.*). KISAN *v.* TUKARAM SIDKE. **A.I.R. 1929 Nag 180.**

———*Alienee—Suit for refund—Cause of action—Limitation.*

Plaintiffs purchased a certain property from a Hindu father and the sale was subsequently cancelled in a suit by the sons to set it aside on their depositing a certain sum in Court. Plaintiffs sued the sons of vendor, for the balance of the purchase money,

Held, that the suit is not barred by the principles of *res judicata* as money paid to the father as consideration for the sale at the time of the sale cannot be regarded as a debt of the father until the sale had been set aside and the right of the vendee to get back the sale consideration from the father has accrued. And that the decree in the son's suit became operative only at the date of deposit and the period of limitation under Art. 97 would run from that date and not from the date of the passing of the decree: 39 All. 485, *Foll.* (*Dalal and Pullan, JJ.*). RAGHUNATH PRASAD *v.* RAM BHAROSE. **100 I.C. 745=A.I.R. 1927 All. 421.**

———Mortgage of joint family without necessity is void from its inception—Mortgagor is bound to re-pay loan under S. 65 of the Contract Act, as soon as it is discovered to be void: 39 All. 500 and A.I.R. 1922 P.C. 403, *Foll.* (*Raza and King, JJ.*). SHAMBOO SUKUL *v.* DHANESHAR SINGH. **101 I.C. 265=4 O.W.N. 256=A.I.R. 1927 Oudh 177.**

———*Reversioner setting aside must refund benefit.*

Where a sale by a Hindu widow having a limited interest has benefitted the estate by the payment of debts which are binding on it, although the amount paid may not amount to the whole of the consideration money received for the property sold, the Court will when it sets aside the sale, direct payment to the alienee to the extent of the benefit received by the estate. It follows, therefore, that if the consideration-money for the sale is found

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intact at the death of the widow, the estate has benefitted to that extent; hence if the reversioner after the widow's death wishes to have the sale by her set aside, he can only succeed if he restores the money. It will be different if it cannot be proved that the purchase-money is still intact in the estate. (*Macleod, C.J. and Coyajee, J.*). SOMESHWAR JETHABAI DAVE *v.* SOMESHWAR GOVINDRAM JOSHI. **67 I.C. 658=47 Bom. 1=24 Bom. L.R. 493=A. I. R. 1923 Bom. 16.**

———Alienation by father set aside in favour of son—Vendee is not entitled to a condition in the decree for return of the consideration, affected by the sale being set aside. For the consideration which has failed, the appellants may either secure payment from the vendor or sue him and execute their decrees against the whole family property. (*Le Rossignol and Campbell, JJ.*). BADAM *v.* MADHO RAM. **66 I.C. 19=2 Lah. 338=A.I.R. 1922 Lah. 241.**

———An alienation could be upheld where if only that amount had been borrowed, which the Court finds for legal necessity, a mortgage would still have been necessary; if not the alienation should be set aside on condition that the creditor be repaid the money advanced with interest. (*Daniels, A.J.C.*). UMRAO SINGH *v.* GAYA PRASAD. **60 I.C. 647=23 O.C. 374.**

—Alienation—Setting aside.

———*A son in embryo can impugn.*

For certain purposes a child *en ventre sa mere* is to be considered as born, and the right of a son to take objection to the alienation made by his father dates not from the hour of his birth, but from that of his conception. (*Shadi Lal, C.J. and Bhide, J.*). MAHOMED KHAN *v.* AHMAD KHAN. **116 I.C. 545=10 Lah. 713=30 P.L.R. 737=A.I.R. 1929 Lah. 254.**

———De facto *guardian—Mortgage by—Validity of—Who can challenge.*

Under Hindu Law a mortgage effected by a *de facto* guardian is not void but only a voidable transaction: and though mortgage can be challenged by the minor as not being for his benefit, third persons have no *locus standi* to challenge it on that ground: 73 P.R. 1890, *Foll.* (*Bhide, J.*). TAPASSI RAM *v.* RAJA RAM. **115 I. C. 417=A.I.R. 1930 Lah. 136.**

———*Alienations by guardian are only voidable—Minor on coming of age may impugn any sale that is not binding on him.*

Alienations made by a guardian, if not legally justified, are only voidable and not void. The minor on coming of age may elect to stand by the same or may elect to avoid the same. The circumstance that the minor has elected not to impugn some sales by guardian is no ground by itself to debar him from impugning the same to an alienee, if on the facts proved a particular sale by the guardian is not binding on the minor. The motive of the minor in bringing the suit is irrelevant, if his legal right to the property is proved, though in appreciating the evidence, the motive may throw some light in particular cases. (*Ananthakrishna Ayyar, J.*). SREENIVASA RAO *v.* ERAPPA. **122 I. C. 43=A.I.R. 1929 Mad. 856.**

———*Transfer not for necessity—No presumption of benefit.*

In absence of evidence to show as to how the consideration-money was disposed of, a transfer of minor's property by his guardian which is proved not to be for necessity, cannot be upheld as benefitting the minor's estate, because there is no presumption that a debt contracted by a manager of a Hindu family is for the benefit of the family: A.I.R. 1924 Lah. 44 and A.I.R. 1925 All. 618, *Applied*, (*Subhedar, A.J.C.*). HARI *v.* JHIM. **117 I. C. 223=A.I.R. 1929 Nag. 117.**

HINDU LAW—Alienation—Setting aside.

———*Suit by minor—Declaration against can be given, when he is not a figure head for alienor.*

A declaratory decree may be given in a suit to contest an unnecessary alienation if the suit is brought honestly on behalf of a minor reversioner to protect his interests, but it would not be proper to pass such a decree in a case in which the minor is merely a figure head and the real plaintiff is the alienor himself, who has caused the suit to be instituted for the purpose of undoing his own act: A.I.R. 1925 Lah. 24, *Foll.* (*Tek Chand and Bhide, JJ.*). MAQBUL HUSAIN *v.* DIL MOHAMMOD. **109 I.C. 585 (Lah.).**

———*Elder brother not challenging in time—Suit by younger brother is barred.*

If the eldest brother, who is naturally the managing member of the family, does not bring a suit within time to set aside an alienation, any suit by a younger brother would be barred inasmuch as the suit is barred against the elder brother: 38 Mad. 118, *Foll.*; A.I.R. 1926 P.C. 16, *Cons.* (*Devadoss and Jackson, JJ.*). SURRAYYAH *v.* SUBAMMA. **106 I.C. 863=1927 M.W.N. 911=A.I.R. 1928 Mad. 42=53 M.L.J. 677.**

———*Portion of consideration not for necessity—If alienation will be set aside—Real question is if alienation was justified—If justified alienee need not see to the application of surplus.*

The statement that, "where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds is accounted for the fact that a small part is not accounted for will not invalidate the sale," although in itself a correct statement of the law, is not a complete statement of the law; a sale will not necessarily be invalidated wherever the part of the consideration not accounted for cannot be described as small.

The true question which falls to be answered in such cases is whether the sale itself was one which was justified by legal necessity. This is the point of view from which the matter should be approached.

Where the sale has been held to be justified, but there is no evidence as to the application of a portion of the consideration, a presumption arises that it has been expended for proper purposes, and for the benefit of the family.

Where the purchaser acts in good faith and after due enquiry, and is able to show that the sale itself was justified by legal necessity; he is under no obligation to enquire into the application of any surplus and is, therefore, not bound to make re-payment of such surplus to the members of the family challenging the sale: 6 M.I.A. 393 (P.C.); (1864) W.R. 385; (1867) 8 W.R. 75, *Rel. on*; 25 All. 330 and 27 All. 494, *Disapproved*; 86 I. C. 91; A.I.R. 1925 All. 324; 47 All. 355, *Overruled*.

Where the sale challenged was made after due enquiry as to the legal necessity by the vendee, such necessity had been proved by him to the extent of Rs. 3,000 out of a total price of the Rs. 3,500 and sale was for an adequate consideration,

Held, that the mere fact that after a long interval of time the purchaser had not been able to establish how the surplus of Rs. 500 was applied is not a sufficient ground in law for setting aside the

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sale. (*Lord Salvesen.*) SRI KRISHNA DAS *v.* NATHU RAM. **100 I.C. 130=49 All. 149=54 I.A. 79=25 A.L.J. 80=1927 M.W.N. 89=38 M.L.T. 48=4 O.W.N. 184=31 C.W.N. 462=8 P.L.T. 210=45 C.L.J. 386=29 Bom. L.R. 825=26 M.L.W. 856=A.I.R. 1927 P.C. 37=52 M.L.J. 720 (P.C.).**

———Property of deceased held by widow for herself and her minor children—Alienation by widow, not for legal necessity—Setting aside—Cause of action arises not on the date of death of the widow, but on date of deed. (*Carr, J.*). M. V. MUDALIAR *v.* V. S. M. PILLAY. **99 I.C. 753=5 Bur. L J. 173=A.I.R. 1927 Rang. 85.**

———Alienation by father—Son's suit challenging alienation is not collusive unless father is the real financier for suit: A.I.R. 1925 Lah. 24, *Foll.* (*Addison, J.*). HARNAM SINGH *v.* JAGER SINGH. **98 I. C. 865=A.I.R. 1927 Lah. 46.**

———*Consideration partly binding — Order to be passed must depend upon equitable considerations.*

A minor through his mother as next friend sued his father for partition of the joint family property. The father had sold certain family property. The sale consideration was Rs. 500 but only Rs. 320 was actually paid. The minor sought to set aside the sale and the question was to what relief the minor was entitled. The two Judges disagreeing, the matter was referred to the Chief Justice.

Held, that there is no uniformity of practice in such matters and in such matters the Court acts on equitable principles. In the present case the fair thing to do was to sell the property and divide the proceeds in proper shares to which the parties were entitled. (*Schwabe, C.J.*). MEENATCHI AYYAN *v.* RANGACHARLU. **1922 M. W.N. 719=A.I.R. 1923 Mad. 120=16 M.L.W. 595.**

———*Necessity or benefit not proved—Reversioner seeking to recover need not pay compensation to alienee.*

Where the mother and guardian of a minor proprietor alienates property of the minor for purposes neither necessary nor beneficial, and the reversioner to the estate of the minor sues to recover the property he is entitled to recover without paying any compensation as no equities arise between the reversioner and the alienee: 9 W.R. 511; 42 Mad. 36 and 32 All. 392, *Dist.* (*Odgers, J.*). B. SITAYYA *v.* P. RA MASWAMI. **91 I. C. 758=22 M.L.W. 476=1925 M. W. N. 587=A. I. R. 1925 Mad. 1288.**

———Sale of joint property for discharging valid mortgages of joint property is binding on coparceners. (*Lord Blanesburgh.*) LAL BAHADUR *v.* AMBIKA. **91 I.C. 471=28 O.C. 371=47 All. 795=52 I.A. 443=23 M.L.W. 220=12 O.L.J. 649=30 C.W.N. 701=1925 M. W. N. 852=2 O.W.N. 913=A.I.R. 1925 P.C. 264 (P.C.).**

———*Validity of alienation—Tests of.*

Per *Srinivasa Iyengar, J.*—When the question is whether a transaction by a guardian on behalf of a minor should be set aside the usual test namely whether a man of ordinary prudence would have entered into such a transaction in respect of his own property is too broad. However, it indicates one limit, namely, that no Court will uphold a transaction which it considers that a man of ordinary prudence would not have had in respect of his own property. The other limit is that, supposing that at the time of the transaction the guardians who acted actually were guardians appointed by the Court and they made an application to the Court for sanctioning a particular transaction, the circumstances must be such as the Court would consider justifiable for the purpose of sanctioning the transaction. (*Spencer, Offg.C.J. and Srinivasa Aiyangar, J.*). MUNAYYA *v.* KRISHNAYYA. **84 I.C. 949=20 M.L.W. 693=A.I.R. 1925 Mad. 215=47 M. L.J. 737.**

HINDU LAW—Alienation—Setting aside.

———Alienation by manager of his share and that of minor brother,

Held, that the minor cannot ignore the sale but must first sue for declaration, that the sale does not bind his share, within 12 years of his becoming aware of the sale. (*Macleod, C.J. and Shah, J.*). KRISHNAJI SONAJI *v.* SADANAND MAHADEO. **80 I.C. 763=26 Bom. L.R. 341=A.I.R. 1924 Bom. 417.**

———Sale proceeds invested in money-lending—Money-lending business brought into account in partition but not property sold—Sale cannot be set aside. (*Schwabe, C.J. and Wallace, J.*). DURAISAMI *v.* SUBBARAYA. **72 I.C. 322=17 M.L.W. 348=32 M.L.T. 277=1923 M.W.N. 242=A. I. R. 1923 Mad. 442.**

———*Son's suit to set aside—Form of relief.*

A Hindu son is entitled to set aside an alienation by his father of ancestral property which has not been effected for the payment of an antecedent debt or for any family necessity: 53 P.R. 1901; 28 A. 328; 39 A. 485, *Rel.* In a suit for possession of the properties so alienated the son is not bound to refund the purchase money but can claim possession of the property. 11 C. 396; 32 I.C. 891, *Ref.* (*Broadway and Martineau, JJ.*). KALI CHARAN *v.* JAGGU. **67 I.C. 89 (Lah.).**

———*Suit to challenge alienation—Subsequently born members have no fresh cause of action.*

Once a cause of action to bring a suit to challenge the alienation of a joint Hindu family property comes into existence, no fresh cause of action accrues to members who are subsequently born in the family after the execution of the sale-deed: A.I.R. 1921 Oudh 196, *Foll.* (*Dalal, A.J.C.*). SHEO AMBUR KHAN *v.* RATIPAL SINGH. **65 I. C. 404=8 O. L. J. 679=A.I.R. 1921 Oudh 229.**

———*Alienation not binding on sons then living, not binding on sons born subsequently also.*

A son cannot object to alienations validly made by his father before he was born or begotten, because he could only by birth obtain an interest in property which was then existing in his ancestor. Hence if at the time of the alienation there had been no one in existence whose assent was necessary or if those who were then in existence had consented, he could not afterwards object on the ground, that there was no necessity for the transaction. If, however, an alienation was made by a father without necessity and without the consent of sons then living, it would not only be invalid against them but also against any son born before they had ratified the transaction, and no consent given by them after his birth would be binding upon him. Where a promissory note executed a few days before the mortgage in favour of the mortgagee himself constitutes part of the consideration of the mortgage, it is upon the mortgagee to show that this debt, although it may be called an antecedent debt was borrowed for purposes which would make it binding on the joint family. (*Rafique and Lindsay, JJ.*). BHUP KUAR *v.* BALBIR SAHAI. **64 I.C. 885=44 All. 190=19 A.L.J. 978=A.I.R. 1922 All. 342.**

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—Alienation—Widow—Consent of reversioner—After-born son.

———*Managing member consenting—Son born subsequently to him is bound.*

Where a widow of deceased co-parcener is in possession of part of family property and a co-parcener as managing member consents to a mortgage by the widow on behalf of the family a son born to him subsequent to such consent cannot impugn the validity of the mortgage, the consent being binding on him: 6 Bom. L.R. 925; 9 Bom. L. R. 595 and 7 W. R. 502, *Dist.* (*Sir Lancelot Sanderson.*) BHAGWAN SINGH *v.* UJAGAR SINGH.

107 I.C. 20=47 C.L.J. 189=30 Bom. L.R. 267=32 C.W.N. 538=29 P.L.R. 182=27 M.L.W. 672=26 A.L.J. 553=1928 M.W.N. 933=A.I.R. 1928 P.C. 20=54 M.L.J. 254 (P.C.).

—Alienation—Widow—Consent of reversioner—Attestation.

———*Consent by attestation can be given only by presumptive reversioner.*

It is only if the presumptive heirs, who alone are expected to take exception to an alienation, consent by attesting the deed, inference of legal necessity is justified. A remoter reversioner cannot by his action bind the presumptive heirs: A.I.R. 1918 P.C. 196, *Ref.* (*Sen and Niamotullah, JJ.*). GAJI SINGH *v.* MT. NEBHABHA. **119 I.C. 514=1929 A.L.J. 309=10 L.R.A. Rev. 138=A.I.R. 1929 All. 223.**

———*Mere attestation is neither consent nor does it create estoppel.*

Attestation of a deed proves no more than that the signature of the executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed nor affect him with notice of its provisions. Mere attestation by itself would neither create an estoppel nor imply consent. Where the reversioner attested a sale-deed executed by a Hindu widow and there was nothing to show that he was aware of the contents,

Held, that the attestation was not presumptive proof of necessity. (*Raza and Pullan, JJ.*). SHEO RATTAN LAL *v.* SANT BAKHSH. **118 I.C. 93=6 O.W.N. 369.**

———*Reversioner attesting maintenance deed—No estoppel.*

Where a person before he had any idea of becoming entitled as reversioner to another man's property, witnesses the mark of his daughter on a maintenance deed in her favour executed by the limited owner of the property, does not thereby admit the title of the limited owner's alienee, and the fact does not estop or militate against his present position as reversioner: 42 Mad. 523, *Foll.* (*Odgers, J.*). CHALLA ELLAMANDE *v.* CHALLAPEDA ELLAMANDA. **114 I.C. 229 (Mad.).**

———Reversioner arranging for a debt for limited owner and for alienation of property cannot challenge that alienation. (*Coutts-Trotter, C. J. and Srinivasa Iyengar, J.*). SHRINIVASA RAGAVACHARIAR *v.* E. RAJAGOPAL CHARIAR.

1927 M.W.N. 231=A.I R. 1927 Mad. 438.

———*Attestation if consent—Inference from surrounding circumstances.*

Although mere attestation of a sale-deed by a reversioner is not by itself conclusive of the fact that he was aware of the nature of the transaction or that he was a consenting party to an alienation by a Hindu widow, the Court can draw proper inference from this as well as other circumstance attending the transaction. (*Ryves and Mukerji, JJ.*). ANANTOO *v.* RAMRUP TIWARI.

87 I.C. 315=6 L.R.A. Civ. 284=A.I.R. 1925 All. 692.

HINDU LAW—Alienation—Widow—Consent of reversioner—Effect of.

———*Evidence Act, S.* 115—*Attestation coupled with other circumstances can be "consent."*

Though mere attestation is not sufficient to fix a party with knowledge of the deed attested yet attestation combined with other circumstances may amount to evidence of consent. Where not only did the reversioners attend before the Registrar, identify the executant and attest the deed, but the debt in respect of which the deed was executed was a debt from the reversioners themselves as principal debtors,

Held, that it was impossible to believe under these circumstances that they were not aware of the nature of the transaction or that their attestation was not meant to indicate their assent to it: 42 Cal. 876; A.I.R. 1922 P.C. 20, *Ref.* (*Daniels and Neave, JJ.*). RAM ADHAR *v.* BHAGWAN SINGH.

85 I.C. 580=5 L.R.A. Civ. 644=A.I.R. 1925 All. 209.

—Alienation—Widow—Consent of reversioner—Burden of proof.

———*Reversioners consenting—Purposes of alienation not mentioned in deed but decided by alienees in their written statement—Onus lies on reversioners to disprove.*

Where reversioners consent to a transaction by a limited owner, in the absence of any evidence to the contrary, their consent is *prima facie* evidence or presumptive evidence of the existence of circumstances which would be sufficient to constitute necessity under the Hindu Law and which would be sufficient to bind the reversion. It is not necessary that the purpose itself should be mentioned in the document. All that the law requires is that the alienee should prove the existence of circumstances at the time the transaction was entered into which would justify a limited owner to pass full interest in favour of the alienee in other words which would entitle a limited owner to bind the reversion by the alienation.

Where the alienees did allege the circumstances which would amount to necessity in their written statement:

Held, that it was not necessary that such circumstances should have been mentioned in the documents by which the alienations were effected and that the onus lay on plaintiffs to disprove the allegations: 42 Mad. 523 (P.C.), *Foll.* (*Devadoss, J.*). RAMASWAMI REDDI *v.* RAJAGOPALA CHARIAR.

91 I.C. 270=22 M.L.W. 518=1925 M. W. N. 789=A. I. R. 1926 Mad. 29.

—Alienation—Widow—Consent of reversioner—Effect of.

———*Consent binds reversioner, though given subsequent to transfer.*

An alienation by a widow is not void but voidable, the reversioner may accept it as valid and if he does so, his acceptance will bind him. In such a case there is no election within the strict meaning of the term. Even given subsequently such assent has the effect of satisfaction of the transfer: 30 All. 1 (P.C.) and A.I.R. 1918 P.C. 196, *Foll.*; A.I.R. 1923 All. 387 (F.B.) and A.I.R. 1929 Mad. 502 (F.B.), *Ref.* (*Jackson, A.J.C.*). MAROTI *v.* MAROTI.

A.I.R. 1930 Nag. 287.

———*Evidence Act, S.* 115—*No act or omission by presumptive reversioners can amount to estoppel against actual reversioners.*

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No act or omission committed by the presumptive reversioners can amount to an estoppel as against the reversioners who actually succeeded to the estate. Their conduct may under certain circumstances raise a presumption in favour of legal necessity but can never debar the actual reversioners from claiming the estate in assertion of their own rights which they do not claim through the former reversioners. Therefore the result of a previous litigation by the presumptive reversioners does not amount to an estoppel. (*Sulaiman and Sen, JJ.*). MUHAMMAD ABDUL KARIM KHAN *v.* BISHAN SAHAI. **121 I.C. 387=1929 A.L.J. 741= A. I. R. 1930 All. 9.**

———*Invalid gift—Consent thereto, does not vest property in the donee.*

J claimed that the widow had made an oral gift of the property in his favour and he was in possession as a donee. The collaterals admitted the gift and agreed to the mutation of names in favour of *J*. The Court accordingly ordered that the name of *J* should be entered in place of the deceased widow,

Held, that as no interest in immovable property can validly pass from one person to another in the eye of the law without there being a registered document of transfer, in the absence of such document, the proprietary interest in the property could not have passed from the widow to *J* or from the collateral to *J* and even if the collaterals be estopped from claiming the possession of the property it is impossible to hold that proprietary title has actually become vested in *J* or his transferee by virtue of the oral gift : A.I.R. 1923 All. 387 (F.B.), *Dist.* (*Sulaiman and Kendall, JJ.*). BACHCHI LAL *v.* DEBI DIN. **119 I.C. 503=51 All. 629= 1929 A.L.J. 430=A.I.R. 1929 All. 300.**

———*Consent given on representation that gift was completed by the husband is no consent to a limited owner's alienation.*

A consent to gift by widow, by a reversioner given under assumptions of facts which never existed, *e.g.*, that the alleged donee was nephew of her husband and that the estate had already been gifted by the husband to the donee but as the donee had allowed the widow to remain in possession she executed a gift deed in his favour, is a consent to an act which the widow did not do in her right of a female heiress but by virtue of her bare possession which she held under the good will of the donee of the estate and thus is not a consent by a reversioner to an act of transfer of the estate by the female heir at all: A.I.R. 1923 All. 387 (F.B.), *Dist.* (*Wazir Hasan, Ag.C.J. and Misra, J.*). BINDESHWARI SINGH *v.* HAR NARAIN SINGH. **6 O.W.N. 233=4 Luck. 622= A.I.R. 1929 Oudh 185.**

———*Alienation is binding on the reversioner when he succeeds to the estate after widow's death.*

Where an alienation without any necessity by Hindu widow of property forming part of her deceased husband's estate is consented to by the next presumptive male reversioner without receiving any consideration for giving such consent, the transaction is binding on the consenting reversioner, if he succeeds to the estate after the death of the widow and of the female reversioner succeeding her: A.I.R. 1923 All. 387 (F.B.) and A.I.R. 1927 Bom. 260 (F.B.), *Appr. and held not inconsistent with* A.I.R. 1918 P.C. 196. (*Coutts-Trotter, C.J.,*

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Madhavan Nair and Jackson,JJ.). RAMAKATAYYA *v.* VIRARAGHAVAYYA. **119 I.C. 156=52 Mad. 556= 1929 M.W.N. 323=29 M.L.W. 818= A. I. R. 1929 Mad. 502=56 M.L.J. 755 (F.B.).**

———Under the Bombay school of Hindu Law, no question of legal necessity, as such, arises, when the next reversionary heirs have consented to the alienation. (*Findlay, J.C.*). VINAYAK *v.* SITABAI. **103 I.C. 373=A.I.R. 1927 Nag. 312.**

———*Next reversioner, whether male or female, joining in the deed cannot challenge alienation on the widow's death.*

Where a Hindu widow sells a part of her husband's property without legal necessity but with the consent of the next presumptive reversioner, and the reversioner joins in the deed by which the property is alienated, the same reversioner cannot challenge the validity of the transaction after the widow's death, having regard to his election testified by his being a party to the deed, and whether such reversioner is a male or a female makes no difference: 21 Bom.L.R. 640 (P.C.) and A.I.R. 1923 All. 387 (F.B.), *Foll.*; A.I.R. 1922 Bom. 102, *Appr.* (*Marten, C.J., Crump and Patkar, JJ.*). RAMCHANDRAPPA YADEO *v.* SAYAD KHAN MUTHEKAN. **102 I. C. 232=51 Bom. 475= 29 Bom.L.R. 386=A. I. R. 1927 Bom. 260 (F.B.).**

———*Consent does not bind his son.*

One reversioner does not claim through another, and the estoppel by consent raises only a personal bar against the consenting party. Therefore consent by a reversioner does not bind his son who gets the estate in his own right. (*Kinkhede, A.J.C.*). JESHWANT RAO *v.* MT. TULSABAI. **99 I.C. 835= A. I. R. 1927 Nag. 134.**

———*Reversioner standing by and asking vendee to purchase property—No estoppel.*

The mere fact that reversioner stood by and asked another person to purchase the property from the female holder, would not in any way estop them from setting up a claim to the property where the purchaser knew that the holder had only a life-interest in it. (*Devadoss, J.*). S. S. SWAMINADHA AIYAR *v.* SWAMINATH AIYAR. **99 I.C. 772= 38 M.L.T. 32=A. I. R. 1927 Mad. 458.**

———A reversioner who consents to an alienation by a widow is himself estopped from questioning it: A. I. R. 1923 All. 387 (F. B.) and A. I. R. 1922 Bom. 102, *Foll.* (*Ramesam, J.*). VIRARAGHAVAYYA *v.* RAMAKOTAYYA. **96 I.C. 132= 23 M.L.W. 305=A.I.R. 1926 Mad. 508.**

———*Non-consenting reversioner can recover only his share on widow's death.*

Every reversioner succeeds to property on the death of a widow in his own right and the property becomes his self-acquired property and not joint family property, and therefore where one of the two reversioners consents to an alienation by widow the non-consenting reversioner cannot sue the vendee for possession of whole property. Sale as regards consenting reversioner's share is valid and the other reversioner can recover only his share : A.I.R. 1923 All. 387 ; 45 All. 339 (F.B.), *Appl.* (*Dalal, J.*). AJUDHIA PRASAD *v.* MATHURA PRASAD. **95 I. C. 698=A.I.R. 1926 All. 609.**

———*Mere consent by a reversioner to a transaction by widow is not estoppel in every case.*

If a reversioner by his act which amounts either to ratification or election, or some other act which he has done after the reversion opened, in order to make the alienee believe that he was standing by

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the transaction and that he was prepared to allow it to be good, he cannot afterwards resile from that position; but by the mere consent to the transaction at the time when it takes place, it cannot be said that in all cases a reversioner is estopped from contesting the validity of the transaction after the death of the limited owner: A.I.R. 1922 All. 297; 46 Cal. 566 (P.C.) and A.I.R. 1922 Bom. 102, *Not foll.* (*Devadoss, J.*). RAJAGOPALA CHARIAR *v.* SAMI REDDI. **93 I.C. 49= 1926 M.W.N. 266=A.I.R. 1926 Mad 517= 50 M.L.J. 221.**

———*Consent of presumptive reversioners at the date of alienation does not estop actual reversioners—Surrender in favour of one is not equal to surrender to all.*

The consent of the whole body of reversioners at the date of the alienation would afford presumptive evidence of necessity but would not estop the actual reversioners from disputing the alienation unless the consenting reversioners themselves were the actual reversioners at the date when the reversion fell due. A Hindu widow can renounce in favour of the nearest reversioner, if there be only one, or of all the reversioners nearest in degree, if more than one, at the moment but a surrender to one of the reversioners is not equivalent to a surrender to all the reversioners, even if it is for the benefit of all the reversioners. (*Shah, Ag. C.J. and Kincaid, J.*). MANJAYA SANNAYA SHANBHOG *v.* SESHAGIRI SHAMBHULING UPADHYA.

85 I.C. 207=49 Bom. 187=73 Bom. L.R. 1267= A.I.R. 1925 Bom. 129.

———Standing aloof of limited owner is not relinquishment nor is disclaimer, at appellate stage. (*Dawson Miller, C. J. and Mullick, J.*). LALLOO PRASAD SINGH *v.* LACHMAN SINGH. **82 I.C. 510= 3 Pat. 224=A.I.R. 1924 Pat. 438.**

———Where the whole body of reversioners joined in the execution of the mortgage by the widow and thus gave consent to it.

Held, they having joined in the deed cannot attack its validity. Where there was any other reversioner in existence who was not a party to the deed it would be open to him successfully to attack it. (*Dawson-Miller, C. J. and Adami, J.*). RAGHUNATH PRASAD *v.* BANK OF BENGAL.

69 I.C. 212=A.I.R. 1924 Pat. 295.

——— *Relinquishment by reversioners of their rights and interest in the property—They cannot challenge the alienation even when succession opens in their favour.*

Where a widow transfers by gift a portion of her husband's property and the reversioners execute a deed of relinquishment whereby they purport to renounce and relinquish whatever rights and whatever interest they might conceivably possess under the Hindu Law in respect of the property covered by the deed of gift and expressly covenant that at no time hereafter will either of them or their heirs, successors or representatives, set up any right or claim or whatsoever to the property,

Held, that they cannot sue to have the gift deed set aside even when the succession opens in their favour: 45 C. 590 (P.C.), *Cons.*; 44 Bom. 488, *Dist.*; A. I. R. 1922 All. 297, *Affirmed.* (*Mears, C. J., Banerjee, Piggott, Walsh and Ryves, JJ.*). FATEH SINGH *v.* THAKUR RUKMINI RAMANJI.

72 I.C. 8=21 A.L.J. 235= 45 All. 339=4 L.R.A. Civ. 392= A.I.R. 1923 All. 387 (F.B.).

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———*Next reversioner's assent—A transferee from consenting reversioner is not estopped from challenging the gift.*

Consent of the reversioner would not validate a gift it being a transfer without consideration, nor could the assent of the next reversioner amount to a relinquishment he having no vested interest which could be relinquished. A transferee from such a reversioner is not therefore estopped from challenging validity of such gift. (*Gokul Prasad, J.*). RAM DAYAL *v.* MITHOO LAL. **71 I.C. 287= A. I. R. 1923 All. 410.**

———*Consent to one sale cannot validate another sale.*

The consent of presumptive reversioners to one sale of property by the widow does not preclude the reversioners who are alive when the reversion falls in though they may be the sons of the reversioners, from disputing the want of legal necessity for another sale of the property by the widow. (*Macleod, C.J. and Shah, J.*). TUKARAM BHAU DHAS *v.* GANPAT ANANDRAO DHAS. **70 I.C. 767= A.I.R. 1922 Bom. 346.**

———*Consenting reversioner is estopped from challenging gift.*

Where a Hindu widow made a gift of a portion of her husband's property in favour of her husband's brother's grandson with the consent of her husband's brother, the next reversioner.

Held, her husband's brother was estopped from questioning the gift and it was valid as against him. (*Macleod, C.J. and Shah, J.*). BASAPPA *v.* FAKIRAPPA. **64 I. C. 214=46 Bom. 292= 23 Bom. L.R. 1040=A.I.R. 1922 Bom. 102.**

———*Reversioner joining in the alienation and consenting to alienation is estopped from disputing it later.*

Where the next immediate reversioner jointly with the widow executed a deed of gift and at the time of mutation stated that he consented to the gift and his successor on being entitled to the estate did not repudiate it at the time of mutation,

Held, the reversioner and his successor-in-title are estopped from disputing the validity of the transfer: A.I.R. 1917 P.C. 95; A.I.R. 1918 P.C. 140, *Ref. to.*; 3 All. 362. *Ref. to.* (*Tudball and Sulaiman, JJ.*). MAHADEO PRASAD *v.* MATA PRASAD. **63 I.C. 721=44 All. 44=19 A.L.J. 799= A.I.R. 1922 All. 297.**

———A transfer for no legal necessity but made by the widow and next reversioner is not binding on the remoter reversioners. (*Mears, C.J, and Banerji, J.*). GHISIAWAN PANDE *v.* MT. RAJ KUMARI. **63 I. C. 556=43 All. 534=19 A L.J. 476= A.I.R. 1921 All. 33.**

———A reversioner's right to sue for possession accrues on the death of the Hindu female. Absence of vested interest which cannot be effectively dealt with, does not prevent the application of the rule of estoppel so as to prevent the reversioner from challenging his own representations. (*Abdur Rahim and Moore, JJ.*). SHANMUGA VELAYUDHAN CHETTY *v.* KOYAPPA CHETTIAR. **60 I.C. 635= 1920 M.W.N. 679.**

—Alienation—Widow—Consent of reversioners—Execution by.

———*Joining in execution is unequivocal form of consent.*

Where entire body of reversioners is a party to an alienation made by a widow, the act of joining in execution of deeds of transfer is the highest and the most unequivocal form of consent which they

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can give to the alienation and they are estopped from impugning it: A.I.R. 1918 P.C 196; A.I.R. 1923 P.C. 189, *Rel. on.* (*Wazir Hasan, Ag. C.J. and Pullan, J.*). CHANDI SINGH *v.* GUR PRASAD SINGH.
A. I. R. 1930 Oudh 339.

———Where not only did the nearest reversioner consent to the alienation by a Hindu widow, but he actually joined in the execution of the deed of gift,

Held: that the deed of gift cannot be set aside by the consenting reversioner: A.I.R. 1927 Oudh 469 and A.I.R. 1927 P.C 227, *Foll.* (*Stuart, C.J. and Raza, J.*). GAYA DIN SINGH *v.* MADHO SINGH.
107 I.C. 180=4 O.W.N. 1101=
A.I.R. 1927 Oudh 558.

—Alienation—Widow—Consent of reversioners—Extent of.

———Consent of only one of the reversioners—No presumption that transaction is right and proper—Assent binds reversioner personally: A.I.R. 1927 P.C. 227, *Foll.* (*Jackson, A.J.C.*). MAROTI *v.* MAROTI. **26 N.L.R. 265=A.I.R. 1930 Nag. 287.**

———*Next reversioner female entitled to absolute estate—Consent of immediate male reversioner is necessary.*

Even under the Bombay School where the next reversioner is a female entitled to an absolute estate upon succession the consent of the immediate male reversioner is necessary in order to estop him from challenging the alienation. Mere consent of female reversioner is not sufficient: 5 Bom. 563; 25 Bom. 129; 34 Bom. 165, *Rel. on*; 38 Bom. 224, *Dist.* (*Subhedar, A. J. C.*). KISHAN *v.* NAMDEO.
119 I.C. 676=A. I. R. 1929 Nag. 277.

———To dispense with proof of legal necessity consent of all existing reversioners must be shown: 42 Mad. 523 (P.C.), *Foll.* (*Kinkhede, A.J.C.*). YESHWANT RAO *v.* MT. TULSABAI.
99 I.C. 835=A.I.R. 1927 Nag. 134.

———Legal necessity—Consent of the body of the next reversioners is best evidence of the *bona fide* nature of the transaction. (*Kinkhede, A.J.C.*). SUMITRA BAI *v.* HIRBAJI. **97 I. C. 983=**
A.I.R. 1927 Nag. 25.

———*Consent must ordinarily be of all reversioners.*

An alienation by a Hindu widow which, if challenged, would be set aside, is a good alienation if the whole body of persons constituting the next reversioner assent to it and their consent will be presumed from their failure to contest it: 30 All. 1 (P.C.), *Foll.* (*Stuart, C.J. and Raza, J.*). MT. JAMNA KAUR *v.* MADARI SINGH.
106 I.C. 328=4 O.W.N. 903=A.I.R. 1927 Oudh 469.

———*Whole body of reversioners must consent.*

Alienation by a Hindu widow or a Hindu mother without proof, either of legal necessity or of reasonable inquiry and honest belief as to its existence but with the consent of the next reversioner or reversioners for the time being, may be valid and binding on the actual reversioner, if the presumption of legal necessity or of reasonable inquiry and honest belief raised by such consent is not rebutted by more cogent proof.

Ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible: 30 All. 1 (P.C.), *Foll.* (*Gokaran Nath Misra and Raza, JJ.*). GAJADHAR LAL *v.* MAKHAN LAL. **99 I.C. 17=**
3 O.W.N. (Sup.) 262.

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———*Gift by widow with consent of next reversioners being themselves life-tenants and as per wishes of last owner is valid.*

The consent of the whole body of next reversioners to a gift by a Hindu female owner for life is as presumptive evidence of that gift having been made for purposes or in circumstances which would validate it after the donor's death, in the way in which such consent was held in 42 Mad. 523 (P.C.) to be presumptive evidence of the legal necessity for an alienation for consideration. The consent of the people interested in quarrelling with an alienation would be equally strong proof of its being justifiable whether it was a gift or a sale or a mortgage.

Where with the consent of the next reversioners who are themselves life-tenants the widow made a gift of the property as per the expressed wishes of the husband,

Held, the donee, in any case, would take an estate valid during the life of the next reversioners but that the expressed wishes of the last owner would be sufficient justifying cause for the alienation of the absolute estate to the donee. (*Batten, J. C. and Hallifax, A. J. C.*). MT. KUSHIBAI *v.* MAURA KHAN. **79 I.C.422=7 N.L.J. 217=**
A.I.R. 1923 Nag. 265.

—Alienation—Widow—Consent of reversioners—Female reversioner.

———*Fawcett, Ag. C. J.*—Even the consent of a female reversioner is sufficient to estop her from challenging an alienation by widow: *Previous Authorities to the contrary deemed overruled by* A.I.R. 1927 Bom. 260 (F.B.). (*Fawcett, Ag. C. J. and Mirza, J.*). TARGEVA *v.* GOVINDAPPA.
113 I.C. 42=30 Bom. L.R. 1145=
A.I.R. 1928 Bom. 495.

———*Consent of only male reversioners raises presumption of legal necessity.*

The consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction affords a presumptive proof which: if not rebutted by contrary proof, will validate the transaction as a right and proper one. Such a presumption does not however arise when the reversioners who joined in the transfer were ladies or life holders: 14 M. I. A. 176; 5 Bom. 563; 25 Bom. 129; 35 Cal. 1086, *Foll.* (*Mukerji and Dalal, JJ.*). MAHOMED NUH *v.* BRIJ BEHARI LAL. **82 I.C. 5=46 All. 656=22 A.L.J. 650=**
5 L.R.A. Civ. 424=A.I.R. 1924 All. 939.

—Alienation—Widow—Consent of reversioners—Non-objection.

———*Absence of objection owing to failure of reversioners, cannot be construed as consent.*

A gift made by a Hindu widow, which is a form of alienation which she is not ordinarily competent to make, can become a valid alienation if made with the consent of her husband's kindred. But if her husband has no kindred or the kindred have failed before they have had an effective opportunity of objecting, the abstention to object cannot be regarded as a consent: 8 M.I.A. 529, *Appl.* (*Stuart, C.J. and Raza, J.*). MT. JUMNA KAUR *v.* MADARI SINGH. **106 I.C. 328=4 O.W.N. 903=**
A.I.R. 1927 Oudh 469.

———*Consent may be implied if reversioners being competent abstain from objecting.*

An alienation by a Hindu widow is a good alienation unless and until the alienation is challenged by the reversioner. Consent may be

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implied from abstention to challenge when there are in existence persons who have a right to challenge : 34 Cal. 329 (P.C.), *Appl.*

In a case in which the reversioner has not challenged the alienation, a Court of law will not permit a third party to challenge it : A.I.R. 1923 Pat. 122, *Foll.* (*Stuart, C. J. and Raza, J.*). MT. JAMNA KAUR *v.* MADARI SINGH.
106 I.C. 328=4 O.W.N. 903=A.I.R. 1927 Oudh 469.

—Alienation—Widow—Consent of reversioners—Presumption.

———Consent of female reversioner to alienation does not raise presumption of legal necessity against parties other than consenting reversioner : 5 Bom. 662 ; 25 Bom. 129 ; 35 Cal. 1086, *Foll.* ; A.I.R. 1918 P.C. 196, *Dist.* ; A.I.R. 1927 Bom. 260 (F.B.) ; A. I. R. 1922 Bom. 102 and A. I. R. 1925 Bom. 129, *Ref.* (*Mirza and Broomfield, JJ.*). KURVATEPPA MAHALINGAPPA KURVATTI *v.* NIGAYYA CHANBASAYA PATRIMATH. **32 Bom. L.R. 626=A. I. R. 1930 Bom. 299.**

———Alienation by minor widow of adoptive son with consent of natural parents of deceased husband—Re-sale by purchaser to consenting guardian for nominal consideration.

Held, that the property was re-sold to consenting guardian for nominal consideration was a valid ground for holding that the prior alienation must have been collusive and whatever presumption of law there might have been as regards legal necessity that was rebutted by collusion. (*Mirza and Broomfield, JJ.*). KURVATEPPA MAHALINGAPPA KURVATTI *v.* NIGAYYA CHANBASAYA PATRIMATH. **32 Bom. L. R. 626=A. I. R. 1930 Bom. 299.**

———A Hindu widow mortgaged a house and the next reversioner stood surety for the due performance of clauses and conditions in the mortgage deed and for any loss accruing from defect of title or for falling short of the mortgage amount realized by sale of the property. Sons of the reversioner sued for possession after widow's death on the ground that the alienation was without legal necessity:

Held, that the consent of the father raised the presumption that the alienation was for legal necessity. (*Dalip Singh and Agha Haidar, JJ.*). SUNDAR *v.* KAMUN. **117 I.C. 84=A.I.R. 1929 Lah. 516.**

———Assent by presumptive reversioner to alienation by widow is cogent evidence of necessity. (*Phillips and Srinivasa Ayyangar, JJ.*). NATESA PILLAI *v.* MEENAKSHISUNDARA MUDALIAR. **109 I. C. 96 (Mad.).**

———The consent of next reversioner, though not conclusive proof of the existence of legal necessity, raises a presumption of the existence of such necessity : A.I.R. 1918 P.C. 196 and 40 Cal. 721 (F.B.), *Foll.* (*Sulaiman and Banerji, JJ.*). HAJI MAHOMED SAID KHAN *v.* KUNWAR DARSHAN SINGH. **103 I. C. 116=25 A. L. J. 744=A.I.R. 1927 All. 835.**

———*Reversioner consenting to alienations made by limited heir—Transaction should be presumed to be proper.*

The consent of such reversioners, as might fairly be expected to be interested to dispute the alienations made by a limited owner, will be held to afford presumptive proof, which if not rebutted by contrary proof, will validate the transaction as a right and proper one : A.I.R. 1918 P. C. 196, *Foll.*

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(*Wazir Hasan and Pullan, JJ.*). BINAIK DAT *v.* MOHAMMAD GAFUR KHAN. **105 I.C. 496=4 O. W. N. 770=A. I. R. 1927 Oudh 442.**

———Consent of next reversioner raises presumption of legal necessity but it is rebuttable. (*Daniels and King, JJ.*). MAHADEO PRASAD *v.* SHYAM SUNDER. **97 I.C. 342=A.I.R. 1926 All. 707.**

———Where a mortgage deed executed by a Hindu widow who was illiterate was signed by the next reversioner (who was her daughter's son) on her behalf,)

Held, that on this ground alone the consent of the daughter's son should not be considered as proved. (*Dawson Miller, C. J. and Jwala Prasad, J.*). RAMBUJHAWAN SINGH *v.* SUBAJ PRASAD. **88 I.C. 502=6 P.L.T. 826=1925 P.H.C.C. 137=A.I.R. 1925 Pat. 467.**

———Where the widow transfers the property in which she has a life-estate ostensibly for legal necessity, and the reversioner assents to the transfer, his conduct presumes that there was legal necessity : 42 Mad. 523 and 40 Cal. 721, *Foll.* (*Suhrawardy and Cuming, JJ.*). AMAR KRISHNA DE *v.* RAJENDRA KUMAR DE. **87 I.C. 790=A. I. R. 1925 Cal. 1205.**

———Where the transaction is in favour of a person having a direct interest in obtaining it, *i.e.*, of the presumptive reversioner himself the presumption of tho transaction being a proper one disappears ; 34 All. 129, *Appr.* ; 9 O.C. 104, *Foll.* ; (*Daniels, J.*). TODAR MAL *v.* KISHAN LAL. **79 I.C. 1007=5 L.R.A. Civ. 395=A. I. R. 1924 All. 919.**

———The circumstances that the only reversioners at the time gave their unqualified consent to the mortgage raised a very strong presumption that the mortgage was supported by legal necessity though the presumption is rebuttable. (*Mukerji and Dalal, JJ.*). DARBARI LAL *v.* GOBIND SARAN. **80 I.C. 31=46 All. 822=22 A.L.J. 753=5 L.R.A. Civ. 556=A.I.R. 1924 All. 902.**

———*Consent by reversioners is evidence of legal necessity.*

The consent of reversioners to an alienation merely affords evidence that the alienation was under circumstances which render it lawful and valid. In other words the consent of the reversioners is evidence of legal necessity. It will depend upon the circumstances of the case whether it is sufficient evidence or insufficient evidence. (*Stuart and Sulaiman, JJ.*). UDAI BHAN SINGH *v.* GAJENDRA SINGH. **70 I.C. 815=A.I.R. 1923 All. 28.**

———*Consent of reversioners is presumptive proof of necessity.*

When the alienation of the whole or part of the estate by a Hindu widow or other female owner has to be supported on the ground of necessity, then if such necessity is not proved *aliunde* and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners, as might fairly be expected to be interested to quarrel with the transaction, will be held to afford a presumptive proof, which if not rebutted by contrary proof will validate the transaction as a right and proper one. (*Tudball and Sulaiman, JJ.*). BHUP SINGH *v.* JHAMMAN SINGH. **64 I.C. 630=44 All. 95=19 A.L.J. 881=A. I. R. 1922 All. 169.**

———*Reversioner present at the time of payment—No presumption of legal necessity arises.*

The vendee must prove that the presence of the reversioner at the time of the payment induced him

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to believe that this money was required by the widow for legal necessity and that for this reason he did not trouble to make any further enquiry. The fact that a reversioner is one of the parties to a sale transaction effected by a Hindu widow and was present at the time, the consideration-money was paid to her does not give rise to a presumption that the payment is made for legal necessity. (*Dalal, A.J.C.*). SHEOAMBAR KHAN *v.* BALKARAN SINGH. **65 I.C. 360=8 O.L.J. 619= A.I.R. 1922 Oudh 112.**

———In the case of an alienation by a Hindu widow, if it is proved that the consent of the immediate reversioners had been obtained, it raises a strong presumption of the existence of legal necessity for the transfer, which if not rebutted by contrary proof, will validate the transaction as a right and proper one: 30 All. 1; 36 M. L. J. 493, *Foll.* (*Tudball and Sulaiman, JJ.*). HARJAN RAI *v.* MAHABIR TEWARI. **64 I.C. 474 (All.).**

———*Consent of reversioner is presumptive evidence of necessity.*

The consent of the reversioner is always presumptive evidence of the legal necessity which justifies an alienation on the part of the Hindu female. The question whether the evidence adduced in any particular case amounts to "a presumptive proof" or not must necessarily be a question of the sufficiency or insufficiency of evidence and as such a pure question of fact. (*Wazir Hasan, A. J. C.*). RAM BODH SINGH *v.* RAM NARAYAN SINGH. **65 I.C. 776=8 O L J. 512= A. I. R. 1921 Oudh 238.**

—Alienation—Widow—Consent of reversioners—Ratification.

———Where a reversioner for whom the succession has not yet opened ratifies an alienation by a widow, such ratification is good: A.I.R. 1929 Mad. 502 (F.B.) and 30 All. 1 (P. C.), *Foll.*; A.I.R. 1923 All. 387, *Ref. Foll.* (*Jackson, A.J.C.*). MAROTI *v.* MAROTI. **26 N.L.R. 265= A.I.R. 1930 Nag. 287.**

—Alienation—Widow—Consent of reversioners—Reversioner purchaser.

———The presumption of legal necessity which arises when a transfer is made with the consent of the next presumptive reversioner does not arise when the transfer is to such reversioner himself. (*B. B. Ghose and S. K. Ghose, JJ.*). UPENDRA NATH MUKHERJEE *v.* GURUPADA HALDER. **34 C W.N. 404=A. I. R. 1930 Cal. 508.**

———The principle that where the next reversioner consents to an alienation by a widow, the alienation operates independently of the question of legal necessity is limited to an alienation by the widow of her whole interest in favour of the next reversioner or reversioners at the time of the alienation: 42 Mad. 523 (P.C.), *Expl.* (*Daniels and King, JJ.*). MAHADEO PRASAD *v.* SHYAM SUNDER. **97 I. C. 342=A.I.R. 1926 All. 707.**

———Where the vendees are some of the reversioners, it cannot be said that they gave their consent to the sale by taking a sale-deed from the widow. (*Devadoss, J.*). K. SEETHARAMAYYA v. R. SAMUDRUDU. **86 I.C. 4=21 M.L.W 69= A.I.R. 1925 Mad. 384.**

—Alienation—Widow—Consent of reversioners—Validity.

———Reversioner transferee of whole share—Such alienation is on same footing as surrender—When however reversioner is transferee of part of estate alienation is not validated by his consent:

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40 Cal. 721 (F.B.) and A.I.R. 1918 P.C. 196, *Ref.* (*Jackson, A.J.C.*). MAROTI *v.* MAROTI. **26 N.L.R. 265=A.I.R. 1930 Nag. 287.**

———Reversioner transferee of part of estate—His consent though not validating transaction estops him, though not his son, from questioning alienation: A.I.R. 1927 P. C. 227 *Dist.*; A.I.R. 1926 All. 715 and A.I.R. 1927 Bom. 260 (F.B.), *Foll.* (*Jackson, A.J.C.*). MAROTI *v.* MAROTI. **26 N.L.R. 265= A.I.R. 1930 Nag. 287.**

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———*Declaration is useful where proof of necessity is required—Gift—No question of necessity.*

In cases of transfers for consideration in which questions of legal necessity may arise, the grant of a declaratory relief ordinarily serves the useful purpose of declaring rights which depend upon proof of circumstances as to which evidence may disappear by the time succession to the estate opens. But in a case where the transfer is a gift pure and simple made by Hindu widow no question of legal necessity or its validity as such can arise. (*Sen and Niamatullah, JJ.*). BECHU AHIR *v.* HANSRAJ AHIR. **A.I.R. 1930 All. 734.**

———*Gift to idol must be of a small fraction.*

Dedication of property by widow to the ancestral deity of the family for the due performance of the Sheba and puja of the family deity is a meritorious act conducive to the benefit of the soul of the deceased owner and although it is for ancestral deity of the family it is on no different footing than the other gifts. To support such a gift according to law it must be of a fraction of the property, and the rule cannot be extended so as to take into consideration the necessity of the idol: A.I.R. 1922 P.C. 261, *Rel. on.* (*Rankin, C.J. and B.B. Ghose, J.*). MADAN MOHAN SAHA BANIK *v.* RAKHAL CHANDRA SAHA BANIK. **33 C.W.N. 1042=A.I.R. 1930 Cal. 173.**

———A Hindu widow has no right to make a gift of whole of the property left to her even for the spiritual benefit of her husband and as such it is invalid, not being of the moderate share thereof: A.I.R. 1922 P.C. 261 and 42 Bom. 136, *Foll.* (*Bhide, J.*). SUNDER SINGH *v.* GURDWARA CHOHA SAHIB. **120 I. C. 189=30 P.L.R. 281= 11 L.L.J. 78=A. I. R. 1929 Lah. 440.**

———*Consent of reversioners does not validate a gift.*

There can be no case of an alienation by a Hindu widow unless the alienation is made for legitimate purposes which may be proved either *aliunde* or by raising a presumption in favour of it, which presumption may, if not rebutted by contrary proof, be passed on the consent of reversioners. A transfer by way of gift in favour of a stranger is not an alienation to which the presumption of its being legitimate founded on the consent of the reversioners can be applicable: A. I. R. 1918 P.C. 196, *Rel on*; A. I. R. 1927 P.C. 227, *Dist.* (*Wazir Hasan, Ag. C.J. and Misra, J.*). BINDESHWARI SINGH *v.* HAR NARAIN SINGH. **6 O. W. N. 233=4 Luck. 622= A.I.R. 1929 Oudh 185.**

———Widow having only one daughter, inheriting property worth Rs. 8,000—Gift of property worth Rs. 2,000 to son-in-law at the time of marriage is valid.

It is established beyond any doubt whatever that a Hindu widow may make a gift of a reasonable portion of her deceased husband's estate to her son-in-law on the occasion of her daughter's marriage. The amount of land which may be alienated for this purpose depends in each case upon the whole of the circumstances, upon the position of the family, the number of children to be provided

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for, the nature of the land alienated, and any other circumstances which may arise in a particular case.

Held, that the gift was valid. (*Fforde and Tek Chand, JJ.*). WAZIR CHAND *v.* MT. JIWAN DEVI. **103 I.C. 353=A.I.R. 1928 Lah. 58.**

———*Gift valid only if for spiritual benefit or for some indispensable religious duty.*

A donee from a widow acquires no title under it, unless the gift is one occasioned by spiritual necessity or made in the performance of indispensable acts of duty or religious necessity and relates to property which forms only a small portion of the entire estate. In absence of any such purpose, the gift is void and cannot be validated by subsequent acts of ratification: 8 M.I.A. 529, *Foll.* (*Kinkhede, A.J.C.*). DASHRATH *v.* TARACHAND. **105 I.C. 379=10 N.L.J. 216= A.I.R. 1927 Nag. 354**

———*Gift for religious purposes—Proportion of gift to estate in widow's hands at the time should be considered.*

In every case in which an alienation by way of gift for religious or charitable purposes is made by a Hindu widow, holding an estate with the limited interest of such widow, the Court is bound to take into consideration the proportion borne by the property gifted away to the total estate in the hands of such widow.

Where the estate that originally came into the hands of a holder of a widow's estate consisted of a 8 annas share of zamindary property but by various transfers, the estate had dwindled to a 2 annas share only, and where, out of this, the limited owner gifted a six pies share to the family priest,

Held, that the gift could not be supported. (*Mears, C.J. and Piggott, J.*). B. ISHWARI PRASAD *v.* BABUNANDAN. **88 I.C. 193=47 All. 563= 6 L.R. A.Civ. 291=A.I.R. 1925 All. 495.**

———*Gift by widow is void after her lifetime.*

A gift made by a Hindu widow even in favour of the next reversioner, if it does not amount to a complete surrender of the widow's estate, is not valid according to Hindu Law. It might be operative during the life-time of the widow but after her death it ceases to have any legal effect. (*Suhrawardy and Cuming, JJ.*). INDRA NARAIN MANNA *v.* SARBASOVA DASI. **87 I.C. 930= 41 C.L.J. 341=A.I.R. 1925 Cal. 743.**

———*Gift does not end at donee's death though it ends at donor's death.*

The interest which the donee of property from a Hindu widow who gave the same, having inherited it from her husband does not terminate with the death of the donee and if the gift be in favour of a daughter the property will be *stridhan* in her hands and after her death it will pass to her personal heirs. This is subject, of course, to the condition that the gift must cease to be effective at the widow-donor's death. (*Kinkhede, A.J.C.*). NARAYAN *v.* MT. TULSHI. **80 I. C. 607=A.I.R. 1925 Nag. 104.**

———*Widow has greater powers of disposal for religious purposes and small portion can be gifted for such purposes.*

A Hindu widow has a larger power of disposition for religious or charitable purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely worldly purposes. Where the value of the property gifted to a priest at Gaya by *suphal sankalp* bears a very small proportion to the total value of the property which the widow had inherited from her husband,

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Held, the gift is valid and binding on the reversioners. (*Lindsay and Kanhaiya Lal, JJ.*). BALDEO PRASAD *v.* FATEH SINGH. **78 I.C 654= 46 All. 533=22 A.L.J. 490=5 L.R.A Civ. 270= A.I.R. 1924 All 933.**

———Gift by widow in favour of a presumptive reversioner—Property subject to usufructuary mortgage in favour of other reversioners—Other reversioners suing for declaration,

Held, that plaintiffs should be granted the declaration but that in the event of the present plaintiffs surviving the widow, they will only be entitled to actual possession of their share of the property which was mortgaged, on payment to *J*, or his legal representatives, their quota of the mortgage debt. 22 W. R. 409 (P. C.), *Foll.* (*Lindsay and Sulaiman, JJ.*). RAGHU NANDAN SINGH *v* TULSHI SINGH. **75 I.C. 244=46 All. 38= A.I.R. 1924 All. 315.**

———Gift to son-in-law of entire property to induce him to marry her blind and crippled daughter—Gift whether invalid after her lifetime.

A Hindu widow has for certain purposes a clear authority to dispose of her husband's property and she might do it for religious purposes which include dowry to a daughter. Although as a general rule such dowry shall not exceed a quarter, the word "quarter" as used here, simply enjoins the allowance of as much as will suffice for the marriage. A gift of the whole property of small value will be held valid after her life time: 37 Cal. 1 and 22 Mad. 113, *Ref.* (*Mears, C.J. and Stuart, J.*). BHAGWATI SHUKUL *v.* RAM JATAN TEWARI. **73 I.C 648=48 All. 297=21 A.L.J. 232= 4 L.R.A. Civ. 386=A.I.R. 1924 All. 28.**

———Gift by a widow with the consent of the next reversioners is valid only for her lifetime. (*Newbould and Ghose, JJ.*). JNANENDRA NATH ROY CHOWDHURY *v.* RAM RANJAN BANERJEE **79 I.C. 588=A.I R. 1924 Cal. 988.**

———*Gift of less than ¼ as dowry in daughter's marriage is valid.*

A Hindu widow can make an absolute gift of a reasonable portion of her deceased husband's estate upon the occasion of the marriage of her daughter as dowry. There is no distinction between a gift made upon the occasion of a daughter's *gowna* ceremony and a gift made as dowry upon the occasion of a daughter's marriage: 37 Cal. 1, *Foll.* Where the total value of gifted portion amounted to something less than 1/4th of the whole estate, the gift was held both proper and reasonable. (*Scott-Smith and Fforde, JJ.*) JAWALA RAM *v.* HARI KISHEN SINGH. **80 I.C 630=5 Lah. 70= A I.R. 1924 Lah. 429.**

———*Gift to charity of more than one-fourth is not valid.*

A gift made by a Hindu widow to a charitable institution of a portion more than one fourth of her deceased husband's estate is not valid against the reversioners. A gift by a Hindu widow of a moderate portion of her deceased husband's estate can only be valid if it is expressly made for the spiritual welfare of the deceased. A gift, however pious or meritorious cannot be enforced against the reversioners unless it is proved to be made with that object and unless that purpose is deemed by the Hindu religion to be fulfilled by the character of the gift in the question. (*Abdul Raoof and Fforde, JJ.*). MUNSHI LAL *v.* MT. SHIV DEVI. **78 I. C. 266=4 Lah. 336= 5 L. L. J. 496=A.I.R. 1924 Lah. 137.**

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———*Consent of reversioner who is insolvent does not pass property to donee.*

Where a Hindu lady purports to alienate property to a third party with the consent of the reversioner the transaction operates as a surrender into the hands of the reversioner followed by a conveyance to a third party and if the reversioner is an insolvent the moment the surrender is made the property passes to the receiver in insolvency. (*Piggott and Walsh, JJ.*). HARI HAR PRASAD (MINOR) *v.* UDAY NATH SAH. **74 I.C. 113= 45 All. 260=21 A.L.J. 77=4 L.R.A. Civ. 70= A.I.R. 1923 All. 190.**

———A gift made by a widow in accordance with the expressed dying wishes of her husband, especially one entailing the many spiritually beneficial acts, would be binding on the reversioners. (*Hallifax, A.J.C.*). RAMCHANDRA BALKRISHNA *v.* RAMCHANDRA JAIRAM. **65 I.C. 952= A.I.R. 1922 Nag. 222.**

———It is not the function of the Court in considering whether a gift by a Hindu widow out of her husband's estate is a valid trust, but the question what were the real purposes for which she made the gift, is of fact only. If the gift was made by the widow for the benefit of the soul of her deceased husband, it should be upheld.

It is unnecessary that there should be any proof that the donee is expected to confer benefit upon the deceased's soul. (*Mears, C.J. and Walsh, J.*). GOBIND UPADYA *v.* LAKHRAM. **63 I.C. 221= 43 All. 515=19 A.L.J. 499= A.I.R. 1921 All. 109.**

———Consent operates to raise a presumption that the transaction was a proper one and for valid necessity. This presumption has no application to the case of a gift. Where the donee is not the nearest reversioner, there is no question of surrender by the widow: 42 Mad. 523 (P.C.), *Foll.* (*Daniels, J. C. and Dalal, A.J.C.*). DRIGHPAL SINGH *v.* HARHAR BAKHSH SINGH. **64 I.C. 80= 24 O.C. 245= A.I.R. 1921 Oudh 169.**

—Alienation—Widow—Powers of.

———According to the Hindu Law, a widow in Gujarat governed by the Mayukha can dispose of movable property inherited from her husband by act *inter vivos*, *i.e.*, by sale, gift or otherwise, but cannot will it away: 28 Bom. 453; 17 Bom. 690, *Ref. to.* (*Marten, C. J. and Patkar, J.*). BHIKUBAI CHUNILAL *v.* MANILAL.

32 Bom. L. R. 1217= A.I.R. 1930 Bom. 517.

———*Alienation such as a prudent owner would make in order to benefit the estate*—Bona fide *lender is not affected by the precedent mis-management of the estate when he is not a party to it.*

The power of a widow to charge an estate not her own is under the Hindu Law a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. But where in a particular instance the charge is one which a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mis-management of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it, in the particular instance is the thing to be regarded. But it must be remembered that according to this principle it is only the *bona fide* lender who is protected. But, if that danger arises from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the widow grounded on a necessity which his own wrong has helped to cause: 6 M.I.A. 393 (P.C.),

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Foll. (*Shadi Lal, C.J. and Bhide, J.*). AHMAD DIN *v.* TULSA SINGH. **113 I. C. 292= A. I. R. 1928 Lah. 875.**

———*Power and extent of disposal depends on the circumstances.*

It is impossible to define the extent and limit of a widow's power of disposing her husband's estate; it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition: 37 Cal. 1 and 22 Mad. 113, *Ref.* (*Greaves and B. B. Ghose, JJ.*). SAILABALA DEBI *v.* BAIKUNTHA NATH. **91 I. C. 186= A.I.R. 1926 Cal. 486.**

—Alienation—Widow—Setting aside.

———*Mortgage for cost of repairs to house—Necessity for repairs not proved—Mortgage not valid.*

According to the condition of a previous mortgage deed, a widow executed another mortgage for sums expended by the mortgagee to effect repairs of the mortgaged property, the widow receiving nothing under the second mortgage. The property was afterwards sold and a suit for possession was brought by the reversioners,

Held: that as it had not been proved that the property required any repairs, the second mortgage was not binding on the reversioners. It was an alienation and the plea that because certain terms of a prior mortgage had not been complied with, therefore, the second mortgage was not to be regarded as an alienation at all, but was merely a transaction following on the first mortgage, could not be sustained. (*Dalip Singh and Agha Haidar, JJ.*). SUNDAR *v.* KAMUN. **117 I.C. 84= A.I.R. 1929 Lah. 516.**

———*Small portion of consideration not for necessity—Decree conditional on payment of consideration proved for necessity is justified* (obiter).

Where in a suit by a reversioner to set aside a sale by a widow of her husband's property, it was found by the lower Court that a small portion of the consideration was not proved to have been supported by legal necessity, and on that ground, the sale was set aside, inserting in the decree, a condition that on failure of the reversioners within a certain time to pay to the purchaser the amount of the consideration which was proved to have been supported by legal necessity, the suit of the reversioners should stand dismissed with costs,

Held, that the imposition of such a condition was fully justified: A.I.R. 1927 P.C. 244; A.I.R. 1925 Nag. 325, *Ref.* (*Kinkhede, A.J.C.*). KISAN *v.* LIKARAM LIDKE. **A.I.R. 1929 Nag. 180.**

———*Alienation by limited owner is only voidable.*

A sale by a limited owner is not *ab initio* void or invalid. It is perfectly valid and binding until it is set aside at the instance of the next reversioner. Such a transaction is like a voidable contract which is valid and enforceable unless it is repudiated by the person at whose option it is voidable. Therefore, if a person who has no right to challenge such an alienation be in possession of the alienated property, he cannot defend his possession against the alienee: A.I.R. 1922 Lah. 217, *Expl.* and *Dist.*; A.I.R. 1924 All. 109, *Appr.* (*Fforde and Jai Lal, JJ.*). DHANNA MAL *v.* PARMESHARI DAS.

111 I. C. 251= A.I.R. 1928 Lah. 9.

———Daughter can maintain a declaratory suit regarding an alienation effected by her stepmother.

On the death of the step-mother the property will descend to the heirs of her husband and his daugh-

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ter is under Hindu Law entitled to succeed to it. She is therefore, his reversioner and has got a *locus standi* to contest the alienation made by her step-mother. (*Tek Chand, J.*). MT. BAL KAUR *v.* MT. HAR KAUR. **108 I.C. 184=A.I.R. 1928 Lah. 242.**

———*Reversioner—Election to set aside—Can be by demand or taking possession.*

The election of a reversioner to treat the alienation by a Hindu widow as a nullity, so as to make the possession of the alienee wrongful, can be expressed not only by the filing of a suit, but by a simple demand.

The intention of a reversioner to avoid an alienation by a Hindu widow can also be communicated to the alienee by an attempt to take possession forcibly: 34 Cal. 329 (P.C.), *Expl.* (*Hallifax, A.J.C.*). SITARAM MADHOJI *v.* MAROTI.
103 I.C. 259=10 N.L.J. 137=A. I. R. 1927 Nag. 305.

———A sale of joint family property should not be set aside merely because a part of the proceeds is not proved to have been applied to purposes of necessity. The principle applies equally to a sale by a widow. Where therefore the sale itself is for necessity a Court should not call upon the transferees to account for every item which goes to make up the sale consideration: A.I.R. 1927 P. C. 37, *Foll.* (*Wazir Hasan and Pullan, JJ.*). BENAIK DAT *v.* MOHAMMAD GHAFUR KHAN.
105 I.C. 496=4 O.W.N. 770=A.I.R. 1927 Oudh 442.

———A suit by reversioner for declaration that a mortgage by vendee from Hindu widow does not affect his rights, is not maintainable. He must attack the sale by widow and if that remedy is time-barred, he cannot get over the difficulty by attacking the mortgage by vendee. (*Stuart, C. J. and Wazir Hasan, J.*). BADRIPRASAD *v.* BACHCHA. **101 I.C. 52=A.I.R. 1927 Oudh 217.**

———Land mortgaged by last male holder—Property sold by widow to discharge the mortgage debts—No proof that there were no other properties available on which to raise the necessary money—Sale set aside. (*Das and Adami, JJ.*). DASARATH SINGH *v.* DAMIN SINGH. **103 I.C. 495=8 P.L.T. 314=A.I.R. 1927 Pat. 219.**

———*Gift of whole interest of the widow is good until questioned after reversion falls in.*

The gift by widow of the whole interest in the property is good against all the world until the reversion falls in, and even then it is liable to be questioned by the actual reversioners. Only when so questioned, if the attack is successful, the interest terminates. (*Phillips and Ramesam, JJ.*). RAMA AIYAR *v.* NARAYANASAMI AIYAR. **96 I. C. 483=23 M. L. W. 496=1926 M. W. N. 958=A.I.R. 1926 Mad. 609=51 M L.J. 313.**

———*Gift by widow—Widow subsequently surrendering her life-estate to next reversioner — Reversioner cannot challenge gift during her lifetime* (Walmsley, J. contra, Page, J.).

Per *Walmsley, J.*—A reversioner on the strength of the deed of relinquishment, cannot obtain possession of the property gifted away by the widow immediately, but he can do so after her death. (*Walmsley and Page, JJ.*). PRAFULLA KAMINI ROY *v.* BHABANI NATH ROY. **91 I. C. 897=52 Cal. 1018=A.I.R. 1926 Cal. 121.**

———*Widow alienating property to purchase new property—Estate improved—Reversioner cannot set aside sale.*

If the parties who have to support an alienation made by a widow can show that the estate has been improved by selling immovable property and buying other lands of equal or greater value and more convenient for cultivation and management, Courts will not set aside such transaction: (1912) M.W.N. 167 and 41 M.L.J. 459, *Appr.*; 32 Bom. 577, *Dist.* (*Spencer, J.*). MAHALAKSHMAMMA *v.* RAMASAMY.
94 I.C. 950=23 M.L.W. 596=1926 M.W.N. 253=A. I. R. 1926 Mad. 641=50 M.L.J. 651.

———*Sale of absolute occupancy holding without necessity is invalid.*

A sale by a widow in possession of her husband's absolute occupancy fields without legal necessity is liable to be set aside by the reversioners and the landlord's consent to the transfer cannot validate the transfer so as to amount to a surrender plus a subsequent grant of tenancy: 8 N.L.R. 154, *Foll.* (*Findlay, Offg. J. C.*). MAROTI *v.* CHIN SOO. **95 I.C. 626=A.I.R. 1926 Nag. 367.**

———*Alienation by widow without legal necessity is not void, but only voidable by reversioner.*

An alienation by a widow without legal necessity is voidable and not void and until the reversioner (including in that term 'Crown' if there is no reversioner) decides to avoid it or to treat it as a nullity, it stands good: 8 M. I. A. 529, *Dist.*; 18 C.W.N. 940 and 34 Cal. 329, *Foll.* (*Greaves and Cuming, JJ.*). UPENDRA NATH JANA *v.* S. M. SHIBADASI DEBI. **88 I.C. 898=A.I.R. 1925 Cal. 1053.**

———*First adopted son dying, second son adopted—Second son can challenge independently.*

An adopted son has, by virtue of his adoption, an inherent right to question any alienation by his adoptive mother before his adoption and the fact that there had been a previously adopted son could in no way affect that right. The second adopted son does not succeed to the first adopted son nor is he the representative of his, and therefore whether the mother as widow of the original holder made the alienation before the first adoption while she held a widow's estate, or after the death of the first adopted son, when she would be holding as his heir, would make no difference to the rights of the second adopted son to question her alienation. (*Macleod, C.J. and Coyajee, J.*). HANMANT SUBBAYA NAIK *v* KRISHNA MANJUNATH YAJI.
89 I.C. 62=49 Bom. 604=27 Bom. L.R. 642=A.I.R. 1925 Bom. 402.

———The position of adopted son and that of reversioner in regard to alienation by widow are the same but for the fact that the former's rights commence on adoption, and the latter's after widow's death. (*Shah, Ag. C.J. and Fawcett, J.*). HANAMGOWDA SHIVGOWDA PATIL *v.* IRGOWDA SHIVGOWDA PATIL. **84 I.C. 374=48 Bom. 654=26 Bom. L.R. 829=A.I.R. 1925 Bom. 9.**

———*Alienation by widow can be challenged by after-born reversioner.*

The limitations imposed upon the estate of a widow or daughter under Hindu Law are not imposed upon her for the benefit of reversioners. They are inseparable from her estate, so that even if there are no reversioners, she cannot alienate the corpus of the property except for a legal necessity. If she does alienate without legal necessity, then, if there be no reversioners, the alienation may be set aside by the Crown taking the property by escheat. So after-born reversioners can set aside alienations by the holders of such estates; 8 M.I.A. 500, *Foll.* (*Harrison and Zafar Ali, JJ.*). LALCHAND *v.* MANOHRI. **78 I.C. 717=A.I.R. 1925 Lah. 108.**

HINDU LAW — Alienation — Widow — Setting aside.

———*All alienations by widow need not be challenged in one and the same suit.*

There is no law which compels a reversioner to bring one common suit to challenge all alienations made by a Hindu widow even though such alienations are in respect of different rights and in favour of different parties. (*Sulaiman, J.*). BANSOLOCHAN RAI *v.* JAGARNATH LAL. **78 I.C. 873= A.I.R. 1924 All. 838.**

———It is open to the reversioners to get only one of several transfers made by a Hindu widow set aside leaving aside the several transfers if they so choose to act. (*Sulaiman, J.*). BANSOLOCHAN RAI *v.* JAGARNATH LAL. **78 I.C. 873= A.I.R. 1924 All. 838.**

———*It is voidable only at the option of next reversioner.*

An alienation by a Hindu female although made without necessity is not absolutely void but is only voidable. The option of avoiding such an alienation rests with the next heir and nobody else has the right to challenge it. (*Chevis and Harrison, JJ.*). WAZIRI MAL *v.* GANGA RAM. **69 I.C. 573 = A.I.R. 1924 Lah. 370.**

———*Alienations by widows are only voidable and only reversioners can avoid them.*

It is the reversioners and the reversioners alone that can dispute a gift or other alienation by a Hindu widow. If they choose to allow the property to which they are entitled to remain with the donee or alienee, that is their affair and no one else can object.

It is not a correct view that a gift is void beyond the life-time of the widow even if it remains unchallenged by the reversioners during her lifetime or after her death.

A Hindu widow is not a tenant for life but is owner of her husband's property subject to certain restrictions on alienation. Her alienation is not therefore absolutely void but is voidable at the election of the reversionary heir. (*Dawson-Miller, C. J. and Mullick, J.*). MAHARAJA KESHEO PRASAD SINGH BAHADUR *v.* CHANDRIKA PRASAD SINGH. **68 I.C. 394=3 P.L.T. 797=2 Pat. 217= A.I.R. 1923 Pat. 122.**

———If the documents purport to have been executed by widow for legal necessity or at any rate for good cause, they are not void but voidable. The persons who are entitled to seek to avoid them are the reversioners, and it is not open to the strangers who do not claim as the reversioners to raise the question. (*Walmsley and B. B. Ghose, JJ.*). JABEDALI SHEIKH *v.* PRASANNA KUMAR NAG. **75 I.C. 281=27 C.W.N. 433= A. I. R. 1923 Cal. 423.**

———*Widow's alienations are only voidable.*

A Hindu widow's estate is not a life-estate and it is not an estate held in trust for reversioners. She represents the estate and has power to make alienations subject to the right of reversioners to have those alienations set aside if they are found to be either not for legal necessity or not for the benefit of the estate. They do not cease to be operative until they are set aside. A reversioner therefore cannot institute a suit for ejectment of the alienees in the Revenue Court without setting aside the alienation. (*Stuart, J.*). KANDHYA *v.* MT. RAJ KUNWAR. **75 I.C. 681= A.I.R. 1923 All. 367.**

———*Widow's alienation is not void but voidable.*

The estate of a Hindu widow is not a life-estate. She is a proprietor of the estate with a right of

HINDU LAW — Alienation — Widow — Miscellaneous.

alienation subject to certain qualifications. Each alienation by the widow in the exercise of that right must be judged by the circumstances in which it is made. Her alienation is not therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court and he shows his election to do the latter by commencing an action to recover possession of the property. (*Wazir Hasan, A. J. C.*). BAHADUR SINGH *v.* N. S. SULTAN HUSAIN KHAN. **66 I.C. 455= 8 O.L.J. 535= A. I. R. 1922 Oudh 171.**

———Reversioner—Each alienation gives a fresh cause of action. (*Wazir Hasan, A. J. C.*). BAHADUR SINGH *v.* N. S. SULTAN HUSAIN KHAN. **66 I. C. 455=8 O.L.J. 535= A.I.R. 1922 Oudh 171.**

———Alienation—Widow transferring equity of redemption—Suit for redemption by donee—Mortgagee cannot resist donee's claim—Only reversioner can dispute his title. (*Macleod, C. J. and Heaton, J.*). SITARAM RAVAJI *v.* KHANDU MAIRALA. **59 I.C. 480=45 Bom. 105= A. I. R. 1921 Bom. 413.**

———*Alienation is not void but voidable—Reversioner suing for possession need not ask for declaration that alienation is inoperative.*

A Hindu widow is not a tenant for life, but is owner of her husband's property, subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it, subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. The institution of a suit for possession shows his election to treat the alienation as a nullity, and in such a suit, it is not necessary for him to ask for a declaration that it is inoperative. (*Mookerjee, Ag. C. J. and Fletcher, J.*). SULIN MOHAN *v.* RAJ KRISHNA GHOSE. **60 I.C. 826=33 C.L.J. 193= 25 C.W.N. 420= A. I. R. 1921 Cal. 582.**

—Alienation—Widow—Miscellaneous.

———A confirmation by a widow of a past alienation by her husband is not a new alienation by her. (*Madhavan Nair, J.*). ELAGAN *v.* NANJAPPAN. **85 I. C. 964= A.I.R. 1925 Mad. 919.**

———Mortgage by widow—Suit by reversioner to declare mortgage void against himself—Necessity for loan proved but no necessity proved for onerousness of terms of loan—Decree to be given that the onerous terms are not binding: A.I·R.1924 P.C. 184, *Foll.* (*Wazir Hasan, A. J. C.*). MOHAN LAL *v.* MT. DHAN KUAR. **85 I.C. 426=27 O.C. 362= A.I.R. 1925 Oudh 509.**

———*Fixing rent in perpetuity where variable rent was agreed to, is not valid against reversioners.*

Where a Hindu widow grants a permanent lease of a plot of land at a fixed rent to a person who is already in possession under a prior lease, at a variable rent granted by the full owner and the grant is not intended to operate as a new lease, the object of the parties being merely to alter one of

HINDU LAW — Alienation — Widow — Miscellaneous.

the most important incidents of the tenancy that is to fix the rent in perpetuity,

Held, that the new lease is not operative against the reversioners. (*Mukerjee and Chotzner, JJ.*). JAMINI MOHAN SARKAR *v.* DEBENDRA NARAIN SINGH. **71 I.C. 976=A.I.R. 1924 Cal. 355.**

———*Reversioner treating the alienations as good cannot complain.*

An alienation by a widow beyond her powers is voidable and not void. If, therefore, a reversioner after he became *intituto* to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as good he would lose his right of complaint. (*Kumaraswami Sastri, J.*). NAYAKAMMAL *v.* MUNUSWAMI MUDALIAR. **84 I.C. 231=20 M.L.W 222=A.I.R. 1924 Mad. 819.**

———Where there is no will, oral or written, the Hindu Law does not recognise any expression of the husband's wish during life as validating an alienation made by her after his death. (*Daniels, J.C. and Dalal A.J.C.*). DRIGPAL SINGH *v.* HARHAR BAKHSH SINGH. **64 I. C. 80=24 O.C. 245=A.I.R. 1921 Oudh 169.**

—Alienation—Miscellaneous.

———Either a gift is good and binding upon the family or it is not. But where once the gift has been declared to be void the donor's heirs, cannot be deprived of their property and compelled to take compensation for it. (*Sulaiman and Pullan, JJ.*). UMA SHANKAR *v.* MAHABIR PRASAD. **118 I.C. 235=A.I.R. 1929 All. 854.**

—Applicability—Aborigines of Assam.

———*Bengal School of Hindu Law applies.*

The Hindu Law should be applied to the aborigines of Assam. The Bengal School of Hindu Law applies to them. So, a sister's son is an heir unless there is a custom to the contrary. (*Chatterjee and Pearson, JJ.*). NEARAM KACHARI *v.* ARDARAM KACHARI. **64 I.C. 145=35 C.L J. 34=A.I R. 1921 Cal. 558.**

—Applicability—Berar.

———Berar is *prima facie* governed by the Bombay School of Law : and, though the Mayukha has not the same authority there as in Gujarath it supplements the Mitakshara and where the text of the Mitakshara is ambiguous, considerable weight must be given to the Mayukha. (*Jackson and Mohiuddin, A.J.Cs.*). BAJIRAO *v.* ATMARAM. **A.I.R. 1930 Nag. 265.**

———The Mitakshara Law is paramount and the Mayukha is of secondary consideration in Berar. (*Macnair, A.J.C.*). GOVIND *v.* CHINLAMAN. **105 I.C. 840=A.I.R. 1928 Nag. 55.**

———In Berar, following the Bombay Deccan, the Mitakshara is paramount and the Mayukha is of secondary consideration, being only relied upon when the Mitakshara is silent or doubtful (*Baker, J.C. and Kotval and Prideaux, A.J.Cs.*). NARAYAN *v.* TULSIRAM. **87 I. C. 979=22 N.L.R. 183=A.I.R. 1925 Nag. 329 (F.B.).**

———In Berar Mayukha predominates over Mitakshara wherever they differ. (*Kotval, A.J.C.*). SHRIRAM *v.* RAJARAM. **78 I. C. 367=19 N.L.R. 193=A.I.R. 1924 Nag. 83.**

———*Lex loci* is Mitakshara as interpreted by Mayukha : 9 N.L.R. 102, *Foll.* (*Prideaux, A.J.C.*). GOVINDA *v.* MT. DOOMI. **65 I. C. 671=5 N.L.J. 187=A.I.R. 1921 Nag. 142.**

—Applicability—Bhale Sultans.

———*Bhale Sultans are governed by Hindu Law in matter of succession.*

HINDU LAW—Applicability—Converts.

The Mahomedan Bhale Sultans have as a whole retained customs of inheritance which are generally in accordance with Hindu Law, and they have not adopted the Mahomedan Law of succession, and, therefore, the father has no share in the property left by his son : 9 M. I. A. 195 (P. C.), *Foll.*; A.I.R. 1922 P.C. 59, *Dist.* (*Wazir Hasan and Pullan, JJ.*). KHALIL AHMAD KHAN *v.* MOHAMMAD MUSTAFI KHAN. **112 I. C. 68=5 O.W.N. 275=A.I.R. 1928 Oudh 269.**

—Applicability—Converts.

———*Non-Hindu—When becomes a Hindu.*

Merely professing a theoretical allegiance to the Hindu faith does not make a person Hindu—Nor an ardent admirer and advocate of Hinduism and its practices is a Hindu—Long residence in India, abdication of one's own religion by a clear act of renunciation, adopting Hinduism by undergoing formal conversion to Hinduism, assuming a Hindu name, marrying in accordance with Hindu religious rites and taking to the Hindu mode of life, are proofs that a non-Hindu has become a Hindu. (*Venkatasubba Rao, J.*). RATANSI D. MORARJI *v.* ADMINISTRATOR GENENRAL OF MADRAS. **111 I C. 364=52 Mad. 160=28 M L.W. 674=1928 M.W.N. 848=A.I.R. 1928 Mad. 1279=55 M.L.J. 478.**

———European convert to Hinduism is subject to Hindu Law—Test of conversion is not of domicile but of religion. (*Venkatasubba Rao, J.*). RATANSI *v.* ADMINISTRATOR-GENERAL OF MADRAS. **111 I.C. 364=52 Mad. 160=28 M.L.W. 674=1928 M.W.N. 848=A. I. R. 1928 Mad. 1279=55 M. L. J. 478.**

———*When Hindu Law is applicable.*

A mere conversion to a religion would not necessarily involve the adoption of the laws as to inheritance and succession obtaining among the adherents of that religion. But when the converts aim at identifying themselves with the rest, strong evidence would be needed to show that they kept their own laws relating to social relations, marriage, inheritance and succession uninfluenced by the rules of law obtaining among the adherents of of the religion to which they became converts. (*Kumaraswami Sastri, Devadoss and Wallace, JJ.*). MOOKKA KONE *v.* AMMAKUTTI AMMAL. **108 I. C. 760=51 Mad. 1=27 M. L. W. 611=A.I.R. 1928 Mad. 299=54 M. L. J. 174 (F.B.).**

———*When the law of survivorship applies.*

Conversion creates partition by operation of Hindu Law itself and therefore the right of survivorship does not survive, unless the convert has shown as a matter of fact that he renounced the partition which his conversion *ipso facto* effected : A.I.R. 1921 Mad. 224, *Expl.*; 1912 M.W.N. 386, *Foll.*; 31 Bom. 26, *Not foll* ; 9 M.I.A. 195 (P.C.), *Rel. on.* (*Wallace, J.*). SUBBAYYA *v.* RANGAYYA **105 I.C. 206=26 M.L.W. 361=A.I.R. 1927 Mad. 883.**

———Hindus who have been converted to Islam frequently retain some of their Hindu customs and in particular those relating to marriage and inheritance. (*Wazir Hasan and Pullan, JJ.*). BINAIK DAT *v.* MOHAMMAD GHAFUR KHAN. **105 I.C. 496=4 O.W.N. 770=A.I.R.1927 Oudh 442.**

———A co-parcener by conversion to an alien faith such as Mahomadanism ceases to be a co-parcener and separation is caused immediately on conversion: 9 M. I.A. 199 and 57 P.R. 1916, *Foll.* (*Martineau, J.*). MT. JAMNA BAI *v.* GOUDA RAM. **80 I.C. 519=6 L.L.J. 84=A. I. R. 1924 Lah. 479.**

HINDU LAW—Applicability—Converts.

———*Conversion to Muhammadanism—Presumption is that Muhammadan Law applies, but may be rebutted.*

Where the family is descended from converts to Muhammadanism from Hinduism the presumption is that they follow Muhammadan Law. The presumption is a rebuttable one.

Instances showing that converts to Muhammadanism had departed from strict Mahomedan Law in other matters could not be regarded as raising any presumption that Mahomedan Law, had been abrogated by custom in matters of succession. But instances are relevant and of importance, *not to prove the special custom set up* but to show that in spite of the fact that the parties are converts to Islam strict Mahomedan Law has not been invariably followed and thus weaken the presumption referred to in 20 Bom. 53 and 45 Mad. 308. (*Broadway and Campbell, JJ.*). NAJIM-UDDIN *v.* ABDUL HAMID. **72 I. C. 845=A.I.R. 1923 Lah. 175.**

———There are among the Mahomedans certain groups whose ancestors were Hindus and professed the Hindu religion, and were then converted to Islam. Among these groups may be reckoned, as is shown by decided cases, Khojas, Suni Borahs, Molesalam Girasias, Cutch Memons, Nassapooria Memons; and, lastly, Halai Memons. Halai Memons domiciled in Porebunder follow the Hindu Law of Succession. (*Lord Dunedin.*) KHATUBAI *v.* MAHOMED HAJI ABU. **72 I.C. 202=47 Bom. 146=50 I.A. 108=27 C. W. N. 774=4 L.R.P.C. 42=37 C.L.J. 131=25 Bom.L R. 127=17 M. L. W. 208=32 M. L. T. 45=A.I.R. 1922 P.C. 414=44 M.L.J. 35 (P.C.).**

—Applicability—Cutchi Memons.

———*Succession—Hindu Law applies.*

The fact that a Cutchi Memon had signed a declaration under the Cutchi Memon Act that he was to be governed in all matters of succession by Mahomedan Law is immaterial in a case of his succession to a person who has not signed such a declaration, as his succession would be determined according to the law applicable to that person. (*Mirza, J.*). ABDUL SAKUR *v.* ABUBAKKAR.
32 Bom.L.R. 215=A.I.R. 1930 Bom. 191.

———*Ex-communication—Decision of "Jamait" not arrived at in consonance with principles of justice—Court has jurisdiction to interfere.*

The decision of the "Jamait" or Council of the Khoja community ex-communicating a person is within the scope of its authority if arrived at in a manner consonant with the ordinary principles of justice, but if it is not so arrived at the Court would have jurisdiction to interfere: 26 Bom. 174, *Foll.* (*Wild, A.J.C.*). FAKIR MAHOMED NANJI *v.* AGHA KHAN. **A.I.R. 1930 Sind 204.**

———*Hindu joint family system does not apply.*

The Hindu joint family system is not known to the law governing Cutchi Memons; and they cannot live jointly in the sense that the word is understood in Hindu Law. The fact that two people live in a house does not make them members of a joint family governed by Hindu Law. The mere fact that younger members of a Cutchi Memon family join in the business started by their head would not make them partners, nor the firm a business governed by the Hindu Law of family firm. (*Tyabji, A.J.C.*). TULSIDAS KESHOWDAS *v.* FAKIR MAHOMED. **93 I. C. 321=19 S.L.R. 376=A.I.R. 1926 Sind 161.**

———*Hindu Law of joint family does not apply.*

Cutchi Memons have never adopted as part of their customary law the Hindu Law of joint family or the distinction existing in that law between ancestral family, joint family and ancestral property they are subject by custom to the Hindu Law of succession and inheritance only.

The presumption of Hindu Law that the money came from joint funds is not applicable to Muhammadans. There is no such thing as joint family property under the Muhammadan Law. (*Raymond, A.J.C.*). YUSIF MOHAMED *v.* ABUBACKER IBRAHIM. **78 I. C. 817=A.I.R. 1925 Sind 26.**

HINDU LAW—Applicability—Dancing girls.

———*Ancestral property—Son has no vested interest.*

The application of the rules of Hindu Law of custom to the Cutchi Memons is limited to rules of inheritance and succession and does not extend to the rules relating to the joint family property as applicable to Hindus. A son of a Cutchi Memon has no vested interest by birth in the ancestral property of his father: (1914) 10 Bom. L.R. 224 and (1915) 41 Bom. 181, *Rel. on.* (*Shah. Ag. C. J. and Pratt, J.*). HAJI OOSMAN *v.* HARROON SALEH MAHOMED. **68 I.C. 862=24 Bom. L.R. 978=47 Bom. 369=A.I.R. 1923 Bom. 148.**

———*Hindu Law of joint family applies.*

The Hindu Law as to joint family and coparcenary is applicable to Cutchi Memons. It is however open to the parties to prove any special custom varying any particular incidence of the joint family law. (*Case-law fully discussed.*)

The question is not whether after conversion a custom sprang up among the Cutchi Memons at variance with the Hindu Law, but whether they retained their old law to any, and if so, to what extent.

At the time of their conversion the Cutchi Memons were Hindus governed by the Mitakshara and the normal state of their families was a system of a joint and undivided family, with a law of survivorship as elaborated in the Mitakshara, whereby females were excluded in favour of male co-parceners, and were only entitled to residence and maintenance. (*Kumaraswami Sastri, J.*). HAJEE ABOO BUCKER *v.* EBRAHIM HAJEE.
70 I.C. 715=31 M.L.T. 183=A.I.R. 1921 Mad. 571.

—Applicability—Dancing girls.

———*Collateral succession obtains amongst sons of dancing girls.*

The rule of collateral succession obtains among the legitimate descendants of the two sons of a dancing woman whose paternity is unknown, *i. e.*, each branch can inherit to the other.

It is a misnomer to call the son of a dancing woman whose paternity is unknown an illegitimate son. The illegitimate son is one born out of wedlock, *i e.*, no marriage was solemnized between the father and the mother. In the case of sons of prostitutes or dancing women the paternity is unknown and it is only an euphemism to call them illegitimate sons.

People who have been born in India and who are of the Hindu faith, and whose customs and manners are those of Hindus, are governed by the Hindu Law. In the case of a dancing woman or a Hindu prostitute her religion is Hindu and her customs, manners and observances are Hindu, and her sons are Hindus, and the Hindu Law therefore is applicable to them. It is consonant with reason and principle that when a particular system of law is made applicable to a set of persons, the whole of that system should be applied and not portions of it, unless any custom, valid and binding, is proved to the contrary, or else the application of that

HINDU LAW—Applicability—Dancing girls.

system is modified either by statute or by anything contained in the rules of that system. It is not necessary that in order to have heritable blood inheritance should be traced through the father. It logically follows that the sons of a dancing woman or a prostitute have heritable blood between them. Hence there is heritable blood between the lines of their legitimate descendants. (*Case-law discussed.*) (*Davadoss and Wallace, JJ.*). VISHWANATH MUDALI *v.* DORAISWAMI MUDALI.

1925 M.W.N. 613=A.I.R. 1926 Mad. 1.

———*Joint family with rights of survivorship is possible—Right by birth is doubtful.*

There can be a co-parcenary of dancing girls, with rights of survivorship. But there is no case which goes to the length of saying that daughters of dancing girls acquire by birth an interest in the ancestral property.

The parties were dancing girls. The mother, daughter and grand-daughter all lived together, put their earnings together and behaved in all respects as members of a joint family.

Held, that they constituted a joint family with rights of survivorship.

Held, also that a mortgage of the joint property was binding on the other members of the family in so far as the amount borrowed had been spent on purposes binding on a joint Hindu family. (*Kumaraswami Sastry, J.*). P. KOKILAMBAL *v.* P. SUNDARAMMAL. **86 I.C. 632= 21 M.L.W. 259=A.I.R. 1925 Mad. 902.**

—Applicability—Dat Brahmans.

———Dat Brahmans of the village Damun Chak tahsil Kharian, district Gujrat, are governed in matters of succession by their personal law namely, Hindu Law, and not by custom prevailing among their agriculturist neighbours. (*Abdul Raoof and Addison, JJ.*). KHAZAN CHAND *v.* PARS RAM.

90 I.C. 1045=6 Lah. 524=26 P.L.R. 627= 7 L.L.J. 459=A.I.R. 1925 Lah. 646.

—Applicability—Dayanandis.

———*Dayanandis are Hindus.*

Dayanandis are Hindus. If the Brahmos are Hindus, the Arya Samjists are more so because though professing to be monotheistic they believe in the supremacy of the Vedas. (*Coutts and Adami, JJ.*). SURAJ JOTE KUMAR *v.* ATTAR KUMARI.

67 I.C. 550=1922 P.H.C.C. 235= 3 P.L.T. 551=1 Pat. 706= A.I.R. 1922 Pat. 378.

—Applicability—Gharbari Gosavis.

———Except so far as their particular customs apply, the Gharbari Gosavis are governed by the usual law as to Hindus. (*Lord Phillimore.*) HARIGIR *v.* BHARATHI. **88 I.C. 343=21 N.L.R. 127= 22 M.L.W. 355=1925 M.W.N. 414= A.I.R. 1925 P.C. 127 (P.C.).**

—Applicability—Gond.

———*Gond is not a Hindu—Hindu Law applies to the extent it has been adopted.*

A Gond is not a Hindu and is not governed by the Hindu Law. In the case of any particular Gond it can of course be proved that this family or any large body of Gonds in which he is included has adopted any particular custom or all the principles of Hindu Law, by becoming converts to the Hindu religion or otherwise, so that they are now bound by that custom or those principles, but it is for the party who alleges this to prove it. Credible evidence that on the points, which most frequently arise, involving personal law, custom of the family or body differs in no respect from that of Hindu families in the locality, would suffice for

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an inference that all the principles of Hindu Law might have been adopted. It would then be for the opposite party to show that although part of the Hindu Law might have been adopted, the particular custom which governed the disposal of the suit had not been adopted: A.I.R. 1923 Nag. 317, *Rel. on.* (*Macnair, Offg. J.C.*). MIRARI *v.* HANSLAL. **121 I.C. 630=26 N.L.R. 111=A.I.R. 1930 Nag. 57.**

———Per *Hallifax, A.J.C.*—Hindu Law cannot be applied to Gond family unless it is shown that it has adopted rules of Hindu Law: A.I.R. 1923 Nag. 317, *Foll.* (*Mohiuddin and Macnair, A.J.Cs.*). MT. SARJABAI *v.* GANGARAM. **118 I.C. 871= A. I. R. 1930 Nag. 35.**

———In the absence of any evidence as regards the law which the Gonds follow a mother of a minor is a preferential guardian to a grand-mother. (*Macnair, Offg. J.C.*). NARBADI *v.* CHOTTI.

117 I. C. 281=A. I. R. 1929 Nag. 129.

———Gonds are not Hindus: A.I.R. 1923 Nag. 317 and 2 N.L.J. 129, *Foll.* The Raj Gonds are no exception to this rule and they also are not governed by the Hindu Law. (*Baker, J.C.*). JANKUBAI *v.* PARVATI. **87 I. C. 1036=A.I.R. 1926 Nag. 353.**

———*Gond is not a Hindu—Family custom—Custom adopting Hindu Law could be proved.*

A Gond is not a Hindu and is not governed by the Hindu Law. In the case of any particular Gond it can of course be proved that his family or any large body of Gonds in which he is included has adopted any particular custom or all the principles of Hindu Law, by becoming converts to the Hindu religion or otherwise but it is for the party who alleges this to prove it. (*Hallifax and Kotval, A.J.Cs.*). VITHOBA *v.* LAL SINGH. **76 I.C. 980= 19 N.L.R. 104=A.I.R. 1923 Nag. 317.**

—Applicability—Grahast Gosains.

———A Grahast Gosain or Bairagi is governed by the ordinary rules of Hindu Law unless it is proved that any special custom applies: *Sheoshankar Gir* v. *Rama Krishna Puri*, S. A. No. 619 of 1909, *Diss. from.* (*Hallifax and Macnair, A.J.Cs.*). ITWARIDAS *v.* BODHAN. **17 N. L.R. 29= A.I.R. 1921 Nag. 54.**

—Applicability—High caste Hindus in Punjab.

———*High caste Hindus in Punjab—Hindu Law applies.*

Even in the Punjab, the high caste Hindus living in towns and working as traders are presumably governed by Hindu Law and in the absence of sufficient evidence it cannot be said that that law is superseded on any particluar point by custom. (*Martineau and Zafar Ali, JJ.*). MT. BAL KAUR *v.* DEOKI. **75 I.C. 109=4 Lah. 236= 6 L.L.J. 69=A.I.R. 1923 Lah. 579.**

—Applicability—Illegitimate sons.

———Hindu Law does not apply to illegitimate sons of a Hindu by a Mahomedan concubine and they are not even entitled to maintenance on general principles of equity. (*Chevis and Le Rossignol, JJ.*). CHARANJIT SINGH *v.* AMIR ALI.

64 I.C. 892=2 Lah. 243=A.I.R. 1921 Lah. 121.

—Applicability—Jains.

———The Hindu Law applies to the Jains in the absence of custom varying the law: 31 C. 11 (P.C.) 1 A. 688 (P.C.); 4 C. 744 (P.C.); 23 Bom. 257, *Ref. to.* (*Marten, C. J. and Patkar, J.*). BHIKUBAI CHUNILAL *v.* MANILAL. **32 Bom. L.R. 1217= A.I.R. 1930 Bom. 517.**

———*Widow and mother take limited interest as under Hindu Law.*

A widow belonging to the community of Dasha Shrimali Shwetambar Jains in Bombay has no

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larger powers over the immovable property inherited from her husband than an ordinary Hindu law. And the mother inheriting as an heir after the widow is not competent to deal with the property inherited from her son. She gets only a limited interest. (*Marten, C.J. and Patkar, J.*). BHIKUBAI CHUNILAL *v.* MANILAL. **32 Bom. L.R. 1217= A.I.R. 1930 Bom. 517.**

———A Jain mother is not competent to make a gift of a large portion of the properties in favour of charities. (*Marten, C.J. and Patkar, J.*). BHIKUBAI CHUNILAL *v.* MANILAL. **32 Bom. L.R. 1217= A.I.R. 1930 Bom. 517.**

———Jains are primarily governed by Hindu Law subject to the proof of any custom that might be set up: 74 P.R. 1916; A. I. R. 1927 Mad. 228, *Foll.* (*Broadway and Hilton, JJ.*). PREM SAGAR *v.* RAM GOPAL. **A.I.R. 1929 Lah. 814.**

———*Succession is governed by Hindu Law unless special custom is pleaded and proved.*

Unless a special custom is pleaded and proved, the ordinary Hindu Law governs succession amongst the Jains. It cannot be assumed that they do possess a peculiar custom of inheritance with reference to the property which devolves upon a Jain widow from her husband and reported decisions cannot supply the place of evidence and any fact relating to custom has got to be proved by the production of evidence bearing upon the question sought to be proved: 16 Bom. 347; 4 Cal. 744 (P.C.); 32 All. 247 (P. C.) and 2 C. W. N. 154, *Foll.*; 1 All. 688 (P. C.), *Dist.* (*Sen and Niamatullah, JJ.*). MT. BULAGAN *v.* RATAN LAL. **110 I.C. 546=26 A.L.J. 1196= A.I.R. 1928 All. 656.**

———*Widow cannot adopt without consent of husband or his sapindas.*

Adoption amongst Jains is regulated by the ordinary Hindu Law, and it is for the Jains to allege and prove any custom different from the normal Hindu Law and usage in the country in which the property is located and the parties reside. Therefore, the consent of the husband or his sapindas is necessary to validate an adoption made by a Jain widow: 4 Cal. 744 (P.C.); 2 C.W.N. 154; 8 W.R. 116; 30 All. 197; 10 Bom. H. C. R. 241; and 16 Mad. 182, *Foll.* (*Kumaraswami Sastri, Offg. C.J. and Curgenven, J.*). GATEPPA *v.* ERAMMA. **99 I.C. 503=50 Mad. 228= 26 M.L.W. 408=A.I.R. 1927 Mad. 228= 51 M.L.J. 757.**

———*Jains are governed by Hindu Law in absence of special custom.*

The ordinary Hindu Law applies to Jains in the absence of proof of special custom varying it, and a widow among Jains holds a limited interest in the joint family property of her husband and his brother in the absence of any special custom: 4 Cal. 744, *Foll.*; 1 All. 688 (P. C.) and 27 Cal. 379, *Dist.* (*Daniels and King, JJ.*). NEKRAM SINGH *v.* SHRINIWAS. **96 I.C. 639=24 A.L.J. 751= A.I.R. 1926 All. 586.**

Per *Mukerji, J.*—Adoption among Jains is more a matter of custom than of spiritual necessity. Even a married man may be adopted among them. (*Lindsay and Mukerji, JJ.*). MITAR SAIN *v.* DATA RAM. **87 I.C. 724=A.I.R. 1926 All. 7.**

———Agarwallas generally adhere to Jainism and repudiate the Brahminical doctrines relating to obsequial ceremonies, the performance of Sraddh, the offering of oblations for the salvation of the soul of the deceased. They do not believe that a son, either by birth or by adoption, confers spiritual benefit on the father: 10 B.H.C.C. 241, *Ref.* (*Mr. Ameer Ali.*) DHANRAJ *v.* SONI BAI. **87 I.C. 357=1925 M.W.N. 692= 30 C.W.N. 601=23 A. L. J. 273= 2 O.W.N. 335=21 N.L.R. 50=52 Cal. 482= 6 L.R.P.C. 97=27 Bom. L.R. 837=52 I.A. 231= A.I.R. 1925 P.C. 118=49 M.L.J. 173 (P.C.).**

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———Among the Jains a widow enjoys absolute power of disposal over property inherited by her from her husband which was not his ancestral property. (*Baker, Offg. J.C.*). MT. SANO *v.* PURAN SINGH. **78 I.C. 461=A.I.R. 1925 Nag. 174.**

———*Jains are Hindu Dissenters—Custom must be proved if exemption from Hindu Law is claimed.*

Jains are Hindu Dissenters and when a custom is set up by them in contravention of the ordinary Hindu Law, the custom must be proved subject to the requirements as to the proof of any other custom varying the ordinary Law. But when so proved, effect must be given to the custom. (*Baker, Offg. J.C.*). MT. SANO *v.* PURAN SINGH. **78 I.C. 461=A.I.R. 1925 Nag. 174.**

———*Jains may adopt in dattaka form.*

There is no authority to show that Jains cannot adopt in the Dattaka form or that an adopted son among Jains can, in no case, become a member of the family of his adoption. (*Broadway and Abdul Qadir, JJ.*). GOPI MAL *v.* PANNALAL. **72 I.C. 424=A.I.R. 1924 Lah. 339.**

———Jains are subject to Hindu Law in matters of alienation except where a special custom is proved. (*Broadway and Brasher, JJ.*). CHHAJJHU MAL *v.* KUNDAL MAL. **70 I.C. 838= A.I.R. 1923 Lah. 53.**

———*Jains generally adhere to Hindu Law—Hindu Law of adoption applies in absence of contrary usage—Sitambari Jain widow can adopt a boy, even married, to her husband without husband's authority.*

The Jains are of Hindu origin; they are Hindu dissenters. Although generally adhering to the ordinary Hindu Law, that is, the law of the three superior castes, they recognise no divine authority in the Vedas and do not practise the Shradhs, or ceremony for the dead. The due performance of the Shradhs, or religious ceremonies for the dead, is at the base of the religious theory of adoption, but the Jains have so generally adopted the Hindu Law that the Hindu rules of adoption are applied to them in the absence of some contrary usage. The only ceremony necessary to the validity of an adoption among the Jains is the giving and taking of the adopted son, actually putting of the boy in the lap of the adoptive father or mother is not necessary.

Among the Sitambari sect of Jains the widow of a sonless Jain can legally adopt to him a son without any express or implied authority from her deceased husband to make an adoption and the adopted son may be at the time of his adoption a grown-up and married man. (*Sir John Edge.*) SHEOKUARBAI *v.* JEORAJ. **61 I.C. 481= 16 N.L.R. 170=1920 M.W.N. 627= 25 C.W.N. 273=A.I.R 1921 P.C. 77 (P.C.).**

———*Jains—Adoption being merely temporal, variations from general law have been recognized.*

Among the Jains adoption is a mere temporal or secular arrangement and has no spiritual or religious object or significance; and consequently several variations from the ordinary Hindu Law have been judicially upheld as valid among them. (*Macleod, C.J. and Fawcett, J.*). PARSHOTAM GANPAT *v.* VENICHAND GANPAT. **61 I.C. 492=45 Bom. 754= 23 Bom. L.R. 227=A.I.R. 1921 Bom. 147.**

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———Jains have so generally adopted the Hindu Law that the Hindu rules of adoption are applied to them in the absence of some contrary usage: 25 C.W.N. 273 (P.C.), *Foll*; 14 M.I.A. 570 (P.C.), *Ref.* (*Macleod, C.J. and Fawcett, J.*). PARSHOTAM GANPAT *v.* VENICHAND GANPAT. **61 I.C. 492= 45 Bom. 754=23 Bom. L.R. 227= A.I.R. 1921 Bom. 147.**

—Applicability—Kayasthas.

———*Lapses from orthodox practices do not entail degradation—Kayasthas—Bihari Kayasthas are not sudras—Adoption—Rules of dwijas apply.*

A Hindu does not cease to be so merely by occasional lapses in matters of diet and ceremonial observances from orthodox Hindu practice. The principle will equally apply where the question is whether the members of a regenerate class have ceased to belong to it by reason of such lapses. The Kayasthas are not Sudras, but belong to the three regenerate classes and their abandoning the performance of Upanayanam ceremony will not degrade them to Sudradom. In any case the Behari Kayasthas are not Sudras. All of them came down from Upper India and are governed by the laws and customs which prevail there: 10 Cal. 688, *Diss. from.* Therefore, the rule prohibiting an adoption of a daughter's son, mother's sister's son and sister's son among the three regenerate classes does apply to them unless varied by family custom. (*Hindu Law texts and case-law fully reviewed.*) (*Jwala Prasad and Bucknill, JJ.*). ISHWARI PRASAD *v.* RAI HARI PRASAD LAL. **106 I.C. 620= 8 P.L.T. 34=6 Pat. 506=A.I.R. 1927 Pat. 145.**

—Applicability—Khoja Muhammadans.

———Hindu Law applies to Khoja Muhammadans with regard to the question of succession and inheritance only. But principles relating to joint family are not applicable to Khojas. (*Percival, J.C. and Aston, A.J.C.*). MAHOMED KASSIM *v.* NATHO BHANO. **107 I.C. 211 (Sind).**

—Applicability—Kurmi Mahtos.

———*Manbhum district — No* lex loci *— Kurmi Mahtos—It is a question of proof if Dayabhaga or Mitakshara applies to them.*

Per *Macpherson, J.*—The term "aboriginal," at least in Chota Nagpur, denotes race only. It implies nothing as to religion which may be even within the same tribe Animism, a slight veneer of Hinduism, various intermediate stages of Hinduism, or Christianity. On the other hand, the term "Hindu" has in Chota Nagpur reference only to religion. The Kurmi-Mahtos of the Manbhum district are racially an aboriginal tribe.

It is far from settled law that the Dayabhaga system is the *lex loci* in the district of Manbhum, particularly the north and the western half, or indeed in any part of the district. Like the rest of Chota Nagpur and the Jungle Mahals the district of Manbhum was until comparatively recent times outside the Hindu pale.

There is no *lex loci* as to the system of Hindu Law which prevails in Manbhum or in any area of it. It cannot be predicated of a Hindu of that district and particularly of a convert to Hinduism from the local tribes that he belongs by operation of law to any particular school of Hindu Law, whether Mitakshara, Dayabhaga or another. It is a matter of proof in each case whether they are governed by a particular school. The onus is upon the person who alleges that customary laws have been discarded and that the aboriginal convert adheres to a particular school of Hindu Law in the

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matter of inheritance. (*Dawson-Miller, C.J. and Macpherson, J.*). KRITTIBASH MAHTON *v.* BUDHAN MAHTANI. **89 I.C. 796=6 P.L.T. 604= 1926 P.H.C.C. 129=A.I.R. 1925 Pat. 733.**

—Applicability—Lingayats.

———Lingayats whose only God is Shiva and who acknowledge the authority of the Vedas are bound by Hindu Law except in so far as it is modified by custom: A.I.R. 1927 Mad. 228, *Ref.* (*Kumaraswami Sastri and Walsh, JJ.*). SOMASEKHARA *v.* MAHADEVA. **53 Mad. 297=A.I.R. 1930 Mad. 496.**

—Applicability—Mahomedans.

———There is a presumption that Muslims are governed by Muhammadan Law, and if a person alleges that Cutchi Memons are governed by Hindu Law by custom, the burden of proving the custom lies on him and the onus will be discharged by proof of actual instances in which the alleged custom has been followed. (*Tyabji, A. J. C.*). THULSIDAS KESHAVDAS *v.* FAKIR MAHOMED. **93 I.C. 321=19 S.L.R. 376= A.I.R. 1926 Sind 161.**

—Applicability—Makkathayam Thiyyas.

———*Makkathayam Thiyyas are governed by custom—Hindu Law is to be adopted in cases where custom is not proved on any particular matter.*

The Makkathayam Thiyyas are governed by the customary law and when a question arises as to what is the rule of law governing them on any particular matter, the Court has to see what is the rule of customary law obtaining amongst them in that matter and in cases which are not sufficiently covered by prior decisions, the question will have to be determined with reference to the evidence in the case: 17 Mad. 184, *Expl.*; 19 Mad. 440 and 19 Mad. 1, *Ref.*

In the absence of any satisfactory evidence to show what exactly is the rule of the customary law in any particular point, the rule of Hindu Law on that point must be presumed and adopted to be the rule of the customary law obtaining amongst the community on that point. The presumption therefore will be useful and will hold good only if satisfactory evidence is not forthcoming as to what is the rule of the customary law: 39 M.L.J. 427 and S.A. 2092 of 1920, *Diss. from*; 15 Mad. 281, *Expl.* and *Foll.*; A. I. R. 1921 Mad. 661, *Ref.* (*Waller and Madhavan Nair, JJ.*). PATTUKKAYAL CHAKUTTI *v.* KOTHEMBRA CHANDUKUTTI. **105 I.C. 55=39 M.L.T. 314= A.I.R. 1927 Mad. 877=53 M.L.J. 368.**

—Applicability—Marathas.

———*Marathas of the five families and* 96 *families are Kshatriyas.*

The popular view lays down three tests for determining the class to which a Hindu belongs: (1) the consciousness of the caste; (2) its customs; and (3) the acceptance of that consciousness by the other castes. Dividing the Marathas, therefore, into the three sub-divisions well recognized among themselves, *viz.*, the five families, the 96 families and the rest, the first two classes are proved to be legally Kshatriyas, judged by the three tests: *Case-law discussed.* (*Madgavkar and Patkar, JJ.*). SUBRAO *v.* RADHA. **113 I.C. 497= 52 Bom. 497=30 Bom.L.R. 692= A.I.R. 1928 Bom. 295.**

—Applicability—Migration.

———A dispute was as to property situated in the Bombay Presidency. The family, to which the property belonged, observed old customs prevailing on the Delhi side.

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Held, that the family must have sprung from Delhi, from where the customs had been introduced in their present place. The family was, therefore, governed by Benares and not Bombay School. (*Lord Buckmaster.*) BALKISAN DEVCHAND *v.* KUNJALAL HIRALAL AGARWALA. **122 I.C. 1= 32 Bom.L.R. 355=51 C L.J. 237= 31 M.L.W. 625=A.I.R. 1930 P.C. 133= 58 M.L.J. 358 (P.C.).**

——*Person migrating, or territory transferred to another province—He is presumed to have carried his personal law with him.*

Whether it is case of an individual migrating from one province to another, or a case of territory where he resides being transferred from one province to another, the presumption until contrary is shewn is that he carries his personal law with him. Where, therefore, North Kanara District of Madras is transferred to Bombay Presidency, Mayukha cannot be said to apply to it simply because of such transfer: 13 W. R. 47 and A. I. R. 1921 P. C. 59, *Rel. on.* (*Kumaraswami Sastri and Walsh, JJ.*). SOMASEKHARA *v.* MAHADEVA. **53 Mad. 297= A.I.R. 1930 Mad. 496.**

——*Law.*

The law existing at the time of migration continues to govern the migrated members until it is renounced. (*Findlay, J. C. and Subhedar, A. J. C.*). TRIMBAKDAS *v.* Mt. MATHABAI. **124 I.C. 609=A.I.R. 1930 Nag. 225.**

——*Person migrating carries his personal law.*

When a person migrates from one country to another, there is a presumption that he carries with him his personal law and unless there is something to show that he has adopted the law of his new domicile, he must be deemed to be still governed by the old law. (*Lindsay and Sulaiman, JJ.*). SUKHBIR SINGH *v.* MANGEISAR RAO. **100 I.C. 778=49 All. 302=25 A. L. J. 185= A. I. R. 1927 All. 252.**

——*Family resident in Bengal claiming to be governed by Mitakshara—Proof of migration.*

Where the parties who were residents of Bengal claimed to be governed by the Mitakshara and the evidence only proved that at sometime or other they must have migrated from outside Bengal but where it could not be ascertained as to when this migration took place or from where the parties' ancestors had come and the parties availed of only the services of Bengali priests on ordinary occasions and only on important occasions procured the services of an up-country Misra Brahmin,

Held: that the evidence was not sufficient to prove that the parties were governed by Mitakshara as alleged. (*Greaves and Mukerji, JJ.*). NAGENDRA NATH ROY *v.* JUGAL KISHORE ROY. **90 I.C. 281=29 C.W.N. 1052=43 C.L J. 83= A.I.R. 1925 Cal. 1097.**

——*Migrating family—Personal law continues to apply unless renounced.*

The personal law of a migrating family will govern them in their new domicile if it was the personal law at the time of migration and provided that they have not renounced the law of the province from which they have migrated. (*Spencer, Offg. C. J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1= A.I.R. 1925 Mad. 497.**

——*Migrating family.*

Employment of local priests under supervision of family priests does not prove adoption of local law. Per *Spencer, Offg. C.J.* (*Spencer, Offg. C.J. and Kumaraswami Sastri, J*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705= 48 Mad. 1=A.I.R. 1925 Mad. 497.**

——*Migrating family—Party pleading the original law as different from local law must prove.*

When a Hindu migrates, he is entitled to carry his own law, that is to say, the personal law from his home of origin, to the new place. He may continue to observe these rules or laws or may abandon them: but where the law to be pleaded is different from the law prevailing in the locality, it must be on the party who pleads that law, to say so. (*Mukerji and Daniels, JJ.*). SHYAM LAL SHAH, *In re.* **86 I.C. 729=6 L.R.A. Civ. 136= 49 All. 848=A.I.R. 1925 All. 648.**

——Where a family migrated from one territory to another and preserved its ancient ceremonies and practices, the presumption is that it also preserved its personal law of succession unless there is proof of the renunciation of the original law for that of the place migrated to. (*Lindsay and Kanhaiya Lal, JJ.*) JAWAHIR LAL *v.* JEVAN LAL. **79 I.C. 861=43 All. 192=22 A.L.J. 49= 5 L.R.A. Civ. 130=A.I.R. 1924 All. 350.**

——*Migrating family going to Bengal need not show immigration before Dayabhaga.*

For a family originally, coming from north west of India and residing in Bengal, it is not absolutely necessary to prove immigration since the establishment of the Dayabhaga system and the continued practice of Mitakshara customs in order to show that the family is governed by Mitakshara. The necessary proof of origin and practice is enough: 31 C.L.J. 52, *Expl.* (*Walmsley and Suhrawardy, JJ.*). RAMESH CHANDRA SINHA *v.* MD. ELAHI BUKSH **79 I. C. 309=50 Cal. 898= A.I.R. 1924 Cal. 383.**

——*Migrating family—New school adopted—Revival by one member not permissible.*

Where a Hindu family migrates from one province to another, the presumption is that it carries with it old laws and customs as to succession and family relations but this presumption may be rebutted by proof that the family has adopted the law and usages of the place to which it has migrated, and once it is proved that a new family usage has grown up in the course of generations, possibly with the concurrence or acquiescence of families of the same group, it furnishes the governing law of the family. It would obviously lead to much confusion and abundant litigation, if the law permitted arbitrary attempts to revive and give effect to the original usages, after they had been clearly abandoned, and the abandonment had been acted upon so long as to result in the adoption of new usages. It is then not open to a member at any time to disclaim his personal law and adopt another at his choice; if this were permissible chaos could be the only result. (*Mookerjee and Cuming, JJ.*). SARADA PRASANNA ROY *v.* UMA KANTA. **77 I. C. 450=37 C. L.J. 233=50 Cal. 370= A.I.R. 1923 Cal. 485.**

——*Migrating family—Law of original country applies*, prima facie.

The law of succession is in any given case to be determined according to the personal law of the individual whose succession is in question. If nothing is known about a man except that he lived in a certain place, it will be assumed that his personal law is the law which prevails in that place. In that sense only is domicile of importance. But if more is known, then in accordance

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with that knowledge his personal law must be determined unless it can be shown that he has renounced his original law in favour of the law of the place to which he migrated. Original law is law which prevailed at the time of migration. The law governing succession to Maharashtra Brahmin whose ancestors had at one time lived in the Bombay Presidency is the law applicable there and his daughter takes an absolute estate in his property after his death. (*Lord Dunedin.*) BALWANT RAO *v.* BAJI RAO. **57 I.C. 545=48 Cal. 30=47 I.A. 213=16 N.L.R. 187=18 A.L.J. 1049=22 Bom. L.R. 1070=28 M.L.T. 157=12 M.L.W. 679=1920 M.W.N. 483=3 N.L.J. 251=25 C.W.N. 243=A.I.R. 1921 P.C. 59=39 M.L.J. 166 (P.C.).**

———New domicile — Connection with original home maintained—Presumption is that the law applicable originally continues to apply, in matters of succession. (*Broadway and Campbell, JJ.*). NAZM-UD-DIN *v.* ABDUL HAMID. **72 I. C. 845=A.I.R. 1923 Lah. 175.**

———If nothing is known about a man except that he lived in a certain place, it will be assumed that his personal law is the law which prevails in that place : 16 N. L. R. 187 (P.C.). *Foll.* (Origin of Gujars of Nimar District traced.) (*Batten, J. C.*). RAMPHABAI *v.* TOTARAM. **71 I. C. 727=6 N.L.J. 39=A.I.R. 1923 Nag. 188.**

———A Hindu from the Punjab is *prima facie* subject to the principles of the Mitakshara School of Hindu Law. (*Rutledge, C.J. and Mya Bu. J.*). C. S. MAHA SABHA *v.* AMMA SOHAN LAL. **104 I.C. 119=6 Bur. L.J. 105=A.I.R. 1927 Rang. 236.**

———Although the migration may take palce before a particular commentary, *e.g.*, the Mayukha was written, it may well be that the rule embodied in the commentary was in force in earlier times and that on this point the commentary only embodied and defined a pre-existing custom : 24 A. 273 (P.C.), *Foll.* (*Batten, J. C.*). RAMPHABAI *v.* TOTARAM. **71 I. C. 727=6 N. L J. 39=A.I.R. 1923 Nag. 188.**

—Applicability—Mithila.

———Per *Das, J.*—The Mitakshara is of authority in Mithila except in regard to those matters where there is a difference ofo pinion between Vijnaneswara and the Mithila commentators. (*Dawson-Miller, C. J. on difference between Das, J. and Foster, J.*). AITENDRA SINGH *v.* RAMESWAR SINGH. **88 I.C. 141=87 I.C. 849=4 Pat. 510=6 P.L.T. 634=A.I.R. 1925 Pat. 625.**

—Applicability—Naiks.

———*Hindu Law applies to Naiks—Even prostates are governed by Hindu Law if they have not adopted any other religion with a personal law—It will apply to aboriginal tribes though complete conversion to Brahmanical religion is not proved.*

Hindu Law should be applied to the Naiks. Even those who abandon the religion of the Srutis and Smritis and do not adopt another religion signifying thereby their intention to adopt the laws of succession of the community following the religion newly adopted, will be governed by the Hindu Law. The Hindu Law as now understood is the law of the Srutis and Smritis including the recognized customs as administered and interpreted in the light of the judicial decision and the said law is applicable to all who have not adopted some other personal laws of their own. The Hindu Law will apply not only to the Aryan settlers and such aboriginal races as have been completely absorbed in the Aryan community but also to the descendants of the original tribes who more or less avoided the complete conversion to the Brahmanical religion. (*Jwala Prasad and Ross, JJ.*). RAM PERGASH SINGH *v.* MT. DAHAN BIBI. **78 I.C. 749=3 Pat. 152=5 P.L.T. 203=1924 P.H.C.C. 85=A.I.R. 1924 Pat. 420.**

HINDU LAW—Applicability—Raj-Chaurasi.

—Applicability—Namboodris.

———*Namboodris are governed by Hindu Law in absence of proof of special usage or custom to the contrary.*

Where the *illom* of a Namboodri consisted of a father who was an idiot, his two sons who were minors and their step-mother who was managing the household and looking after the minors and where the step-mother borrowed money on mortgage of family properties for family necessity and a suit was brought to enforce the mortgage,

Held, that there was no authority of the mortgagor either as guardian of the members of the family or its surviving efficient member to mortgage the family estate and that the mortgage was not enforceable against the family properties since a mere *de facto* guardian has no such power.

The Hindu Law as contained in the Mitakshara is the law that governs the Namboodris at Malabar save in so far as it is proved to have been modified by usage or custom having the force of law. Therefore in the absence of either party proving that a special usage or custom not known to the ordinary Hindu Law has been established by precedents or otherwise, Courts will ordinarily apply only the Hindu Law to Namboodris. (*Jackson, J.*). T. M. NARAYANAN NAMBUDIRI *v.* K. RAVUNNI NAIR. **84 I.C. 973=20 M.L.W. 876=35 M. L. T. 127=1924 M.W.N. 792=A. I. R. 1925 Mad. 260=47 M. L. J. 686.**

—Applicability—Outcaste.

———Person belonging to a regenerate class though degraded is governed by rules governing that class. (*Jwala Prasad and Bucknill, JJ.*). ISHWARI PRASAD *v.* RAI HARI PRASAD LAL. **106 I.C. 620=6 Pat. 506=8 P.L.T. 34=A.I.R. 1927 Pat. 145.**

—Applicability—Powars.

———*Powars of C. P. are not governed by Bombay School.*

The Powars of C.P. are not governed by Bombay School of law and though after their migration to the Central Provinces they came into close contact with the Mahrattas and have inevitably been tinged thereby in matters of language, dress, marriage ceremonies and the like, they did not come from the Bombay Presidency, bringing with them Bombay customs. (*Findlay, J.C.*). MT. RUKHMABAI *v.* JAIPAL. **100 I.C. 457=23 N.L.R. 108=A.I.R. 1927 Nag. 122.**

—Applicability—Rajbansis.

———Family of Rajbansis of Bengal of non-Hindu origin alleging to be governed by Hindu Law—Hindu names—Hindu priests—Hindu castes and gotras—Observed Hindu ceremonies and Hindu secular and ritual observances—Hindu Law (Dayabhaga) held applicable. (*B. B. Ghose and Panton, JJ.*). NARENDRA NARAIN *v.* NAGENDRA NARAIN. **118 I.C. 342=50 C.L.J. 267=A. I. R. 1929 Cal. 577.**

———Rajbansis of Bengal are governed by ordinary Hindu Law. (*C. C. Ghosh and Panton, JJ.*). SANTALA BEWA *v.* BADASWARI DASI. **75 I.C. 11=27 C.W.N. 669=50 Cal. 727=A.I.R. 1924 Cal. 98.**

—Applicability—Raj-Chaurasi.

———*Lachmipur Raj-Chaurasi is governed by Hindu Law.*

HINDU LAW—Applicability—Rajgonds.

The Lachmipur Raj-Chaurasi even supposing its origin to be not Hindu had adopted in general not only Hindu religion and Hindu social usages, but also the Hindu Law regulating the succession of landed property, and this though, there were still some relics of non-Hinduism. (*Lord Phillimore.*) SAHDEO NARAIN *v.* KUSUM KUMARI.

71 I.C. 769=2 Pat. 230=4 P.L.T. 217=50 I.A. 58=37 C.L.J. 369=25 Bom. L.R. 560=1923 M.W.N. 377=32 M.L.T. 121=27 C.W.N. 901=18 M.L.W. 597=A.I.R. 1923 P.C. 21=44 M.L.J. 476 (P.C.).

—Applicability—Rajgonds.

———Rajgonds are governed by Hindu Law. (*Kinkhede, A.J.C.*). RAMNATH *v.* SAKALSI.

78 I.C. 185=A.I.R. 1924 Nag. 330.

———Raj Gonds of Bhagi in Bhandara District are not governed by Hindu Law and, in absence of custom, a question of guardianship must be decided as per justice, equity and good conscience.

Certain minors of a *Gond* family with their mother lived jointly with their step-brother who managed the whole estate and was regarded by the family and all the world as the natural and rightful guardian of the minor's property,

Held, he must according to equity and justice be treated as against the mother both *de facto* and *de jure* guardian since he was the actual guardian of the property of his brothers and was regarded by the whole of his family and all the world as the natural and rightful guardian and since he would be the natural and rightful guardian under the system of personal law, governing practically the whole of the population in the midst of which the family lives. (*Hallifax, A. J. C.*). KOLHU *v.* BELSINGH. **66 I.C. 303=17 N.L.R. 183=A.I.R. 1922 Nag. 201.**

—Applicability—Rajputs.

———Persons who are agricultural Rajputs for many generations past are ordinarily governed by custom and not by Hindu Law. (*Campbell and Zafar Ali, JJ.*). SITAB SINGH *v.* HAZARI SINGH. **93 I.C. 993=7 Lah. 117=27 P.L.R. 200=A.I.R. 1926 Lah. 207.**

—Applicability—Rao Rathor Telis.

———*Descendants of Rao Rathor now settled in C. P.—Benares School applies.*

Descendants of Rao Rathor Telis who left their original home in Ajmer about 1500 A. D., and settled in Central Provinces but who still observe the personal law which governed them in Ajmer, are governed by the prevalent School in Ajmer, namely the Benares School, in respect of the estate inherited by a woman from her father. (*Hallifax, A.J.C.*). NARAIN *v.* MOTISA. **99 I.C. 461=A.I.R. 1927 Nag. 121.**

—Applicability—Sikhs.

———Nirmalas in Punjab are distinct from other Sikhs and have merged among Hindus. (*Zafar Ali and Bhide, JJ.*). KIRPA SINGH *v.* AJAIPAL SINGH. **11 Lah. 142=31 P.L.R. 424=A.I.R. 1930 Lah. 1.**

———History of Sikh sects, Udasi and Akali, traced. (*Stuart, C. J. and Wazir Hasan, J.*). SATGUR PRASAD *v.* HAR NARAIN DAS. **111 I.C. 817=A. I. R. 1929 Oudh 44.**

—Applicability—Sodhis.

———Sodhis of Anandpore, Dist. Hoshiarpore, are not governed by Hindu Law in matters of inheritance. That being so, there can be no presumption that an Anandapore Sodhi family constituted a coparcenary body in accordance with the Hindu Law of Mitakshara. (*Zafar Ali and Campbell, JJ.*). WAZIR SINGH *v.* MOTI SINGH. **94 I. C. 492=7 Lah. 522=27 P.L.R. 846=A.I.R. 1926 Lah. 395.**

HINDU LAW—Ascetic—Bairagi.

—Applicability—Thattans.

———*Follow Makkattayam—Property is* prima facie *partible.*

The Thattans are Hindus, and, therefore, the Courts have to apply to them the principles of Hindu Law, unless and until it is proved that they follow any other customary law. The rule of Hindu Law is in favour of partibility and impartibility is the exception. Makkattayam Law, which the Thattan caste admittedly follows, corresponds in the main to the ordinary Hindu Law. Marumakkattayam, in which partibility is unknown, is an exception to the general rule. Hence *prima facie* Makkattayam involves partibility : 40 M.L.J. 301, *Foll.* (*Schwabe, C.J. and Wallace, J.*). KUNHI KUTTY *v.* RAMAN. **72 I.C. 145=46 Mad. 597=18 M. L. W. 525=1923 M.W.N. 173=A.I.R. 1923 Mad. 432=44 M.L.J. 274.**

—Applicability—Thiyyas.

———*Hindu Law applies unless special custom is proved.*

Prima facie the ordinary Mitakshara system of Hindu Law applies to the Thiyyas of South Malabar, and the burden of proving a custom opposed to Hindu Law is on the party alleging such custom. Thus a daughter with her husband alive, claiming a right of residence in her father's house, must prove the custom. (*Sidasiva Aiyar and Spencer, JJ.*). KUTTAYATHA KUTTI *v.* ATCHUTAN. **60 I. C. 209=13 M.L.W. 101=A. I. R. 1921 Mad. 74.**

—Applicability—United Provinces.

———*The Mitakshara is of paramount authority, though where it is silent other books of authority can be referred to.*

In the United Provinces, the Mitakshara by Vijnaneswara is of paramount authority. But where the Mitakshara is silent or is doubtful, other books of authority can legitimately be referred to. But where the Mitakshara lays down a rule clearly, then, even though it contradicts other books of authority, it has to be followed in the United Provinces. (*Walsh, Ag. C.J. and Sulaiman, J.*). KANHAIYA LAL *v.* MT. GAURA. **83 I.C. 147=47 All. 127=22 A.L.J. 890=6 L.R.A. Civ. 1=A.I.R. 1925 All. 19.**

—Applicability—Yadavas.

———The Madura Ramayana Chavadi 1000 Yadhavas who reside chiefly in the town of Madura and about 56 adjoining villages are Hindus belonging to the Sudra caste. (*Kumaraswami Sastri, Devadoss and Wallace, JJ.*). MOOKKA KONE *v.* AMMAKUTTI AMMAL. **108 I.C. 760=51 Mad. 1=27 M.L.W. 611=A.I.R. 1928 Mad. 299=54 M.L.J. 174 (F.B.).**

—Ascetic—Arya Samajist.

———The performance of the Prajapathiyesthi homam is essential and is the final ceremony to be performed even by the Arya Samajist who becomes a Sanyasi: 33 M. L. J. 63 and 14 C. W. N. 191, *Ref.* (*Sulaiman and Kendall, JJ.*). BALDEO PRASAD *v.* ARYA PRITI NIDHI SABHA. **124 I.C. 761=A.I.R. 1930 All. 643.**

—Ascetic—Bairagi.

———Brahman becoming Bairagi does not necessarily lose caste. (*Mukerji and Dalal, JJ.*). JASWANT RAO *v.* KASHINATH RAO. **86 I.C. 208=6 L.R.A. Civ. 14=A.I.R. 1925 All. 253.**

HINDU LAW—Ascetic—Renunciation.

—Ascetic—Renunciation.

———*Necessary ceremonies must be gone through, to become a Sanyasi.*

The mere fact that a person declares that he has become a Sanyasi or that he is described as such or wears clothes ordinarily worn by the Sanyasis would not be sufficient to make him a perfect Sanyasi. It is essential that he must enter into the fourth stage of his life in accordance with the necessary requirements. He must not only retire from all worldly interests and become dead to the world, but to attain this he must perform the necessary ceremonies without which the renunciation will not be complete. (*Sulaiman and Kendall, JJ.*). BALDEO PRASAD *v.* ARYA PRITI NIDHI SABHA. **124 I.C. 761= A.I.R. 1930 All. 643.**

—Ascetic—Sanyasi.

———*Rituals necessary for becoming—Arya Samajist—Rituals are same as in Sanatana Dharma.*

An elaborate procedure including *Viraja homam* and other purificatory ceremonies is prescribed for becoming a Sanyasi of the Sanatana Dharma religion; the procedure is the same in the case of an Arya Samajist. Merely calling oneself a Sanyasi does not confer that status. (*Sulaiman and Kendall, JJ.*). BALDEO PRASAD *v.* ARYA PRITI NIDHI SABHA. **124 I. C.761 (All.)= A.I.R. 1930 All. 643.**

———"*Apath Sanyasi*" *described.*

Renunciation is considered meritorious, but a man renounces only what he may keep and gives up what he may retain. In the case of an Apath Sanyasi, the man is face to face with death and he makes a virtue of necessity and gives up earthly things when he cannot help doing so. He expects that he is dying and goes through the form of renouncing the world. (*Kumaraswami Sastri and Venkatasubba Rao, JJ.*). RUKMANI AMMAL *v.* ANKAMA NAIDU. **96 I. C. 26=23 M. L. W. 664= 1926 M W.N. 938=A.I.R. 1926 Mad. 744.**

—Caste—Agarwallas.

———The Agarwallas are divided into a number of sub-castes or sects: 6 N.W.P. 383, *Ref.* (*Mr. Ameer Ali.*) DHANRAJ *v.* SONI BAI. **87 I.C. 357= 1925 M.W.N. 692=30 C. W. N. 601= 23 A. L. J. 273=2 O. W. N. 335= 21 N. L. R. 50=52 Cal. 482=6 L.R.P.C. 97= 27 Bom. L.R. 837=52 I.A. 231= A. I. R. 1925 P.C. 118=49 M.L.J. 173 (P.C.).**

—Caste—Bhumihar Brahmans.

———The Bhumihar Brahmins are unquestionably *dwij* and a very important community in Bihar, but it would be incorrect in all respects to class them as Brahmans. (*Kulwant Sahay and Macpherson, JJ.*). SITA DEVI *v.* GOPAL SARAN NARAYAN SINGH. **111 I.C. 762=9 P.L.T. 397= A.I.R. 1928 Pat. 375.**

—Caste—Ghrabari Gosavis.

———*Gharbari Gosavis—Their status.*

Gharbari Gosavis are a fraternity within the Sudra caste. Gharbari means householder, and the literal translation of the two words, is "householder ascetics"—that is, they are married ascetics having certain of the customs and practices of ascetics, necessarily modified by the fact of marriage and its consequences. (*Lord Phillimore.*) HARIGIR *v.* BHARATHI. **88 I.C. 343= 21 N.L.R. 127=22 M.L.W. 355= 1925 M. W. N. 414=A.I.R. 1925 P.C. 127 (P.C.).**

—Caste—Hindu.

———It is not necessary that a person who is a Hindu must be a member of some caste. (*Venkatasubba Rao, J.*). RATANSI *v.* ADMINISTRATOR GENERAL OF MADRAS. **111 I.C. 364=52 Mad. 160= 28 M.L.W. 674=1928 M.W.N. 848= A.I.R. 1928 Mad. 1279=55 M.L.J. 478.**

HINDU LAW—Caste—Tests.

—Caste—Jats.

———The Jats are Sudras: 24 I.C. 982, *Foll.* (*Iqbal Ahmad, J.*). MEWA RAM *v.* LAL SAHAI. **100 I.C. 650=A.I.R. 1927 All. 410.**

—Caste—Kayasthas.

———*Kayasthas are not Sudras.*

The law that the Kayasthas are not Sudras is perfectly well settled and finally laid down though it dissents from the view held in the Calcutta High Court; A.I.R. 1927 Pat. 145, *Foll.*; 10 Cal. 688, *Diss. from*; 20 C.W.N. 901; A.I.R. 1921 Cal. 48 and A.I.R. 1920 P.C. 129, *Ref.* (*Ross and Wort, JJ.*). RAJENDRA PRASAD *v.* GOPAL PRASAD. **108 I.C. 545=7 Pat. 245=9 P.L.T. 123= A.I.R. 1929 Pat. 51.**

———Bengali Kayasthas are Sudras by caste. (*Sanderson, C.J. and Richardson, J.*). BISHWANATH DAS *v.* SARASIBALA DASI. **66 I.C. 590= 48 Cal. 926=25 C.W.N. 639=A.I.R. 1921 Cal. 48.**

—Caste—Mohals.

———*Mohals are Rajputs.*

Mohal is the name of a sub-division of the tribe of Rajputs and in the Punjab there is no other tribe which has a *got* of the name of *Mohal*. There are no persons in the Punjab who have any real right to be described as *Mohals* except *Rajputs* and some *jats* who, rightly or wrongly, claim that they are really of *Rajput* origin. (*Lord Carson.*) GHULAM RASUL *v.* SECY. OF STATE. **86 I.C. 654=23 A.L.J. 631=52 I.A. 201= 2 O.W.N. 646=22 M.L.W. 299=30 C.W.N. 101= 26 P.L.R. 390=6 Lah. 269= A.I.R. 1925 P.C. 170=50 M.L.J. 120 (P.C.).**

—Caste—Nattukottai Chettis.

———Nattukottai Chettis are Sudras. (*Krishnan and Odgers, JJ.*). VELLIYAPPA CHETTY *v.* NATARAJAN. **100 I.C. 655=50 Mad. 340= 25 M.L.W. 493=A.I.R. 1927 Mad. 386= 52 M.L.J. 229.**

—Caste—Presumption.

———There is a presumption that all castes who are not proved to be twice-born and who are not admitted to be untouchables were Sudras. (*Spencer, Offg.C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.**

—Caste—Tanjore Royal family.

———The late Raja Sivaji of Tanjore was a Sudra. (*Spencer, Offg. C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I. C. 705=48 Mad. 1= A. I. R. 1925 Mad. 497.**

—Caste—Tests.

———*Caste is the result of birth alone.*

Caste is the result of birth and not of choice or volition; though a person may lose caste he cannot by any act of his, rise to a higher caste. The mere performance of ceremonies which are performed by the twice-born classes would not elevate the Sudras or the fourth class to the status of the twice-born class, though where the caste of a family is doubtful and its origin cannot be traced, the performance of Vedic or Puranic rituals without any objection for a long series of years will be important evidence as to the caste. (*Spencer, Offg. C. J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705= 48 Mad. 1=A.I.R. 1925 Mad. 497.**

HINDU LAW—Caste—Tests.

———Per *Spencer, Offg. C.J.*—The consciousness of a community is a good test of *Varna*. (*Spencer, Offg.C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR.
93 I. C. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.

———*Upanayanam is a test.*

Upanayanam is the ceremony which differentiates the three higher classes, namely the Brahman, the Kshatriya and Vaisya, from the Sudra. Where in cases of controversy as to whether a person belongs to the twice-born class or to the Sudra class, it is shown that Upanayanam ceremony was not performed, it is a very important piece of evidence to show that the person belongs to the Sudra caste and not to the higher caste, though the converse case of the non-performance of Upanayanam by the twice-born would not necessarily show that the person not performing it belongs to the lower class. In cases of Sudras for whom Upanayanam ceremony is not prescribed there is the practice of putting on the sacred thread at the time of the marriage or funeral ceremonies. This is called the *Alankara Poonool or Loukika Poonool* [or the ornamental sacred thread] and is merely an imitation of the higher classes involving no religious consequences not being prescribed by any of the Smrithis. (*Spencer, Offg. C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR.
93 I. C. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.

———Wearing the sacred thread, though worthy of notice, is by no means conclusive on the question of caste. (*Spencer, Offg.C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I. C. 705=48 Mad. 1= A. I. R. 1925 Mad. 497.**

———Gayatri Upadesam *is essential for the twice-born.*

Per *Kumaraswami Sastri, J.*—Closely connected with Upanayanam ceremony is the *Gayatri Upadesa* or the teaching of the sacred verse in the *Gayatri mantra* at the Upanayanam that really confers on the Brahmin, the Kshatriya or the Vaisaya the status of a twice-born. The mantra which the Sudras are authorised to use is the first verse in Devi Bhagavatam, and not the *Gayatri*. (*Spencer, Offg. C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR.
93 I.C. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.

———Vedic mantras are prescribed only for the three higher or twice-born classes and prohibited for the Sudras. In the case of Sudras, rituals have to be performed with mantras taken from the Puranas. (*Spencer, Offg. C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR..
93 I.C. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.

———*Many Sudras have gotra but no pravara.*

Per *Kumaraswami Sastri, J.*—The mere fact of having a gotra would not settle the question as to whether a person is a Sudra or a twice-born, as many Sudra families have gotras—some Rishi gotras and some non-Rishi gotras. One important thing connected with gotra is pravara; and gotra and pravaras go together. So far as the Sudras are concerned, though they have gotras, they have no pravaras. (*Spencer, Offg. C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1= A. I. R. 1925 Mad. 497.**

———*Marriage between sagotras is allowed only among Sudras.*

So far as twice-born classes are concerned, marriages between members of the same gotra and Pravara are absolutely forbidden, and, if performed, would be invalid; among Sudras this rule does not apply. (*Spencer, Offg. C. J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1= A.I.R. 1925 Mad. 497.**

HINDU LAW—Custom—Evidence of.

———In regard to sradha, the offerings to the ancestors called pinda consist in the case of Kshatriyas of cooked rice balls or pindas, while in the case of Sudras cooked rice is not used but only flour. (*Spencer, Offg. C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1= A.I.R. 1925 Mad. 497.**

———Employment of Sudra cooks evidences sudrahood. (*Spencer, Offg. C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1= A.I.R. 1925 Mad. 497.**

———*Kunbis and Mahrattas in Berar are Sudras.*

Kunbis and Mahrattas in Berar are Sudras. One of the tests by which a Sudra is known is that they do not don the sacred thread, intercaste eat forbid- amongst them are customary and they marriages den flesh, such as the flesh of fowls. (*Prideaux, A.J.C.*). GOPAL RAO *v.* SITARAM RAM RAO.
64 I.C. 863=A.I.R. 1921 Nag. 150.

—Custom—Alienation.

———Killajat Mahal of Orissa is alienable in the absence of custom to the contrary: 31 Cal. 224 and 32 Cal. 158, *Ref.* (*Courtney-Terrell, C. J. and James, J.*). MADHUSUDAN DEB *v.* KHESTABASI SAHU. **121 I.C. 462=8 Pat. 932= A. I. R. 1930 Pat. 137.**

———The village Vellikurichi granted to the Naick family was held to be not inalienable: (1851) Mad. Sadr. Ad. Dec. 87 and 21 Mad. 310, *Cons.* (*Madhavan Nair and Thiruvenkatachariar, JJ.*). THIRUMALAI SOURI NAICKER *v.* VENKATACHALAM CHETTY. **116 I.C. 571= A.I.R. 1929 Mad. 234.**

———In Rohtak Tahsil the *riwaj-i-am* places upon the plaintiff, the person seeking to challenge an alienation, the burden of proving that he possesses such a right. A very large part of the customary law regarding restrictions on alienation is purely case made law and the law primarily applicable to Hindus is Hindu Law modified by custom: 147 P.W. R. 1913, *Foll.* (*Le Rossignol, J.*). GIANI *v.* TEK CHAND. **64 I.C. 549= 11 P.L.R. 1922=4 Lah. 111=A.I.R. 1922 Lah. 69.**

—Custom—Evidence of.

———A custom at variance with the ordinary Hindu Law should be ancient and invariable. It should be established by clear and unambiguous evidence: 14 M.I.A. 570, *Ref. to.* (*Marten, C.J. and Patkar, J.*). BHIKUBAI CHUNILAL *v.* MANILAL.
32 Bom. L.R. 1217=A.I.R. 1930 Bom. 517.

———*Custom is not founded on reason—One custom is no evidence of existence of another.*

Custom cannot be said to be founded on reason, for no reason, even the highest whatsoever, would make a custom or law. Custom cannot therefore be enlarged by any parity of reasoning. Customs may be similar or contradictory, probable or improbable, and the existence of one custom is no evidence for the existence of another. The only proof of custom is the evidence of that custom and not other evidence that given certain data certain results follow with the force of law: 37 Cal. 322,

HINDU LAW—Custom—Evidence of.

Rel. on. (*Wallace and Jackson, JJ.*). PALANIAPPA CHETTIAR *v.* V.N.S. CHOCKALINGAM CHETTI.
30 M.L.W. 1040=A.I.R. 1930 Mad. 109=57 M.L.J. 817.

———Special custom must be ancient, invariable and established by clear and unambiguous evidence. 14 M.I.A. 570 (P.C.) and 29 All. 109, *Foll.*; A.I.R. 1917 P.C. 181; A.I.R. 1922 P.C. 59 and A.I.R. 1928 P.C. 10, *Ref.* (*Patkar and Baker, JJ.*). HIRABHARTHI JAMANA BHARATHI *v.* BAI JAVER.
113 I. C. 406=30 Bom. L. R. 1555=A. I. R. 1929 Bom. 35.

———*Custom modifying ordinary law of succession must be ancient and invariable.*

It is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends: 14 M.I.A. 570 (P. C.), *Foll.* (*Madgavkar and Patkar, JJ.*). SUBRAO *v.* RADHA. **113 I. C. 497=52 Bom. 497=30 Bom. L. R. 692=A.I.R. 1928 Bom .295.**

———*Custom at variance with Hindu Law—Clear instances must be given.*

In order to give effect to a custom which is set up and which is at variance with the ordinary Hindu Law it should be ancient invariable, continuous, notorious not expressly forbidden by the legislature and not opposed to morality or public policy, and as regards instances in support of the custom they should be established by clear and unambiguous evidence and must be conclusive. (*Kumaraswami Sastri, Devadoss and Wallace, JJ.*). MOOKKA KONE *v.* AMMAKUTTI AMMAL.
108 I.C. 760=51 Mad. 1=27 M.L.W. 611=A.I.R. 1928 Mad. 299=54 M.L.J. 174 (F.B.).

———*Custom at variance is not necessarily a departure from or exception to Hindu Law principles.*

It is now settled by a long course of decisions that the Hindu Law, as understood by the Judges and the legal profession is applicable to all Hindus and a custom not in accordance with the general Hindu Law has to be proved by the party setting it up. But, in considering the proof of such a custom, the Court should not labour under the impression that the custom pleaded is a conscious departure or from variation of the Hindu Law applicable to the parties. The custom is not an exception to the general Hindu Law as if that a set of persons who were governed by the Hindu Law agreed to adopt a course of conduct in variance with the law which governs them. In weighing the evidence as regards any custom which is set up the Court should consider whether the caste or sect or clan among whom it is said to prevail ever adopted wholly or only with some reservations the general body of Hindu Law and whether they ever intended to alter their customs and customary laws completely. (*Kumaraswami Sastri, Devadoss and Wallace, JJ.*). MOOKA KONE *v.* AMMAKUTTI AMMAL. **108 I.C. 760=51 Mad.1=27 M.L.W. 611=A.I.R. 1928 Mad. 299=54 M.L.J. 174 (F.B.).**

———*Proof of custom by evidence of instances.*

In support of the alleged custom the defendant examined some 33 witnesses. Thirty of these spoke of the general custom permitting the adoption of a daughter's son prevailing among the Agarwala Vaishas and they were able to cite at least 34 witnesses out of which 20 instances were accepted as being instances where adoption either of a daughter's son or a sister's son had taken place. Out of these 20 instances, 11 were instances of the adoption of a daughter's son,

Held, the customs set up by the defendant was satisfactorily established. (*Lindsay and Sulaiman, JJ.*). MT. BALLO *v.* RAMKRISHNA. **81 I.C. 490=21 A. L. J. 478=A.I.R. 1924 All. 49.**

HINDU LAW—Custom—Jains.

———*Custom in contravention of general Hindu Law must be strictly proved.*

A custom is a matter which has to be proved with more thoroughness and with greater precision than a case which merely affects the parties on record and does not adversely affect parties who themselves are not present in Court, but are nevertheless interested by virtue of belonging to the same community. (*Mears, C.J. and Piggott, J.*). MT. DHOLA KAUR *v.* MATHURA SINGH. **75 I.C. 657=A.I.R. 1923 All. 341.**

———*Evidence of modern instances may be enough.*

Evidence of modern instances, which alone can be proved by oral evidence, may establish the custom, though the Court is not satisfied by the evidence of texts or experts that those instances have occurred in pursuance of a recognised custom, in order to link the present with the past. (*Case-law discussed.*) 32 All. 247, *Ref.* (*Macleod, C.J. and Fawcett, J.*). PARSHOTAM GANPAT *v.* VENICHAND GANPAT. **61 I. C. 492=45 Bom. 754=23 Bom. L.R. 227=A.I.R. 1921 Bom. 147.**

—Custom—Hereditary office.

———*Birt jajmani to sweep—In the absence of irrevocable grant or usage binding on owner of the house it cannot prevail against his wishes.*

Except possibly in cases where the right can be traced to a grant of an irrevocable character by the owner of a house, or to usage and prescription proved by evidence to be binding on the owner of the house, the right of birt jajmani to sweep, though enforceable between the rival claimants cannot prevail against the wishes of the owner, and the relief of injunction can be granted to one claimant against another only where it is a matter of indifference to the owner as to who renders services to him on payment of remuneration which he is willing to offer: 9 M.I.A. 344; 2 M.H.C.R. 330; 20 All. 234; and 12 A. L. J. 267, *Considered.* (*Sen and Niamatullah, JJ.*). LACHMAN *v.* BHAJAN. **114 I.C. 874=26 A.L.J. 815=A.I.R. 1928 All. 389.**

—Custom—Hindu temple.

———Brahmins employed to recite mantras during worship—Custom under which recitation by less than the fixed number of Brahmins is alleged to be quite valid is opposed to public policy. (*Sadasiva Aiyar and Spencer, JJ.*). KRISHNA AIYANGAR *v.* RAMAN CHETTIAR. **69 I.C. 469=14 M.L.W. 329=A.I.R. 1921 Mad. 670.**

—Custom—Jains.

———*No custom giving absolute power to widow over immovables.*

No custom has been established in Bombay to show that a Jain widow is the absolute owner of the immovable properties inherited from the husband (Cases bearing on Jain customs reviewed). Her powers are no larger than those of an ordinary Hindu widow: 27 C. 379, *Dist.* (*Marten, C. J. and Patkar, J.*). BHIKUBAI CHUNILAL *v.* MANILAL, **32 Bom. L.R. 1217=A.I.R. 1930 Bom. 517**

HINDU LAW—Custom—Jains.

———Kinds of proof to establish custom—In support of custom that among Swetambari Dasashrimali Jains of Balapur in Akola District, widow takes absolute interest in husband's self-acquired property, 15 instances of alienations by widows unchallenged by reversioners adduced—One of those alienations upheld by Bombay High Court—Many of those instances being of same locality and same sect of Jains—Custom held to be established.

Evidence in support of a custom should be such as to prove the uniformity and the continuity of the usage and the conviction of those following it that they were acting in accordance with law; and (2) evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of Courts, or even of panchayats upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid will all be admissible, but although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted: 7 M. H. C. R. 250, *Foll. Case-law discussed.* (*Findlay, J. C. and Subhedar, A.J.C.*). TRIMBAKDAS *v.* MT. MATHABAI. **124 I. C. 609= A.I.R. 1930 Nag. 225.**

———If the custom that a widow takes an absolute interest in the self-acquired property of her husband is found to obtain in other sects of the Jains it will also bind the Swetambari Desashrimali sect: 27 Cal. 379 and A.I.R. 1923 All. 656, *Rel. on.* (*Findlay, J.C. and Subhedar, A. J. C.*). TRIMBAKDAS *v.* MT. MATHABAI. **124 I.C. 609= A.I.R. 1930 Nag. 225.**

———An Oswal Jain father in the joint family has a right to alienate the ancestral property as he wishes, under a custom: 29 All. 495, *Ref.* (*Stuart, C.J. and Raza, J.*). MILAP CHAND *v.* MT. MOHINI BIBI. **110 I.C. 180=5 O.W.N. 515= A. I. R. 1928 Oudh 348.**

———Decisions recognizing custom in one place is relevant in establishing same custom in another. But the evidence that the usage has application to the particular case cannot be dispensed with: 27 Cal. 379, *Ref.* (*Kumaraswami Sastri, Offg. C.J. and Curgenven, J.*). GATEPPA *v.* ERAMMA. **99 I.C. 503=50 Mad. 228=26 M.L.W. 408= A.I.R. 1927 Mad. 228=51 M.L.J. 757.**

———Evidence Act, S. 13—Judicial decisions recognising custom among Jains of one place are relevant in respect of Jains of another place. (*Baker, Offg. J.C.*). MT. SANO *v.* PURAN SINGH. **78 I.C. 461= A.I.R. 1925 Nag. 174.**

—Custom—Migrating family.

———*Family custom—Primogeniture — Migration of family.*

The family to which the parties belonged were Chohan Rajputs who migrated into the Nima district of the Central Provinces from their homes. It was claimed by the principal defendant, in a suit for partition that the succession in the family was governed by the rule of primogeniture and the properties belonged exclusively to him as the holder of the title of Rana and the *gadi*, as they were impartible,

Held, it could be presumed that the family carried with it to its new home the custom and institutions to which it was subject in its original home. (*Mr. Ameer Ali.*). RANA SHEONATH SINGH *v.* BADAN SINGH. **64 I.C. 194=20 A. L. J. 443= 26 C.W.N.226=48 Cal. 997= 48 I.A. 446=17 N. L. R. 128= 4 N.L.J. 89=A.I.R. 1922 P.C. 146 (P.C.).**

HINDU LAW — Debt—Antecedent debt—Applicability.

—Debt.

Antecedent debt.
Co-parcener.
Father.
Immoral or illegal.
Liability.
Manager.
Necessity.
Son's liability.
Trade.

—Debt—Antecedent debt.

Applicabiliy.
Burden of proof.
Liability.
Meaning.
What is.
What is not.

Debt—Antecedent debt—Applicability.

———*Pressure is not pre-requisite of "antecedence."*

If the debt was "antecedent" it is immaterial that it was neither pressing nor even due, since pressure is not a pre-requisite of "antecedence," though it is proof of necessity; nor is the fact that the debt might have been otherwise paid even relevant to the question of antecedence: A. I. R. 1924 P.C. 50, *Ref.* (*Macnair and Subhedar, A. J. Cs.*). NARAINRAO *v.* SETH MANUMANTRAM. **A.I.R. 1930 Nag. 273.**

———*Legal necessity need not be proved for father's antecedent debt.*

The proof of antecedent debts which dispenses with the necessity of proving legal necessity for a sale must be father's antecedent debts and not those incurred by a managing member other than the father: A.I.R. 1924 P.C. 50; A.I.R. 1924 All.465; A.I.R. 1924 All. 309 and A.I.R. 1924 All. 551 (F.B.), *Foll.* (*Kinkhede, A.J.C.*). WAMAN *v.* VISHNU. **107 I.C. 516=A.I.R. 1928 Nag. 151.**

———*Alienation for antecedent debts may be for those of grand-father and great-grand-father as well.*

To satisfy the validity of an alienation of the undivided estate on the basis of an "antecedent debt". It is not necessary that the alienation must be by the father for his own debts but may be for the debts of the grandfather or the great-grandfather: A.I.R. 1926 P.C. 105, *Expl.* (*Stuart, C.J., Raza and Srivastava, JJ.*). SHEO RAM *v.* DURGA BAKHSH. **112 I.C. 288=5 O.W.N. 735= 3 Luck. 700=A.I.R. 1928 Oudh 378 (F.B.).**

———Where the debts arose out of extravagance and carelessness of the father but there was no suggestion that they were incurred for immoral or illegal purposes.

Held, that the sons were bound by such debts. (*Baker, J.C.*). BANSIDHAR *v.* PANDURANG. **78 I. C. 431=A.I.R. 1925 Nag. 196.**

———*Alienation by father as manager for antecedent debt binds sons but not other co-parceners.*

There is a very clear distinction between cases in which an alienation for an antecedent debt is made by a Hindu father and is being contested by the sons, and cases in which an alienation for an antecedent debt, is made by the managing co-parcener of a joint undivided estate, and is being contested by other co-parceners, not the sons of the person making the alienation. In the former case the sons are bound by the father's alienation to the extent of their interest in the joint family property; in the latter case the co-parceners are not bound by the manager's alienation and their interest in the joint family property is unaffected by it: 21 A.L.J.,

HINDU LAW — Debt—Antecedent debt—Applicability.

943, *Foll.* (*Mears, C. J. and Piggott, J.*). ANANTOO KALWAR *v.* RANI PRASAD. **78 I.C. 619= 46 All. 295=22 A.L.J. 182= 5 L.R.A. Civ. 86=A.I.R. 1924 All. 465.**

———*Mortgage for legal necessity—Second mortgage to secure prior mortgage is valid.*

The principle that a prior mortgage does not constitute an antecedent debt enunciated in the case of Ram Chandra, does not apply if it is shown by evidence on the record that the previous mortgages had been given for loans that were themselves taken for legal necessity and were binding on the family. (*Rafique and Piggott, JJ.*). RANJIT SINGH *v.* GANGA SAHAI. **69 I.C. 765= A. I. R. 1922 All. 291.**

———Antecedent debt, doctrine of, is applicable only when relationship of father and son exists. (*Das and Bucknill, JJ.*). KUMAR KALIKANAND SINGH *v.* SHIVA NANDAN PRASAD SINGH. **63 I. C. 625=3 P.L.T. 149= A. I. R. 1922 Pat. 122.**

———*Legal necessity need not be proved.*

It is only when legal necessity cannot be established that the question of antecedent debt becomes material, and in the case of antecedent debts legal necessity need not be proved. (*Daniels and Wazir Hasan, A. J. Cs.*). RAM SURAN *v.* MANGAL SINGH. **60 I.C. 219=8 O. L. J. 87= A.I.R. 1921 Oudh 38.**

—Debt—Antecedent debt—Burden of proof.

———*Debt not illegal or immoral—Mortgagee need not prove necessity.*

Where joint family property was mortgaged by the father to his antecedent creditor in consideration for his antecedent debt, and the debt was a just debt, *i.e.*, not tainted with fraud or an act of extravagance, the mortgagee need not prove that such antecedent debt was for a necessary purpose: 81 P.L.R. 1912; A.I.R. 1926 Lah. 569; 65 P.R. 1900 (F.B.); 60 I.C. 714 and A.I.R. 1921 Lah. 112, *Ref.* (*Shadi Lal, C.J. and Skemp, J.*). SADHU LAL *v.* CHIMNA RAM. **116 I.C. 898=30 P.L.R. 267= A.I.R. 1929 Lah. 397.**

———*Mortgagee proving antecedency of debts—Sons must prove that they were for immoral or illegal purposes.*

In all cases the mortgagee must, in the first instance, establish that his debt was either for legal necessity or for payment of antecedent debts or for the benefit of the family. Once the mortgagee has established that the loan was for payment of antecedent debts it is no longer incumbent upon him to prove that these antecedent debts in themselves were for necessity. In order to get rid of his liability the burden then lies on the son to establish that those antecedent debts were tainted with immorality or illegality: 13 Cal. 21 (P.C.) and A.I.R. 1924 P.C. 50, *Foll.* (*Lindsay and Sulaiman, JJ.*). TULSI RAM *v.* BISHNATH PRASAD. **105 I. C. 885=25 A.L.J. 753= A.I.R. 1927 All. 735.**

———*Prior loan to be proved to have been for necessity.*

In order to establish necessity for alienation it is not enough to prove that a debt raised by a father by mortgaging family property was used in discharging a prior mortgage on it. It must also be proved that the prior mortgage was for necessity also. [But see *Brij Narayan* v. *Mangla*, A.I.R. 1924 P. C. 50.] (*Walmsley and Suhrawardy, JJ.*). SURENDRA NATH PANDEY *v.* BRINDAVAN CHANDRA GHOSE. **78 I. C. 45=A.I.R. 1925 Cal. 545.**

HINDU LAW—Debt—Antecedent debt—Meaning.

———Antecedent debt as consideration for mortgage bond proved—Proof of family necessity or benefit to minor son is not necessary. (*Jwala Prasad, Ag.C. J. and Das, J.*). SHEIKH ABDUL RAHAMAN *v.* SHIB LAL SAHA. **63 I.C. 570= 1922 P.H.C.C. 81=6 P.L J. 650= 2 P.L.T. 572=A.I.R. 1922 Pat. 252.**

—Debt—Antecedent debt—Liability.

———Antecedent but not immoral debts are binding on the sons irrespective of whether income from ancestral property was or was not sufficient for the needs of the family and there was no necessity for incurring them: 15 N.L.R. 88 and A.I.R. 1924 P.C. 50, *Rel. on.* (*Staples and Subhedar, A. J. Cs.*). BABURAO *v.* PANDHARINATH. **120 I.C. 326= A.I.R. 1930 Nag. 43.**

———The family property is liable when the father has contracted debt for the satisfaction of an antecedent debt: 46 All. 95 (P. C.), *Foll.* (*Tek Chand and Agha Haidar, JJ.*). RAM SINGH *v.* GANGA RAM. **103 I.C. 496=A.I.R. 1927 Lah. 755.**

———Any prior mortgage debt due by the father is valid as an antecedent debt and it is not necessary that the mortgage debt must also be enforceable as a personal liability: 42 Mad. 711 and A.I.R. 1924 All. 543, *Foll.* (*Phillips and Ramesam, JJ.*). SATYANARAYANA *v.* SATYANARAYANA MURTHI. **92 I. C. 85=1926 M.W.N. 7= A.I.R. 1926 Mad. 428=50 M.L.J. 144.**

———*Antecedent debts of father borrowed for imprudent and unreasonable purpose—Still sons' pious duty attaches.*

In determining the liability of sons to pay the antecedent debts of father the test is whether the transaction for which money constituting the antecedent debt was borrowed was one which a prudent man would enter into and the question of benefit must be determined by the nature of the transaction and not by reference to the result thereof, although such result may properly be taken into consideration in determining whether the transaction was one into which a prudent owner would enter: A.I R. 1926 Patna 17, *Rel. on.*

Even where the antecedent debt is incurred for a purpose which is imprudent and unreasonable, it is one to which the pious duty of the son will attach: 14 C.W.N. 659, *Appr.* (*Findlay, J.C.*). LAXMAN *v.* WASUDEORAO. **95 I.C. 730= A.I.R. 1926 Nag. 457.**

———Payment made in satisfaction of antecedent debts of the father independent of the transaction of the mortgage is recoverable from the family property if the suit for recovery of money is within time. (*Dalal, J. C.*). SITLA BAKHSH SHUKLA *v.* JAGATPAL SINGH. **86 I.C. 693=12 O.L.J. 114= A.I.R. 1925 Oudh 394.**

———*Sons liable for antecedent debts, unless they be illegal or immoral.*

The son cannot recover the property lost by his father either by voluntary or involuntary sale for antecedent debts unless he shows that the debt was taken for immoral purposes or was of such character that he was not in any contingency bound to discharge. (*Stuart and Kanhaiya Lal, A.J.Cs.*). BHARATH SINGH *v.* SARSRUTI SINGH. **60 I.C. 137=23 O.C. 244=7 O.L.J. 459.**

—Debt—Antecedent debt—Meaning.

———An independent debt, neither illegal nor immoral, contracted by a Hindu father on the security of the joint family estate, antecedent to the transaction impeached, is an antecedent debt.

HINDU LAW—Debt—Antecedent debt—Meaning.

(*Fforde and Campbell, JJ.*). ULFAT RAI *v.* TEJ NARAIN. **106 I.C. 176=8 Lah. 632=29 P.L.R. 132=A.I.R. 1928 Lah. 83.**

———'*Antecedent*' *debt can be in favour of the alienee—Dissociation in fact and time explained.*

Where a previous mortgage deed is renewed in favour of the same mortgagee and the consideration for the subsequent deed is the amount due on the earlier one the alienation can be deemed to be in lieu of an 'antecedent debt' so as to be binding on the sons, unless they can establish immorality or illegality : A.I.R. 1924 P.C. 50; 46 All. 95, *Expl.* In *Brij Narain's* case, A.I.R. 1924 P.C. 50, their Lordships do not say that the two debts must be absolutely independent of each other, or wholly unconnected with each other. All that is said is that the previous debt, in order to be antecedent debt, should be truly independent and not part of the subsequent transaction. Whenever a previous debt is set off in a subsequent mortgage deed, the second deed is in one way connected with the first, and one might in one sense say that the second is not independent of the first. But the true test to apply is whether the first one was independent of the second. The two deeds must not be part and parcel of the same transaction, but they must be distinct and separate not only in point of time but in reality. There must be dissociation in time as well as in fact. If at the time when the earlier mortgage transaction was entered into the later one was not even in contemplation, the first will be independent and will remain an antecedent debt, even though it be set off in the second document and even though both be in favour of the same mortgagee. (*Walsh, A.C.J., Sulaiman, Daniels, Mukerji and King, JJ.*). RAM REKHA *v.* GANGA PRASAD. **97 I. C. 514=49 All. 123=24 A.L.J. 970=A. I. R. 1926 All. 545 (F.B.).**

———Under the Hindu Law, in order to constitute an antecedent debt binding on the sons, it is not necessary that the prior and subsequent creditors should be different persons : A.I.R. 1922 All. 312, *Dist.*; 6 O.L.J. 297, *Foll.* (*Hasan and Misra, JJ.*). JAI NARAIN *v.* MAHABIR PRASAD. **95 I.C. 857=2 Luck. 226=13 O.L.J. 574=3 O.W.N. Sup. 23=A. I. R. 1926 Oudh 470.**

———*Antecedent debt must have been incurred independently of the estate.*

The obligation incurred by a father in order to be binding upon his sons must have two attributes, namely, first, that it must have been incurred antecedently to the transaction in suit and, secondly, it must have been incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such a joint estate : A.I.R. 1922 P. C. 247, *Foll.* (But see *Brij Narayan* v. *Mangal*, A.I.R. 1924 P.C. 50). (*Walmsley and Suhrawardy, JJ.*). SURENDRA NATH PANDEY *v.* BRINDAVAN CHANDRA GHOSE. **78 I. C. 45=A. I. R. 1925 Cal. 545.**

———It seems plain from the recent decision of their Lordships of the Privy Council in *Brij Narain* v. *Mangal Prasad*, A I.R. 1924 P. C. 50 that the definition of "antecedent debt" which was given in *Sahu Ram Chandra's* case has been materially altered.

———Antecedent debt now means merely a debt, which is antecedent in fact as well as in time, that is to say, a debt truly independent of and not part of the transaction impeached. (*Lindsay and Sulaiman, JJ.*). B. GAURI SHANKAR *v.* PDT. SHEO NANDAN. **78 I.C. 911=46 All. 384=22 A.L.J. 369=5 L.R.A. Civ. 306=A.I.R. 1924 All. 543.**

HINDU LAW—Debt—Antecedent debt—Meaning.

———*Antecedent debt must be antecedent in time and independent from ownership of joint estate.*

The obligation incurred by a father which would be binding upon his sons must have been incurred antecedently to the transaction in suit and must have been incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. [This view is no longer tenable see *Brij Narain* v. *Mangal Prasad*, A.I.R. 1924 P.C. 50.] (*Dalal and Simpson, A.J.Cs.*). AMBIKA PRASAD *v.* LAL BAHADUR. **83 I. C. 840=11 O.L.J. 164=A.I.R. 1924 Oudh 353.**

———An antecedent debt to be binding on Hindu sons must not only be antecedent in time to the transfer questioned by the sons but also dissociated in fact therefrom: 39 All. 437, *Ref.* (*Dalal, J. C. and Neave, A. J. C.*). AVADH RAM SINGH *v.* MAHBUB KHAN. **79 I.C 725=10 O.L.J. 525=A. I. R. 1924 Oudh 255.**

———An antecedent debt means an obligation not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or security afforded or supposed to be available by the joint estate. (*Cf.* A.I.R. 1924 P.C. 50). [Note :— This is not tenable after *Brij Narain* v. *Mangal Prasad*, A.I.R. 1924 P. C. 50.] (*Kennedy, J. C. and Raymond, A. J. C.*). NARUMAL MULCHAND *v.* NICHUMAL. **76 I.C. 778=18 S.L.R. 1=A.I.R. 1924 Sind 124.**

———*Must be incurred apart from ownership of joint estate.*

Under Hindu Law family property in the hands of the sons is bound by a mortgage executed by their father, during his lifetime, to pay off antecedent debts, if two conditions have been fulfilled, firstly, the mortgage must have been to discharge an obligation antecedently incurred and secondly, the obligation antecedently incurred must have been incurred wholly apart from the ownership of the joint estate: 39 All. 437 (P.C.), *Foll.* [Note:— Compare *Brij Narain* v. *Mangal Prasad*, A.I.R. 1924 P. C. 50]. (*Scott-Smith and Abdul Qadir, JJ.*). LAKHU MAL *v.* BISHEN DAS. **66 I.C. 408=3 Lah. 74=A. I. R. 1922 Lah. 291.**

———*Debt must be one incurred antecedent to transaction.*

The doctrine of antecedency applies where the debt is one incurred in substance and reality antecedently to the mortgage whether or not the debt so incurred was secured by a charge on the family property. (*Dawson Miller, C. J. and Bucknill, J.*). HARI PRASAD SINGA *v.* SOURENDRA MOHAN SINGH. **66 I.C. 945=1 Pat. 506=3 P.L.T. 709=A.I.R. 1922 Pat. 450.**

———*Test is, if loan and mortgage to secure it, are one transaction.*

The true test of antecedency is whether the payment of the advance and the transfer securing its payment are in reality a single transaction or not. The mere hope by the creditor that the debts will be binding on the estate of the joint family and his expectation of recovering them from the joint estate do not make the payment and the transfer a single transaction. What makes the subsequent transfer a part of the prior transaction of the advance is the original understanding or agreement at the time of the advance. If there is such an understanding, both the payment and the transfer flowing from it are really one transaction, though the transfer is put off to a later date;

HINDU LAW—Debt—Antecedent debt—Meaning.

39 All. 437 (P.C.), *Expl.* (*Kotwal and Prideaux, A.J.Cs.*). PANDURANG *v.* KESHORAO.
64 I.C. 718=A.I.R. 1921 Nag. 173.

———An antecedent debt must not only be prior in time but must be quite separate from the mortgage in question. If a person borrows money on a mortgage, a little more than a fortnight after a prior mortgage there is no separation so as to render the latter an antecedent debt. (*Daniels, A.J.C.*). UMRAO SINGH *v.* GAYA PRASAD.
60 I.C. 647=23 O.C. 374.

———*Secured and unsecured debts can both be "antecedent debts."*

The liability of a father under a personal covenant to repay in a mortgage bond can be antecedent debt.

Per *Jwala Prasad, J.*—It is impossible to make a real distinction between a secured and unsecured debt for the purpose of its being an antecedent debt.

The principle is that in order to be antecedent debts, for which the father can validly mortgage the family property, both the secured and the unsecured debts must have been incurred not only antecedently to the mortgage sought to be enforced, but also independently of it. (*Jwala Prasad and Ross, JJ.*). MICHU MISSIR *v.* BALBHADRA PRASTI.
62 I.C. 116=2 P.L.T. 147=A.I.R. 1921 Pat. 367.

———*Debts laid down in Sahu Ram's case—What are.*

In Sahu Ram's case, 39 All. 437 the Privy Council intended to lay down a general principle regulating not merely the particular facts of the case before them, but all cases of a similar nature where the question might arise in future, in order to bring the case within the exception that the family property in the hands of the sons is bound by a mortgage executed by the father during his lifetime to pay off an antecedent bebt two conditions must be fulfilled, first, that the mortgage must have been to discharge an obligation antecedently incurred, and secondly, that the obligation antecedently incurred must have been incurred wholly apart from the ownership of the joint estate: 5 P.L.J. 120 and 41 All. 235, *Foll.*; 42 Mad. 711, *Dissented from.* (Note—Compare A.I.R.1924 P.C. 50) (*Dawson-Miller, C.J. and Mullick, J.*). BANKHANDI RAI *v.* KISHORI MANDAL. **61 I.C. 102=6 P.L.J. 72=2 P.L.T. 17=1921 P.H.C.C. 113=A.I.R. 1921 Pat. 18.**

—Debt—Antecedent debt—What is.

———Mere recital of debts in the sale-deed amounting to an acknowledgment by the manager of the joint family executing the sale-deed does not make those debts antecedent debts. (*Sulaiman and Kendall, JJ.*). SRI NATH *v.* JAGANNATH.
A.I.R. 1930 All. 292.

———*Debt payable to third person is antecedent debt.*

A debt payable to a third person is deemed to be a just antecedent debt unless it is tainted with immorality. Payments of just antecedent debt amounts to a legal necessity. Where therefore no allegation of immorality is made, no question of extravagance or character arises and the alienation by the father for paying off the debt binds the son. (*Jai Lal and Tapp, JJ.*). MADHO RAM *v.* DHARAM SINGH.
A.I.R. 1930 Lah. 394.

———The debt does not cease to be antecedent merely because it is not ripe for payment when it is sought to be charged upon ancestral property by the father; A.I.R. 1923 All. 535, *Not foll.*; A.I.R. 1924 P.C. 50, *Rel. on*; A.I.R. 1925 Nag. 2 and A.I.R. 1926 P.C. 16, *Dist.* (*Staples and Subhedar, A.J.Cs.*). BABURAO *v.* PANDHARINATH.
120 I.C. 326=A.I.R. 1930 Nag. 43.

HINDU LAW—Debt—Antecedent debt—What is.

———Debts due on a previous mortgage and incorporated in the consideration of the mortgage sued are antecedent debts: A.I.R. 1926 Oudh 470 and 42 Mad. 711 (F.B.), *Rel. on.* (*Staples and Subhedhar, A.J.Cs.*). BABURAO *v.* PANDHARINATH.
120 I.C. 326=A.I.R. 1930 Nag. 43.

———*Purchase on credit—Credit period not expired—Liability to pay purchase money is antecedent debt.*

A debt may conceivably be both due and payable even though not demandable or enforceable at law and thus the payment of a debt which is really payable, even though not demandable, cannot be said to be premature especially when on such payment being made, proportionate discount can also be obtained. Therefore, an alienation by father to pay off such debt is binding on son as one for paying an antecedent debt, especially when it is a trade debt: A.I.R. 1923 All. 535, *Dist.* (*Coutts-Trotter, C.J. and Srinivasa Aiyangar, J.*). DAMODARAM CHETTY *v.* BANSILAL ABURCHAHD.
111 I.C. 297=51 Mad. 711=28 M.L.W. 521=A.I.R. 1928 Mad. 566=55 M.L.J. 471.

———Mortgage by father—Renewal by son, consideration being amount due on earlier mortgage, in favour of same mortgagee—The alienation is one in lieu of antecedent debt and binds the son's sons: A.I.R. 1926 P.C. 105, *Expl.* (*Stuart, C.J., Raza and Srivastava, JJ.*). SHEO RAM *v.* DURGA BAKSH. **112 I.C. 288=5 O.W.N. 735=3 Luck. 700=A.I.R. 1928 Oudh 378 (F.B.).**

———An antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached: A.I.R. 1924 P.C. 50, *Foll.* (*Broadway and Jai Lal, JJ.*) ABDUL GHANI *v.* SAMSAR CHAND. **107 I.C. 385=A.I.R. 1928 Lah. 101.**

———*Separate and independent previous mortgages are antecedent debt—Mortgagee taking fresh mortgage in lieu of them does not destroy their antecedency.*

The mere fact that instead of bringing a suit to enforce his claim on the previous documents, when time was about to expire, which are absolutely separate, distinct and independent transactions, the mortgagee thought fit to take a fresh mortgage in lieu of the amounts due on the previous deeds as well as some further consideration and also agreed to reduce the rate of interest, cannot destroy the character of the previous mortgages as antecedent debts, the inclusion of the previous amounts notwithstanding, and there was no necessity to prove legal necessity for them: A.I.R. 1924 P. C. 50 (P.C.), *Expl.*; A.I.R. 1927 All. 127 and A.I.R. 1926 All. 690, *Dist. from. Case-Law considered.* (*Sulaiman and Boys, JJ.*). SHEO PRASAD *v.* BALWANT SINGH. **98 I.C. 1023=24 A. L. J. 1041=A.I.R. 1927 All. 150.**

———Debt owed to pre-emptor by vendor (Hindu father) prior to the 'pre-emption sale' is antecedent debt for which sons are liable. A contract for a loan which never was completed, to pay off a previous debt, otherwise discharged, is not an antecedent debt. (*Mr. Ameer Ali.*) JAWAHIR SINGH *v.* UDAIPRAKASH. **93 I.C. 216=48 All. 152=53 I.A. 36=24 A.L.J. 97=1926 M.W.N. 197=3 O.W.N. 365=43 C.L.J. 374=28 Bom. L.R. 851=30 C.W.N. 698=A.I.R. 1926 P.C. 16=50 M.L.J. 344 (P.C.).**

HINDU LAW—Debt—Antecedent debt—What is.

———An independent debt neither illegal nor immoral contracted by a Hindu father on the security of the joint family estate, antecedent to mortgage sued on is an "antecedent" debt and it does not cease to be so simply because the prior mortgagee and the subsequent mortgagee are the same: A.I.R. 1924 P.C. 50 and 42 Mad. 711 (F.B.), *Foll.* (*Zafar Ali, J.*). MT. THAKARAI BAI *v.* JASPAT RAI. **93 I.C. 911= A. I. R. 1926 Lah. 436.**

———The debt previously borrowed on the security of the joint family property is an antecedent debt for which the joint family property is liable: A.I.R. 1924 P.C. 50 (P.C.), *Foll.*; 39 All. 439 (P.C.), *Not foll.* (*Kotval, A.J.C.*). CHOTTURAM BHIKRAJ *v.* NARAYAN. **90 I.C. 210=A.I.R. 1926 Nag. 49.**

———Mortgage by father—Though personal remedy is barred, the debt can be as an antecedent debt: A.I.R. 1924 P.C. 50 and 42 Mad. 711 (F.B.), *Foll.* (*Ashworth, A.J.C.*). BHARATH SINGH *v.* SHEODUT SHARMA. **91 I.C. 189=A. I. R. 1926 Oudh 266.**

———Where a mortgage is executed by a father to pay off certain previous mortgages of joint family property, is a mortgage to pay off antecedent debts and as such is binding on the sons: A.I.R. 1924 P.C. 50, *Foll.* (*Stuart, C.J. and Hasan, J.*). RAM NARAIN *v.* KUNWAR BAHADUR. **93 I.C. 4 (Oudh.)**

———Antecedent debt means antecedent in fact as well as in time; that is to say, that the debt must be truly independent and not part of the transaction impeached.

There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead. (*Lord Dunedin.*) RAJA BRIJ NARAIN RAI *v.* MAGLA PRASAD RAO. **77 I.C. 689=21 A.L.J. 934= 5 L.R.P.C. 1=28 C.W.N 253=5 P.L.T. 1= 2 Pat. L.R. (Civ.) 41=1924 M.W.N. 68= 19 M L.W. 72=33 M.L.T. 457=51 I.A. 129= 46 All. 95=26 Bom. L.R. 500=11 O.L.J. 107= 1 P.L.R. 1924=41 C.L J. 232= A.I.R. 1924 P.C. 50=46 M.L.J. 23 (P.C.).**

———In order to be an antecedent debt the previous debt need not necessarily be a simple debt but may also be a mortgage debt. (*Sulaiman and Mukerji, JJ.*). SANMUKH PANDE *v.* JAGANATH PANDE AND RAMSARAN PANDE. **83 I.C 838= 46 All. 531= 22 A.L.J. 417= 5 L.R.A. Civ. 289= A.I.R. 1924 All. 708.**

———A debt secured by a mortgage containing a personal covenant may constitute antecedent debt equally with a debt secured only by a personal bond: 42 Mad. 711, *Foll.* (*Daniels, J.C.*). GAURI SHANKAR *v.* JANG BAHADUR. **79 I.C. 1008= 27 O. C. 124=11 O. L. J. 246= A.I.R. 1924 Oudh 394.**

———Consideration for a purely usufructuary mortgage may constitute antecedent debt which could support a subsequent alienation. (*Wazir Hasan, J.C.*). MANNU LAL *v.* BISHAMBUR NATH. **79 I. C. 35=11 O. L. J. 415= A. I. R. 1924 Oudh 378.**

———A debt secured by a mortgage of joint family property but not yet time-barred as a simple money debt, is an antecedent debt such as would support an alienation of joint family property. (*Dalal and Simpson, A.J.Cs.*). DWARKA PRASAD *v.* MT. RAM DEBI. **77 I. C. 329=10 O. L. J. 360= 27 O. C. 140= A.I.R. 1924 Oudh 120.**

———*Debt incurred before plaintiff was born is a valid antecedent debt.*

The mortgage in suit was executed by the father of the plaintiff as head of the joint family. Part of the consideration was applied to pay off a mortgage executed by the father at a time when the plaintiff was not born and no joint family was in existence,

Held, that this constituted a valid antecedent debt and that the plaintiff was not entitled to challenge it: A.I.R. 1922 All. 51, *Ref.* (*Daniels, J.*). TRILOCK SAITHWAR *v.* LALSA SAITHWAR. **71 I. C. 465=A. I. R. 1923 All. 483.**

———*Secured debt is not antecedent debt.*

Prior mortgage debts forming consideration of subsequent mortgage are not antecedent debts so as to bind the sons, but the oral debt incurred by a co-parcener of the grandfather which was binding on the grandfather binds the grandson as an antecedent debt. (*Piggott and Sulaiman, JJ.*). RAM RATAN MISIR *v.* KAPIL DEO SINGH. **83 I.C. 417= A.I.R. 1923 All. 20.**

———But though a debt, which has become absolutely barred by time and the liability to pay which has not been undertaken in a previous writing, cannot be deemed to be a good antecedent debt so as to validate a conveyance by the father in lieu of it, yet when the mortgage-debt as such has not become time-barred, but only the personal remedy against the father is barred, it can still be a good antecedent debt so as to justify an alienation in lieu of it. (*Lindsay and Sulaiman, JJ.*). B. GOURI SHANKER *v.* P.H. SHEO NANDAN. **78 I. C. 911= 46 All. 384=22 A.L.J. 369=5 L.R.A. Civ. 306= A. I. R. 1924 All. 543.**

———*Loan on void mortgage is antecedent debt.*

What is in fact an antecedent or pre-existing debt due by a Hindu, for the satisfaction of which he would be entitled to alienate his son's shares in the joint family property as security along with his own if he had not mortgaged that property as security for the debt at the time he incurred it, does not change its character as an antecedent debt due by the father for which he is entitled to alienate his son's shares merely by reason of his having executed a void mortgage of those shares along with the valid mortgage of his own when he first incurred the debt. (*Batten, J.C.*). GANPAT RAO *v.* LAXMI CHAND. **77 I.C. 640=6 N. L. J. 239= A. I. R. 1924 Nag. 1.**

———*Money borrowed on hypothecation bond is antecedent debt.*

It is settled law of the Court of the Judicial Commissioner, Lucknow, to regard the definition of their Lordships, in Sahu Ram's case (in 39 All. 437) as one to be construed in the light of the particular facts before it, and as not excluding from the category of antecedent debts money borrowed on a hypothecation-bond, since the personal liability for debts as secured continues to exist independently of the hypothecation: 23 O. C. 211' *Foll.*

The antecedency of a debt incurred by a father may be invoked to uphold a transfer by him as against the sons even during the father's lifetime. (*Ashworth, J.C.*). JAMNA PRASAD *v.* BALBHADDAR. **74 I.C. 353=25 O.C. 388= 9 O.L.J. 601=A.I.R. 1923 Oudh 147.**

———Where in a previous mortgage there was no personal covenant to pay and no provision permitting the mortgagee to sell the mortgaged property in case of non-payment, held, that this cannot constitute an antecedent debt. (*Dalal and Daniels, A. J. Cs.*). RAM SARUP SINGH *v.* P. JAGESHUR SINGH. **73 I.C. 466=26 O.C. 341= A.I.R. 1923 Oudh 150.**

HINDU LAW—Debt—Antecedent debt—What is.

———Mortgage prior to birth of son—Sale after birth of son to discharge mortgage—mortgage debt must be deemed to be antecedent debt.

Per *Walsh, J.*—Mere antecedency, however is not sufficient to support a charge made by a father upon family property for a debt. (*Walsh and Piggott, JJ.*). SURAJ PRASAD *v.* MUKHANDAL.

66 I.C. 134=44 All. 382=20 A.L.J. 236= A.I.R. 1922 All. 51.

———*Loan on mortgage—Second mortgage to discharge original mortgage—If original mortgage is antecedent debt.*

Per *Kotval, A. J. C.*—Where a creditor has lent money to the father originally on the security of the joint family estate and later on a fresh mortgage is granted for the same money it may well be taken that the security afforded by the second mortgage is in pursuance of the original intention to make the estate security for the debts and that the debt is therefore not dissociated in fact from the alienation.

If a debt secured by a mortgage of the joint family property is to be treated as an antecedent debt when a second mortgage is executed in respect of it, the result would be that a transaction, which was originally of no force as constituting according to their Lordships of the Privy Council a breach of trust, would be legalised by what really is a repetition of that breach.

Per *Macnair, A. J. C.*—Their Lordships of the Privy Council did not intend to lay down in 39 All. 437 the rule that the antecedent debt must be one which was not incurred on the security of the joint family property: F. A. 70 of 1917 and S.A. 291 of 1918. 41 All. 235, *followed*; 42 Mad. 711, *dissented from.*

A Hindu father may incur a debt at one time and subsequently execute a mortgage so as to bind the son's interest in order to pay off the previous debt and such a mortgage is an antecedent-debt binding on the share of the son even though the mortgage forms the consideration for a later mortgage the binding nature of which is challenged by the son. (*Hallifax, Kotval, Macnair and Batten, A. J. Cs.*). SHEONARAIN *v.* NATHU.

65 I.C. 786=5 N.L.J. 114=19 N.L.R. 81= A.I.R. 1922 Nag. 1.

———Mortgage debt—Personal liability to re-pay may be antecedent debt.

A personal liability to re-pay a mortgage debt may be an antecedent debt: 21 O. C. 200; 39 All. 437 (P. C.) and 23 O. C. 204, *Ref.* (*Daniels and Wazir Hasan, A. J. Cs.*). RAM SURAN *v.* MANGAL SINGH.

60 I.C. 219=8 O.L.J. 87= A.I.R. 1921 Oudh 38.

—Debt—Antecedent debt—What is not.

———Sums admitted to be paid in part consideration of the deed attacked, do not constitute antecedent debt. (*Wazir Hasan and Srivastava, JJ.*). LACHMI NARAIN *v.* MANGAL PRASAD.

6 O.W.N. 801=A.I.R. 1929 Oudh 453.

———Where a mortgage of family property was executed to pay off the sale price of land purchased three days earlier,

Held, that there was no room for the theory of antecedent debt in the case: A. I. R. 1928 Pat. 83, *Foll.* (*Ross and Fazl Ali, JJ.*). JAN MOHAMMAD *v.* BIKOO MAHTO. **116 I.C. 33=7 Pat. 798= 10 P.L.T. 811=A.I.R. 1929 Pat. 130.**

———*Loan that cannot be re-paid except by borrowing on the security of family property is no antecedent debt.*

HINDU LAW—Debt—Antecedent debt—What is not.

In order to validate a transaction on the doctrine of antecedent debt, there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact. When, therefore, an obligation is created at a time when the father had no money and with the knowledge that the debt can be re-paid only by borrowing on the security afforded by the estate, a mortgage executed to pay such a debt cannot be supported: A. I. R. 1917 P. C. 61, *Foll.* (*Das and James, JJ.*). RAGHUNATH SINGH *v.* MODNARAYAN SINGH. **105 I.C. 1= 9 P.L.T. 142=A.I.R. 1928 Pat. 83.**

———A renewal of the original transaction cannot be an alienation for antecedent debt as defined by the Privy Council: A.I.R. 1924 P. C. 50, *Not appl.* (*Walsh and Pullan, JJ.*). BABU RAM *v.* MAHADEO RAM. **98 I.C. 1012= A.I.R. 1927 All. 127.**

———*Mortgage renewed by a second mortgage is not an antecedent debt.*

Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached: A.I.R. 1924 P. C. 50, *Foll.* If a mortgage includes in its consideration the whole of the sum advanced previously on the same security by the same mortgagee, the first mortgage is antecedent in time but not in fact, and not being truly independent of the second mortgage is not an antecedent debt. (*Walsh and Pullan, JJ.*). GUNDI LAL *v.* BASDEO. **96 I.C. 671= A.I.R. 1926 All. 690.**

———A mortgage by step-mother of a Hindu minor though ratified by the minor subsequently does not constitute an antecedent debt with respect to a subsequent mortgage by the minor, executed after attaining majority. (*Campbell, J.*). CHANDA LAL *v.* MUKANDI. **87 I.C. 40=26 P.L.R. 120= A.I.R. 1925 Lah. 503.**

———Previous mortgage executed by defendant's father—Subsequent mortgage executed by defendant's uncle to discharge first—Previous mortgage debt is not antecedent debt: A.I.R. 1923 Oudh 150, *Ref.* (*Dalal and Wazir Hasan, A.J.Cs.*). BANSIDHAR *v.* BEHARI LAL. **89 I. C. 67=12 O.L.J. 359= 2 O.W.N. 369=A.I.R. 1925 Oudh 626.**

———*Antecedent debt must be prior in time and in fact to the alienation by the father.*

To satisfy the validity of an alienation of the undivided estate on the basis of an antecedent debt the alienation must be by the father for his debts antecedent in time and in fact to the alienation supporting it. A mortgage by sons to re-pay the mortgage debt incurred by their father is not valid on the ground of its having been made for the purpose of paying off an antecedent debt. So also the mortgage debt incurred by the father is not antecedent if the alienation by him is not made for the payment of a debt prior or in time and in fact to the security supporting it. (*Wazir Hasan and Neave, A.J.Cs.*). GAJADHAR BAKSH SINGH *v.* BAIG NATH. **79 I.C. 104=27 O.C. 133=11 O.L.J. 264= A.I.R. 1925 Oudh 9.**

———Money payable by the successful plaintiff in a pre-emption suit is not antecedent debt for the purpose of supporting an alienation of the family property. It does not follow from this that the payment of a pre-emption decree might not be binding on the family on the ground of legal necessity or benefit to the estate: A.I.R. 1923 All. 218, *Foll.* (*Daniels, J.*). SHEODEN *v.* HABHI ULLAH KHAN. **75 I.C. 872=A.I.R. 1924 All. 721.**

HINDU LAW—Debts—Antecedent debt—What is not.

———*Father's debt on security of property is not antecedent.*

Per *Drake-Brockman and Batten, J. Cs.*—A debt borrowed by a Hindu father on the security of the joint family property does not constitute an antecedent debt so as to bind his sons by a subsequent mortgage effected for the discharge of that debt and it is open to the sons when a suit is brought to enforce the later mortgage to plead that earlier one was not justified by legal necessity. The fact that the father is dead at the time of suit makes no difference : A.I.R. 1922 P.C. 247; 6 P.L.J. 526, *Foll.* (*Batten, J.C. on difference between Drake-Brockman, J.C. and Hallifax, A.J.C.*). GANPAT RAO *v* LAXMI CHAND. **77 I.C. 640=6 N.L.J. 239= A.I.R. 1924 Nag. 1.**

———It would be very dangerous to hold that the money required to satisfy the pre-emption decree is an antecedent debt due from pre-emptor: 33 All. 242, *Foll.*(*Piggott and Walsh, JJ.*). CHATUR BHUJ *v.* GOBIND RAM. **67 I.C. 668= 21 A.L.J. 343=45 All. 407=4 L.R.A. (Civ.). 409= 74 I.C. 571= A.I.R. 1923 All. 218.**

———A previous mortgage cannot be considered as an antecedent debt if it was in favour of the same mortgagee and was effected only a few days before the mortgage in dispute and the two mortgages formed practically one transaction. (*Broadway and Brasher, JJ.*). MD. USMAN KHAN *v.* ATA MOHYUDDIN. **73 I.C. 871=5 L.L.J. 304= A. I. R. 1923 Lah. 142.**

———*Mortgage debt is not an antecedent debt.*

A mortgage executed by a father is not an antecedent debt since it is not incurred by the father independently of the security of the joint family property. The sons are therefore entitled to advance the plea that there was no legal necessity for the second mortgage by the other sons (their brothers) to pay off the mortgage by their father so as to bind their shares : 39 All. 437, *Foll.* [Note *Brij Narain* v. *Mangal Prasad*, A.I.R.1924 P.C. 50]. (*Prideaux, A.J.C.*). PURNIA *v.* SONIA. **69 I.C. 569= A.I.R. 1923 Nag. 23.**

———*Invalid mortgage is not an antecedent debt for subsequent sale.*

A mortgage, invalid at its date in so far as purporting to encumber the joint family property, cannot become a just and legal consideration on the principle of "antecedent debt" for a sale at a later date. The antecedency should not only be an antecedency to the mortgage itself but there must be disconnection with the mortgage in fact as well as in time. The doctrine of "pious obligation" cannot be invoked against grandsons while the sons of the mortgagor are living. (*Lord Shaw.*) CAET RAM *v.* RAM SINGH. **67 I. C. 569= 44 All. 368=16 M.L.W. 89=3 P L.T. 363= 31 M.L.T. 50=1922 M.W.N. 455= 49 I.A. 228=24 Bom.L.R. 1231=27 C.W.N. 150= 21 A.L.J. 114=37 C.L.J. 79= A.I.R. 1922 P.C. 247=43 M.L.J. 98 (P.C.).**

———A loan made to the father on the occasion of a grant by him of mortgage on the family estate is not an antecedent debt, so as to be binding on the sons. (*Prideaux, A.J.C.*). BALOO *v.* GODAWARIBAI. **66 I.C. 257=5 N.L.J. 238= A.I.R. 1922 Nag. 136.**

———*Usufructuary mortgage—Mortgagor personally liable, if mortgagor is dispossessed—No personal liability—No antecedent debt.*

If once it is proved that a sale has taken place in consideration of antecedent debt the sons are precluded from attacking it, but they are not precluded from raising the prior question whether the sale really was in consideration of such a debt. In order to validate a transaction entered into by a father in consideration of antecedent debt there must be not only antecedency in time but also true dissociation in fact. A clause in a deed of usufructuary mortgage executed by a father, making the mortgagor personally liable for the mortgage money in case the mortgagee be dispossessed from the mortgaged property, does not constitute a personal liability so as to treat it as antecedent debt : *Sahu Ram Chandra* v. *Bhup Singh* referred to. (*Daniels, J.C.*). MT. MANGURAN BIBI *v.* JANKI PRASAD. **66 I.C. 930=9 O.L.J. 35=A.I.R. 1922 Oudh 50.**

HINDU LAW—Debts—Father—Burden of proof.

———*Loan on the security of joint family property is not antecedent debt.*

Where a father borrows money by mortgaging joint family property and the mortgage contains a covenant for personal liability the debt is not an "antecedent" debt because of the personal covenant, because the debt is not borrowed wholly apart from the security afforded or supposed to be available by the joint estate. For a similar reason, where money is borrowed by executing a promissory note and the promissory note itself recites that the money was taken in order that it might form part of the mortgage which was to be subsequently executed the debt cannot be said to be antecedent: 39 All. 437 (P.C.), *Foll.* [*Note.*—Compare *Brij Narain* v. *Mangal Prasad*, A.I.R. 1924 P.C. 50.] (*Mears, C.J. and Banerji, J.*). RAM SARUP *v.* BHARAT SINGH. **64 I.C. 763=43 All. 703= 19 A. L. J. 744=A.I.R. 1921 All. 113.**

———A mortgage debt is not as such an antecedent debt unless coupled with a personal obligation to pay the debt. (*Daniels and Wazir Hasan, A.J.Cs.*). RAM DEI *v.* SURAJ BAKHSH. **60 I.C. 177= 23 O.C. 204=7 O.L.J. 509=2 U.P.L.R. (J.C.) 156.**

—Debts—Co-parcener.

———Where a promissory note is executed subsequent to partition of the joint family by one alleging himself to be the managing member of the family, it is the duty of the person who deals with such member of the family to satisfy himself that he had subsisting authority. (*Kumaraswami Sastri and Reilly, JJ.*). VENKATAKRISHNAYYA *v.* RANGAYYA. **117 I.C. 720=A.I.R. 1928 Mad. 865.**

———*Loan by son—No reference to joint family—Alienee to prove that loan was for family benefit*

The onus of proving that a debt incurred by a member of a joint Hindu family was for the benefit of the family must be placed on the creditor, more especially when he is dealing, not with the natural head of the family, namely, the father, but with the son who is living in another village and when he contracts the debt, signs his name only and makes no reference whatever to any business or joint family business for which the loan is being taken. (*Broadway, J.*). NARAIN SINGH *v.* MOHAN SINGH. **93 I.C. 340=8 L.L.J. 10= 27 P.L.R. 95=A.I.R. 1926 Lah. 214.**

———A man is not bound to repay the debts of his paternal uncle. (*Baker, J. C. and Hallifax, A. J. C.*). CHITNAVIS *v.* NATHU SAO. **79 I.C. 1002= 20 N.L.R. 106=7 N.L.J. 170=A.I.R. 1925 Nag. 2.**

—Debts—Father—Burden of proof.

———*Mortgage by father for no antecedent debt—Decree on mortgage against father—Before execution, sons suing challenging mortgage—Mortgagee to prove necessity.*

HINDU LAW—Debts—Father—Burden of proof.

Per *Full Bench.*—Where the father mortgages the joint ancestral property not for paying any antecedent debt and the mortgagee obtains a decree on the mortgage against the father without impleading the sons,and before the property is sold in execution of the decree the sons sue for a declaration that the property is not liable to be sold, the sons are bound to succeed if the mortgagee fails to prove legal necessity for the loan, and the sons are not required to prove immoral character ofthe debt: *Walsh, J.*, in A.I.R. 1928 All. 86 and A.I.R. 1926 Oudh 321, *Diss. from.* (*Sulaiman, Ag. C. J., Mukerji and Boys, JJ*). JAGDISH PRASAD *v.* HOSHYAR SINGH. **115 I.C. 775=51 All. 136= 26 A.L.J. 1289=A.I.R. 1928 All. 596. (F. B.).**

———Debts contracted by father for legal necessity —No partition—No proof as to the debt being immoral or illegal—Whole joint family property can be sold in execution of a decree for that debt : A.I.R. 1926 Oudh 321 ; 44 Cal. 524 and A.I.R. 1924 P. C. 50, *Ref.* (*Raza, J.*). MANOHAR LAL *v.* IMDADALI. **98 I.C. 300=3 O.W.N. 862= A.I.R. 1927 Oudh 15.**

———*Debt on pro-note—Onus is on sons to prove immorality or illegality.*

Where the father of a joint Hindu family borrows money on the security of a promissory note, in a suit on the promissory note, it is for the sons of the executant of the note to prove that the debt was tainted with illegality or immorality : otherwise they will be bound by the debt: A.I.R. 1924 P.C. 50, *Foll.*; 39 All. 437, *Dist.* (*Dalal, A.J.C.*). SRI KISHEN DAS *v.* KANHAYA LAL. **86 I. C. 877= 12 O.L.J. 232=2 O.W.N. 206= A.I.R. 1925 Oudh 559.**

———*Mortgage merged in a decree—Alienee need not prove necessity.*

So long as the creditor is seeking to enforce a mortgage executed by the father he is bound to prove as against the sons that it was executed for valid necessity. But when once the mortgage has merged in a decree it no longer subsists and the judgment debt which the creditor is seeking to enforce is on the same footing as any other debt incurred by the father. Sons cannot set up their rights against the remedies of their father's creditors for their debts if not tainted with immorality: 17 O.C. 318; A.I.R. 1923 Oudh 227, *Foll.*; A.I.R. 1923 Oudh 182, *Dissented from.* (*Daniels, J.C.*). GAURI SHANKAR *v.* JANG BAHADUR. **79 I.C. 1008= 27 O.C. 124=11 O.L.J. 246= A.I.R. 1924 Oudh 394.**

—Debts—Father—Debt.

———*Debt for which son's share can be sold in execution excludes a mortgage.*

Per *Full Bench.*—In proposition No. 2 as laid down in A.I.R. 1924 P.C. 50, "if he (the manager) is the father and the reversioners are the sons, he may by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt," the word *debt* does not include mortgage debt. (*Sulaiman, Ag. C.J., contra.*) (*Sulaiman, Ag.C.J. and Mukerji and Boys, JJ.*). JAGDISH PRASAD *v.* HOSHYAR SINGH. **115 I.C. 775= 51 All. 136=26 A.L.J. 1289= A.I.R. 1928 All. 596 (F.B.).**

———*New partnership—Debt for—Sons not liable unless they derived benefit.*

Where sons are sought to be made liable for the debt of their father in respect of a partnership which is not ancestral it must be shown that the business resulted in some benefit to the family and that the other members participated in such benefit: A.I.R. 1922 P.C 237 (P.C.), *Rel. on.*

Unless it is shown that other members were admitted to the benefits of the partnership they are not liable for the debts of the firm. (*Coutts-Trotter, C.J. and Ramesam, J.*). MAYA NADAN & BROS. *v.* ARUNACHALAM. **97 I.C. 981= 1926 M.W.N. 671=A.I.R. 1926 Mad. 1106.**

HINDU LAW—Debts—Father—Debt.

———*Son's share can be sold in execution of decree against father.*

A money-decree passed against a Hindu father can be executed against ancestral property in his hands inclusive of his son's interest and the fact that the sons were brought on record as heirs of the father on his death pending appeal in the original proceedings does not make any difference. (*Shah, Ag.C.J. and Fawcett, J.*). NARAYAN GANESH *v.* SAGUNABAI GANGADHAR. **85 I. C. 181= 49 Bom. 113=26 Bom. L. R. 1200= A. I. R. 1925 Bom. 193.**

———*Debt by father for pre-emption money—Sons bound.*

A debt contracted by the father to pay pre-emption money is for a legal necessity for which the father, the managing member of the family, may borrow money. Apart from that it will be the pious duty of the son to pay a simple money debt due from his father even during the life-time of his father. (*Dalal, J.*). BISHUNATH RAI *v.* JODHI RAI. **82 I.C. 180=5 L.R. A. Civ. 690= A.I.R. 1925 All. 120.**

———*Money advanced to father after division of status, but before actual partition—Onus on sons.*

Although at the time of the advance of money to the father, the family had expressed the intention to separate, and in the eye of the law, they were no longer members of a joint Hindu family, yet if there had been no partition of the joint property the onus, would be upon the sons to show that the advance made to their father, was made after the actual division of that property so that they would no longer be liable for such advance. (*Macleod, C.J. and Kanga, J.*). MOTI CHAND RAOJI *v.* MANEKCHAND RAMCHAND GOJAR. **77 I.C. 515=A.I.R. 1922 Bom. 147.**

———*Debts incurred by father—Creditor can proceed against son's shares also.*

Per *Spencer, J.*—It has always been held in this Presidency since the Full Bench decision of *Ponnappa Pillai* v. *Pappuvayyangar*, 4 Mad. 1, that so long as a Hindu family remains undivided, a creditor can proceed against the interest of the sons of the ancestral property for the debts of their father which have not been contracted for illegal or immoral purposes.

Per *Devadoss, J.*—As the law stands at present a creditor can proceed against the shares of the sons in the family property in execution of a decree obtained against the father without proving either family necessity or that the debt was incurred to discharge an antecedent debt. Their Lordships in *Sahu Ramchandra* v. *Bhoop Singh* did not intend to alter the law as it stood as regards the right of an execution creditor to proceed against the son's share in execution of a money-decree obtained against the father. The law has been settled for over a generation as regards this point : 39 All. 437, *Dist.*; 12 Mad. 142; 20 Cal. 328 at 337, *Foll.* (*Spencer and Devadoss, JJ.*). K. SAMA RAO *v.* LAL CHAND. **71 I. C. 153=1922 M. W. N. 708= 32 M.L.T. 9=17 M.L.W. 661=46 Mad. 64= A.I.R. 1923 Mad. 36=43 M.L.J. 745.**

HINDU LAW—Debts—Father—Decree.

—Debts—Father—Decree.

———*Decree against father cannot be challenged merely on ground of unconscionable rate of interest.*

As a Hindu son cannot challenge his father's transaction merely on the ground that it was not for legal necessity, and since the question as to rate of interest falls under the head of legal necessity, once a decree has been passed against a Hindu father, his son cannot challenge it on the ground of its being unconscionable to save the family property from sale: A.I.R. 1924 P.C. 50; A.I.R. 1926 Oudh 321; 17 O.C. 318, *Rel. on*; 4 O. L.J. 157, *Diss. from.* (*Pullan, J.*). SOBHA SINGH *v.* KESHO SINGH. **A.I.R. 1930 Oudh 234.**

———*Decree against father is binding on the sons.*

The reason why the interest of a son in the joint family property can be sold in execution of decree obtained against the father alone is that the decree is binding on the sons as they are deemed to be represented by the father and therefore themselves parties to the suit: A.I.R. 1914 P.C. 136, *Ref.* (*Mukerji and Niamatullah, JJ.*). KISHAN SARUT *v.* BRIJ RAJ SINGH. **121 I. C. 257= 1929 A.L.J. 941=51 All. 932= A.I.R. 1929 All. 726.**

———Where the father of a joint Hindu family incurred a debt for a shop and not separately for himself, and the sons failed to prove immorality regarding this debt,

Held, that joint family property including the share of the sons may be proceeded against, on a decree on the debt: 15 Cal. 717 (P.C.); A.I.R. 1924 P.C. 50, *Foll.* (*Madgavkar, J.*). RAMCHANDRA ANANT DESAI *v.* BHAGWANT GOPAUL THAKUR. **121 I.C. 435=53 Bom. 777=31 Bom. L.R. 1115= A.I.R. 1929 Bom. 465.**

———*Decree against father personally—Sons can be exonerated only on the ground of debt being illegal or immoral.*

A decree although passed against the father personally and after his sons are exonerated, can be executed against the shares of his sons in the family property and such property is liable for the father's debt. The sons can claim exoneration from the liability only on the ground that the debt is immoral or illegal: 13 Cal. 21, *Rel. on*; 31 M.L.J. 502; 27 M.L.J. 276; 28 All. 288 and 37 All. 214, *Ref.*; A.I.R. 1928 Mad. 657 (F.B.) and A.I.R. 1927 Mad. 471 (F. B.), *Expl.* (*Coutts-Trotter, C. J. and Walsh, J.*). DORAISWAMI NADAN *v.* NAGASAMI NAICKEN. **121 I.C. 863= A.I.R. 1929 Mad. 898.**

———*Decree against father on mortgage—Sons not impleaded—Personal remedy against father time-barred—Mortgagee must prove necessity and no question of pious obligation arises* (*Iqbal Ahmad, J.*, differing *Walsh, J.*).

The pious obligation of a Hindu son has reference only to simple money debts which the father is under a personal obligation to pay and to simple money decrees obtained against the father for recovery of such debts, and a distinction must be drawn between a simple money debt and a decree for such debt on the one hand and a debt secured by a mortgage of the family property and a decree for sale of such property on the other. So far as simple money debt or a decree for such debt against the father is concerned, the father is under a personal obligation to discharge that debt or that decree, and the sons labour under a pious obligation to discharge the liability of their father. But in the case of a debt incurred on the security of the family property by the father, when the mortgagee has not sued for recovery of the debt within six years of the date of accrual, of the cause of action and has thus allowed his right to a simple money-decree against the father to become time-barred, the personal obligation of the father disappears, and the mortgagee is then only entitled to recover the debt by sale of the mortgaged property, and in such a case the sons labour under no pious obligation to discharge that debt for the simple reason that the debt is not due from their father.

The principle of pious obligation cannot be applied to the case of a decree for sale on the basis of a mortgage of the family property. In the cass of a suit brought by a creditor against the father for recovery of a simple money debt all that he has to prove, in order to entitle him to a decree, is that he advanced the debt, and it is not necessary for him to prove the purpose for which the debt was incurred. On the other hand, in a suit for sale of the family property, the mere fact that the mortgagee advanced the debt does not entitle him to a decree, unless and until he succeeds in further proving that the debt was advanced for family necessity. Because of their pious obligation to discharge their father's debts the sons cannot impugn the validity of a simple money decree to which they were no party, on the ground of the absence of legal necessity for incurring the debt. But in the case of a decree for sale, when the personal remedy against the father has become time-barred, the sons are under no such obligation and, therefore, if the mortgagee has obtained a decree for sale of the joint family property without impleading the sons or without suing the father in his representative capacity, the sons are entitled to challenge the validity of that decree on the ground that they being no parties to that decree are not bound by the same and in such a suit, unless the mortgagee succeeds in proving that the debt secured by the mortgage was for legal necessity, the sons will be entitled to avoid the decree: 12 A.L.J. 613. *Foll.*; A.I.R. 1924 Oudh 394, *Diss. from.*

Walsh, J.—There is no real distinction between the two cases of a simple money-decree and a decree for debt secured by a mortgage: A.I.R. 1924 Oudh 394, *Appr.*: A. I. R. 1917 P. C. 61 and A.I.R. 1924 P.C. 50, *Expl.* (*Walsh and Iqbal Ahmad, JJ.*). THAKUR LAL *v.* JAGRAJ SINGH. **107 I.C. 693=50 All. 546=26 A.L.J. 229= A.I.R. 1928 All. 86.**

———*Obligation incurred before adoption is binding on the adopted son.*

Where, before adopting a son, a Hindu father enters into a contract to sell his property and receives a sum of money as advance, the obligation to perform the contract or to pay back the amount arises before the date of adoption, and if a son who is born after an obligation has been incurred which obligation by reason of non-performance results in a debt, it cannot be said to be a debt incurred after the birth of the son. Though in certain circumstances it might not result in a debt, yet if the obligation was incurred before the birth of a son, or as in this case, before the adoption, it is not open to the son to dispute the liability of the whole family property for the debt which resulted from obligation incurred by the father before the date of adoption, and the son's share is liable to be proceeded against in execution of a decree obtained against the father for the recovery of advance and for damages for breach of contract: A.I.R. 1921 Mad. 447, *Dist.* (*Devadoss and Madhavan Nair, JJ.*). SWAMINATHAN *v.* SUBRAMANIA AYYAR. **116 I.C. 360= A.I.R. 1928 Mad. 1082.**

HINDU LAW—Debts—Father—Decree.

——*Decree against son as the legal representative of his father—Execution.*

Where sale by a Hindu was set aside as being without family necessity and the vendee being deprived of possession sued to recover the purchase money from the vendor and where his son had been brought on the record as the legal representative of his father who died during the pendency of the suit,

Held, that the proper decree to pass would be a decree against the son as the legal representative of his father and capable of execution against him so far as he held property which was liable to attachment under the Hindu Law for his father's debts. (*Ashworth and Neave, A. J. Cs.*). KALLU MAL *v.* PARTAB SINGH. **92 I.C. 787= A.I.R. 1926 Oudh 301.**

——*Entire family property can be sold for debts of deceased father or grand-father.*

There is no authority for holding that the pious obligation of sons does not arise until after the death of the father. Therefore the whole of the joint family property in the possession of the sons and grandsons of the deceased judgment-debtor can be attached and sold in execution of a personal decree passed against the father or the grand-father: 1 O.W.N. 13, *Ref to.* (*Kendall, A.J.C.*). HARIHAR PRASAD *v.* MAHABIR PANDEY. **79 I.C. 1055= 11 O.L.J. 689=27 O.C. 306= A. I. R. 1925 Oudh 91.**

——A decree for mesne profits can be executed against ancestral property in the hands of the son after the death of the father. (*Wazir Hasan, J. C. and Kendall, A.J.C.*). SHAMBU BHAN SINGH *v.* CHANDRA SHEKHAR BAKSH SINGH. **80 I. C. 17= A.I.R. 1925 Oudh 230.**

——The passing of a personal decree in a partition suit against father who was the manager is not alone sufficient to prove immorality of the debts for which decree is passed. (*Mullick and Ross, JJ.*). RAGHUNATH PRASAD *v.* BASDEO PRASAD. **88 I.C. 1012=3 P.L. R. 328= 6 P.L T. 764= A.I.R. 1925 Pat. 823.**

——Sons can question validity of a decree to which they were not parties provided they claim by independent title. (*Daniels, A.J.C.*). MT. SURJA *v.* BIJAI BAHADUR SINGH. **73 I.C. 13= 26 O.C. 336= A.I.R. 1924 Oudh 136.**

——Shares of the sons in the joint family estate can be proceeded against in execution of a decree even in the lifetime of the father where the decree obtained against the father though personal is in respect of a debt which was for the benefit of the family estate and was neither illegal nor immoral. (*Kennedy, J.C. and Raymond, A.J.C.*). NARUMAL MULCHAND *v.* NICHUMAL. **76 I.C. 778= 18 S.L.R. 1= A.I.R. 1924 Sind 124.**

——Sons cannot recover share of joint property sold under a decree against father unless debt is shown to be immoral: (1874) 1 I.A. 321; 43 Bom. 612 and 60 I.C. 137, *Ref.* (*Lindsay and Sulaiman, JJ.*). RAM CHANDER *v.* HAJI MOHAMMAD NUR. **73 I.C. 656=45 All. 545=4 L.R.A. Civ. 237= 21 A.L.J. 485= A I.R. 1923 All. 591.**

——*Judgment against father alone operates against sons' interests unless the debt is illegal or immoral.*

By the Mitakshara Law according to 44 Cal. 524 (P.C.), a judgment against the father of the family, cannot be executed against the whole of the Mitakshara property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. *In every other event* it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against "*the father alone.*" These words could not be clearer and they are absolutely comprehensive. There are no limitations, qualifications or reservations to the effect that the debt must be incurred by the father as representing the estate or purporting to be for the benefit of the estate or in some capacity other than his personal capacity. The words in 44 Cal. 524 are: "*In every other event* it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against *the father alone*"—and there is nothing to qualify the words, "the father alone." The decision in 44 Cal. 524 is to the effect that, once a simple money decree is passed against the father, and manager of a joint Hindu family, that simple money decree can be executed by the execution creditor against the whole of the estate, and will operate against the interests of the sons, unless the debt has been incurred for illegal or immoral purposes. The decision in 15 A.L.J. 437 lays down an absolutely different proposition that joint family property cannot be transferred by an act of volition on the part of the manager, except with the consent of other co-parceners or for legal necessity or in payment of antecedent debts, and that the doctrine of the pious duty of a Hindu son to satisfy his father's debts can have no operation to validate such a transfer, so long at any rate as the father is alive. But in order to apply the principle of the second decision, there must be a transfer by the volition of the manager. (*Stuart, J.*). SHAMBHU DAYAL SINGH *v.* ISWAR SARAN. **75 I.C. 597= A.I.R. 1923 All. 306.**

——*Mortgage-decree—When binds sons.*

A decree against the father on the mortgage by the father has no more force than the mortgage itself, which must be proved, in order to bind the son, to be for an antecedent debt or for legal necessity. (*Scott-Smith and Zafar Ali, JJ.*). HANS RAJ *v.* BALAJI MAL. **76 I.C. 582= A.I.R. 1923 Lah. 356.**

——*Decrees on debts incurred neither for necessity nor for paying antecedent debt—Not binding on sons—Mortgage not binding—Decree thereon is not also binding.*

It cannot be laid down that apart from the question of family necessity or antecedent debt there is a pious obligation on the sons to pay the debts due by their father, which had matured into a decree and that the entire interest of the family could be sold in satisfaction of the decree obtained for the payment of that debt.

A decree unless it is binding on sons does not improve the position of the creditor any more than a sale which a father effects in order to pay a debt incurred by himself on the security of the mortgaged property. The exception to the general rule, that no manager, guardian or trustee can be entitled for his own purpose to dispose of the estate which is under his charge, cannot be extended where a liability under a mortgage merges into a decree unless that decree can by any rule of law be held to be binding on the other members of the family. If a mortgage is not valid in so far as it purports to encumber the joint family property, it cannot become a just and legal consideration if in the absence of the sons of the mortgagor, a decree had been obtained on foot thereof against the mortgagor; otherwise the protection intended for the junior members of the family can in that way be easily circumvented and becomes illusory. (*Kanhaiya*

HINDU LAW—Debts—Father—Decree.

Lal, J. C.). GANGA BAKSH SINGH *v.* RAGHUBAR SINGH. **73 I.C. 27=10 O.L.J. 61=26 O.C. 299=A. I. R. 1923 Oudh 182.**

———*Simple money-decree against father—Family property is liable, if debt is not illegal or immoral.*

Where there is a simple money-decree against the father which is not shown to have been based on a debt which was tainted with immorality, the decree can clearly be executed against the father and the father's interests in the family property can be attached and sold: A.I.R. 1917 P.C. 61, *Dist.* and A.I.R. 1916 P.C. 220, *Foll.* (*Stuart and Sulaiman, JJ.*). KALYAN SINGH *v.* DHARAM SINGH. **68 I.C. 794=20 A.L.J. 721=A.I.R. 1922 All. 489.**

—Debts—Father—Representation.

———*Father represents son in execution.*

Execution against father is effective enough to bind the son also, and if any matter in execution is *res judicata* against the father, the plea of *res judicata* is operative against the son too, for practically the father represents the son in execution proceedings even where the suit was not framed against him as manager of the family. (*Ramesam and Jackson, JJ.*). SUBRAMANIA PILLAY *v.* VENKATARAMA REDDI. **120 I.C. 375=1929 M.W.N. 776=A.I.R. 1930 Mad. 257.**

———Civil P.C., S. 11—Suit for mortgage debt against father and sons—Mortgagee's pleader making statement that sons should be discharged—Simple money-decree passed—Statement neither operates as *res judicata* nor as estoppel in subsequent declaratory suit by sons that the property is not liable to execution and sale in the decree against father. (*Raza, J.*). MANOHAR LAL *v.* IMDAD ALI. **98 I.C. 300=3 O.W.N. 862=A.I.R. 1927 Oudh 15.**

———*Father represents son in litigation.*

Where a joint family property has been sold out and out or where a decree in execution of the mortgage has been obtained against the property, and the rights have thus sprung up with regard to the joint family estate these rights are not to be defeated by the son simply questioning the transaction entered into by its head. He must prove that the debt was contracted for immoral or illegal purposes: 17 O.C. 318, *Foll.*; 2 A.L.J. 613, *Dist.* The father in a suit against him represents the son also. The law is based on the presumption that the managing member represents the other member and not on the actual facts of every case. (*Dalal and Simpson, A.J.Cs.*). RUP KISHORE *v.* KANHAIYA LAL. **74 I.C. 563=10 O.L.J. 141=26 O.C. 266=A.I.R. 1923 Oudh 227.**

———*Mortgage by father—Suit on—Father cannot represent minor son as his guardian* ad litem.

Bucknill, J.—The interest of son in a suit on a mortgage by the father is against that of the father and therefore the father cannot represent son but persons who could plead illegality or immorality of the debt can represent the son: 9 C.L.J. 485; 15 C.L.J. 446; 34 A. 549; 16 C.L.J. 264; A.I.R. 1914 P.C. 136, *Foll.* (*Dawson-Miller, C. J. and Bucknill, J.*). HARIPRASAD SINGHA *v.* SOURENDRA MOHAN SINGHA. **66 I.C. 945=1 Pat. 506=3 P.L.T. 709=A.I.R. 1922 Pat. 450.**

—Debts—Immoral or illegal—Breach of duty.

———*Damages for breach of civil duty are not illegal or immoral debt.*

Where the father had cut certain trees which did not belong to him and the rest of the damages he had to pay for breach of a civil duty in demolishing a house and the family had benefitted to a large extent by the action of the father.

HINDU LAW — Debts — Immoral or illegal—Burden of proof.

Held, there is distinction between a debt which follows as the result of an offence under the original law and a debt for which one is made liable on the ground of a breach of civil duty. In the former case the debt incurred by the father would be immoral and illegal but not in the latter case.

Held, further the damages were due in consequence of a breach of civil duty by the father: 32 Bom. 348, *Dist.*; 39 Cal. 862; 5 C.L.J. 80; 11 C.W.N. 163; A.I.R. 1923 Lah. 399, *Foll.* (*Daniels and Dalal, JJ.*). CHANDRIKA RAM *v.* NARAIN PRASAD. **79 I.C. 1036=46 All. 617=22 A.L.J. 468=5 L.R. A. Civ. 378=A.I.R. 1924 All. 745.**

———*Breach of civil duty by father involving tort or crime—Sons are liable.*

There is no authority for the theory that the sons are not liable upon contracts and quasi-contracts entered into by their father or upon other similar obligations legally incurred. Where there is a breach of civil duty, even though it may involve some tort or crime, the sons are liable to make it good out of the family property: 27 Mad. 71 and 24 Cal. 672, *Dist.* (*Spencer and Odgers, JJ.*). VENKATACHARYULU *v.* MOHANA PANDA. **61 I.C. 530=44 Mad. 214=A.I.R. 1921 Mad. 407.**

—Debts—Immoral or illegal—Burden of proof.

———*Onus of proving immoral nature of debt lies upon son.*

It is not sufficient for a son in Mitakshara joint family to prove that the father was a man of immoral habits: but he must also prove that the particular debt was incurred for an immoral purpose.

Where a father contracted a debt and subsequently executed a mortgage for the debt and the son contested the transaction on the ground that the debt was contracted for an immoral purpose, the onus of proving the immoral nature of the debt lies upon the son who contested the transaction and not upon the alienee: 17 C. W. N. 124 (P.C.), *Rel. on.* (*Ross and Chatterji, JJ.*). BISWANATH SINGH *v.* KAYESTHA CORPORATION. **119 I.C. 405=8 Pat. 450=10 P.L.T. 379=A.I.R. 1929 Pat. 422.**

———The proposition of Hindu Law is well-established that the burden of proof lies, in cases where the son challenges the debts incurred by the father on the ground of immorality, on the son to establish that the particular debt which he wishes to challenge was incurred for immoral or illegal purposes and this burden is not discharged merely by showing that the father was leading an extravagant or immoral life: 10 P. R. 1918; 58 P. R. 1917 and A.I.R. 1928 Lah. 83, *Foll.* (*Tek Chand and Bhide, JJ.*). SHANTI SARUP *v.* JAGIRI MAL BANSIMAL. **110 I.C. 273 (Lah.).**

———*Young man just attained majority and in affluent circumstances and leading reckless life—Loan by—Lender to prove necessity.*

In the case of a joint family the sons are liable for their father's debts even if the debts are contracted by the father for his own benefit without any legal necessity so long as the debts are not incurred for an unlawful or immoral purpose. Where, however, a young man who has just attained majority and who has inherited valuable property which would yield an income more than sufficient to keep him in comfort having regard to the position of the family and its requirements, leads on openly reckless and immoral life and borrows large sums of money which will not in the ordinary circumstances be necessary for any lawful

HINDU LAW — Debts — Immoral or illegal—Burden of proof.

purpose, Courts have thrown the burden of proving the *factum* of the loan upon money-lenders. In such a case the lender cannot get the protection which is usually given to *bona fide* lenders unless he proves that he made reasonable enquiries. It is not necessary in such a case that direct connection should be established between the debt and the necessary purpose for which it was borrowed. (*Kumaraswami Sastri, J.*). GURUMOORTHI IYER *v.* P. S. SUBRAMANIAM. **107 I.C. 401 (Mad.).**

———*Evidence Act, Ss.* 101, 102, 103—*Onus of proof is on son.*

The onus of proving illegality or immorality as affecting the debt incurred by the father is upon the sons, for after the death of their father their liability to pay the father's debt arises under the express text of the Mitakshara. (*Jwala Prasad and Adami, JJ.*). (SHEIK) KAROO *v.* RAMESHWAR SAO. **62 I.C. 905=3 P.L.T. 43=6 P.L J. 451= A.I.R. 1923 Pat. 143.**

—Debts—Immoral or illegal—Direct connection.

———*Direct connexion with money raised and immorality must be established.*

Where an alienation is sought to be impugned on the ground that it was made for immoral purposes it is incumbent on the party impeaching the alienation to prove that there was a direct connexion between the money raised and the immorality: A.I.R. 1928 Lah. 83, *Rel. on.* (*Tek Chand and Agha Haidar, JJ.*). BELI RAM *v.* SARDARI LAL. **A.I.R. 1930 Lah. 613.**

———*Connexion between transaction and immoral life must be proved.*

In cases to set aside alienations on the ground that the father led an immoral life prior to the transaction, the mere allegation that the father led an extravagant, immoral and licentious life would, even proved, not be sufficient to relieve the son but the connexion between the transaction and alleged immoral life must be proved: 21 All. 238 and 17 C.W.N. 124, *Ref.* (*Gokaran Nath Misra and Srivastava, JJ.*). INDRA BAHADUR SINGH *v.* KHAIRATI LAL. **113 I.C. 489=4 Luck. 107= 5 O.W.N. 836=A.I.R. 1928 Oudh 465.**

———*Proof of general immorality is not enough.*

Proof of general immorality and waste of money is not sufficient to invalidate an alienation by a Hindu father: 6 M.I.A. 393, *Foll.* (*Kumaraswami Sastri and Curgenven, JJ.*). RAMASWAMI PILLAI *v.* KASINATHA IYER. **108 I. C. 529= 1927 M.W.N. 356= A.I.R. 1928 Mad. 226.**

———To prove the immorality of the debt direct connexion between the debt and immorality must be shown: A.I.R. 1924 P.C. 50, *Foll.* (*Fforde and Campbell, JJ.*). ULFAT RAI *v.* TEJ NARAIN. **106 I.C. 176=8 Lah. 632=29 P.L.R. 132= A.I.R. 1928 Lah. 83.**

———*Son must connect immorality with debt.*

It is necessary for a Hindu son to connect the immorality with the debt and proof of the general immoral habits of the father mortgagor, at the time the debts are advanced, is not sufficient to justify the Court in presuming that the debt is so tainted: 30 All. 156; 2 O.L.J. 241 and 36 M.L.J. 296, *Foll.* (*Lindsay and Sulaiman, JJ.*). TULSHI RAM *v.* BISHNATH PRASAD. **105 I.C. 885= 25 A.L.J. 753=A.I.R. 1927 All. 735.**

———*Application of debt to immoral purposes need not be proved.*

Per *Kotval, A.J.C.*—It is not necessary to prove that the debts were applied to immoral purposes in

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order that the son may succeed as against the mortgagee or vendee of joint ancestral property.

The connection between the debts and the immorality can be proved by inference from evidence showing that the debts were contracted during the period of extravagant and immoral habits, but in such a case there must be definite and convincing proof that the immoral practices were contemporary with the loans and that the mortgagor could not indulge in them without the use of the borrowed amount. (*Hallifax, Kotval, Macnair and Batten, A.J.Cs.*). SHEONARAIN *v.* NATHU. **65 I.C. 786= 5 N.L.J. 114=19 N.L.R. 81= A.I.R. 1922 Nag. 1 (F.B.).**

———*Debt and the immoral purpose must be connected.*

A Hindu son must establish connexion between a particular loan and expenditure in order to exonerate himself from liability to pay his deceased father's debt: 30 All. 156 and 1 Pat. L. J. 86, *Foll.* (*Batten, J. C. on difference between Drake-Brockman, J. C. and Hallifax, A. J. C.*). GANPAT RAO *v.* LAXMI CHAND. **77 I.C. 640=6 N.L.J. 239= A. I. R. 1924 Nag. 1.**

———*Son to prove direct connection between the debt and immorality.*

To avoid liability for a debt of his father the son has to establish a direct connection between the debt and the alleged illegal or immoral purpose. The onus cast by law on the son is not discharged by evidence showing that the father was keeping a concubine and to that extent must have incurred additional expense. Direct evidence of the application ot a debt for a specific immoral purpose is not always possible to obtain and it will be sufficient if the evidence is such that the Court could infer that the debt must have been incurred for immoral purpose: 15 Cal. 717; 14 Bom. 320; 36 Bom. 68, *Foll.* (*Abdur Rahim and Moore, JJ.*). SUNDARA GOUNDAN *v.* ARUMUGA GOUNDAN. **59 I.C. 390= 12 L.W. 159.**

—Debts—Immoral or illegal—Litigation.

———*Costs of false and dishonest litigation—Sons not bound.*

Where the grounds on which the father bases his claim against other persons and also the grounds on which he resists the suit brought against him by others are false and dishonest, the sons are not liable to pay costs for which decrees are passed against the father: 20 M. L. J. 89, *Foll.*; A. I. R. 1925 Oudh 230; A. I. R. 1925 Oudh 325; 40 Bom. 126; 33 All. 472; 39 Cal. 862; 40 Cal. 288; 37 Mad. 458 and 65 P. R. 1900, *Ref.* (*Wazir Hasan and Raza, JJ.*). MAHOMED ALI *v.* JHAO LAL. **106 I.C. 392=4 O.W.N. 1069= A.I.R. 1928 Oudh 10.**

———A Hindu widow surrendered her estate in favour of a certain person. After her death, another person instituted a suit for the recovery of possession of the property. The person in whose favour the surrender had been made defended the suit but he ultimately failed,

Held, that the judgment debt was not tainted with illegality or immorality and it was open to the decree-holder to proceed in execution for costs against the ancestral property in the hands of the son of the judgment-debtor. (*Sulaiman and Boys, JJ.*). RUDRA PRATAP *v.* SHARDA MAHESH. **88 I.C. 200=23 A.L.J. 467=6 L.R.A. Civ. 321= A.I.R. 1925 All. 471.**

———A decree for mesne profits against a father under Hindu Law stands on the same footing as

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any other debt created by him and his conduct in defending a suit unsuccessfully for *mesne* profits cannot be characterised as illegal or immoral. (*Wazir Hasan, J. C. and Kendall, A.J.C.*). SHAMBU BHAN SINGH *v.* CHANDRA SHEKHAR BAKSH SINGH. **80 I.C. 17=A.I.R. 1925 Oudh 230.**

———Debts on decree passed in respect of damages for malicious prosecution is an illegal and immoral debt. A debt incurred by a father to defend himself in a criminal case may in certain circumstances be for the benefit of the family in order to save the father and consequently the family from the degradation in the eyes of thepublic : 33 All 472 34 All. 4 ; 1 P.L.T. 34 ; 1 P.L.T. 133, *Foll.* (*Jwala Prasad and Foster, JJ.*). SUNDER LAL *v.* RAGHUNANDAN PRASAD. **83 I.C. 413=3 Pat. 250=5 P.L.T. 135=A. I. R. 1924 Pat. 465.**

—Debts—Immoral or illegal—Meaning.

———*Antecedent debt is just debt when not contracted as act of reckless extravagance or wanton waste or with intention of injuring interests of reversioners.*

It is settled law that payment of an "antecedent debt" is "necessity" provided the antecedent debt is a "just one." A "just debt" has been defined as one which is actually due and which is not immoral, illegal or opposed to public policy. It means a debt not contracted as an act of reckless extravagance or of wanton waste or with the intention of injuring interests of reversioners. An alienee claiming "necessity" in respect of payment has therefore to prove that the debts were "just" in the above sense and it makes no difference whether the antecedent debts are due to himself or other parties: 65 P. R. 1 900 ; 40 Cal. 288 (P.C.) and 60 I. C. 714, *Foll.* (*Bhide, J.*). KEHR SINGH *v.* GANGA SINGH. **A.I.R. 1930 Lah. 130.**

———*Avyavaharika debt—Meaning of.*

The expression "avyavaharika" debt means a debt which is not supportable as valid by legal arguments, and on which no right could be established by the creditor in a Court of Justice : 37 Mad. 458, *Foll.* (*Wazir Hasan and Raza, JJ.*). MAHOMED ALI *v.* JHAO LAL. **4 O.W.N. 1069=106 I.C. 392=A. I. R. 1928 Oudh 10.**

———*Decree for mesne profit against father—Sons' share in joint family property can be attached in execution.*

In execution of a decree for mesne profits, the shares of the sons of the judgment-debtor, in the joint family property, are liable to be attached and sold.

A debt, which is not immoral, at its inception is binding on the son, though subsequently it may be tainted by dishonesty and immorality. Improper, imprudent, unreasonable, or dishonest debts are not necessarily immoral. But liability arising by the commission of offences by the father has been always held to be immoral. The test of benefit to the estate is not a material question for consideration as the liability of the son depends upon the nature of the act.

The liability for mesne profits is not in the nature of 'danda' or fine. The obligation is *rina* or in the nature of a debt.

(Case-law fully reviewed. Texts on the point discussed.) (*Venkatasubba Rao and Madhavan Nair, JJ.*). RAMASUBRAMANIA PILLAI *v.* SIVAKAMI AMMAL. **90 I.C. 165=21 M.L.W. 606=1925 M. W.N. 371=A.I.R. 1925 Mad. 841.**

———*Decree against father in representative capacity—Sons can plead immorality or illegality.*

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In a suit on a mortgage brought against the father in his representative capacity, father represents the entire joint family and the sons cannot re-open a decree against him except on grounds personal to themselves, *e. g.*, that the debt for which the mortgage was given was not binding on them under the Hindu Law. The sons are entitled to plead that it was illegal or immoral. They are also entitled to plead that there was no debt of their father's existing at the time at all, which was of such a nature as to justify an alienation of their shares for its satisfaction.

The term "illegal or immoral" is used as a translation of the word "avyavaharika" which includes "(promises without consideration." 39 Cal. 862, *Foll.* (*Hallifax, A.J.C.*). ARJUN *v.* CHAGGAN LAL. **72 I.C. 1044=6 N.L.J. 185=A.I.R. 1923 Nag. 300.**

—Debts—Immoral or illegal—Penalty.

———*Penalty against father—Son not bound to pay.*

The father of a Hindu family, bid a sum of money for property at an execution sale and deposited one-fourth of the sum bid but did not make good the balance. The property was resold and it fetched a very small price, whereupon the judgment-debtor applied to recover the deficiency. The father died and his son was impleaded a party in his place, and an order, was made to recover the deficiency by sale of the family property. In a suit by the son to set aside the order,

Held, that the suit must succeed. As the father and son were members of a Hindu joint family, as it was the joint family property which it was sought to make liable and as what was due from the father was in the nature of a penalty, neither the father nor the family property was liable. (*Tudball and Rafique, JJ.*). RATAN LAL *v.* BIRJ-BHUKHAN SARAN. **61 I.C. 774 (All.).**

—Debts—Immoral or illegal—Presumption.

———*Loan contracted while leading immoral life—Presumption is it was for immoral purpose.*

It is not necessary for a Hindu son, in order to absolve himself from liability, to prove not merely the purpose for which the loan by the father was contracted but also that the lender knew the immoral purpose of the loan. It will be sufficient to prove that the borrower was at the time leading a licentious life beyond his means indulging in drink, riot, prostitution and debauchery and that at the same time he was without any business or occupation upon which the money have been legitimately spent without showing on which particular act of immorality the money was spent. If it is proved clearly that at the time the borrower was notoriously wasting his substance in riotous living and spending large sums beyond his means and above his station in life in this wayonly, a loan contracted in the midst of such living, and spent upon it, would be a loan contracted for immoral purposes. (*Kumaraswami Sastri, J.*). GURUMOORTHY IYER *v.* P. S. SUBRAMANIAM. **107 I.C. 401 (Mad.).**

—Debts—Immoral or illegal—Prohibited by law.

———Debt by father when under Court of Wards and incompetent to contract debts—Son is not under pious obligation to pay it. (*Rafique and Lindsay, JJ.*). BALDEO PRASAD *v.* BINDESHRI PRASAD. **66 I. C. 128=44 All. 388=20 A.L.J. 241=A.I.R. 1922 All. 215.**

HINDU LAW—Debts—Immoral or illegal—Speculation.

—Debts—Immoral or illegal—Speculation.

———*Speculation by itself does not make the debt immoral.*

Speculation is not usually repugnant to good morals and if the transaction in question is speculative the debt cannot be considered to be tainted with immorality unless is tainted with fraud: A. I R. 1928 Oudh 10, *Rel. on.* (*Stuart, C. J. and Raza, J.*). CHOLKAO SINGH *v.* HASAN BAQAR. **119 I.C. 458=6 O.W.N. 622= A.I.R. 1929 Oudh 458.**

———Debts incurred in speculative transactions cannot be said to be immoral debts. (*Martineau and Zafar Ali, JJ.*). KHEM CHAND *v.* NARAIN DAS SETHI. **89 I.C. 1022=6 Lah. 493= 26 P.L.R. 848=A. I. R. 1926 Lah. 41.**

—Debts—Immoral or illegal—Subsequent immorality.

———The fact that managing co-parcener or father was found extravagant, vicious and generally of an immoral character after the date of borrowing money for paying antecedent debt does not affect the validity of debt contracted by him: 10 P. R. 1918; A.I.R. 1921 Lah. 205, *Ref.* (*Broadway and Jai-Lal, JJ.*). ABDUL GHANI *v.* SANSAR CHAND. **107 I.C. 385=A. I. R. 1928 Lah. 101.**

—Debts—Immoral or illegal—Surety.

———*Liability of indemnity not immoral or illegal.*

One of three Hindu brothers who formed a co-parcenary obtained certain property in settlement of a claim which the co-parcenary as a whole had as against a stranger. In so obtaining the property the co-parcener who made the settlement undertook to indemnify the common debtor in the event of any claim being made by the other brothers,

Held, that the debts arising out of the liabieity to indemnify were neither illegal nor immoral. (*Wazir Hasan, A.J.C.*). MATA DIN *v.* MAHARAJ DIN. **85 I.C. 959=12 O.L.J. 33= A.I.R. 1925 Oudh 325.**

—Debts—Immoral or illegal—Trade.

———*Antecedent debt borrowed for trade purposes is not avyavaharika.*

It is not every impropriety or every lapse from right conduct that stamps the debt as immoral. The son can claim immunity only when the father's conduct is utterly repugnant to good morals or is grossly unjust or flagrantly dishonest.

An antecedent debt borrowed for trade purposes is not an avyavaharika debt: A.I.R. 1926 Mad. 323 and A.I.R. 1925 Mad. 841, *Rel. on.* (*Venkatasubba Rao, J.*). RAJAGOPALA PILLAI *v.* P VEERAPERUMAL. **102 I.C. 680=39 M L.T. 76= A.I.R. 1927 Mad. 792=53 M.L.J. 232.**

—Debts—Liability.

———*Maintenance of Hindu widow charged on specific property takes precedence over unsecured debts binding on family.*

A simple money creditor of a joint Hindu family has no priority over a charge for maintenance over specific items of property granted to a widow by decree in the absence of fraud or collusion. An auction-purchaser, during the pendency of such maintenance suit of an item of property over which a charge was claimed in the plaint and was granted by the decree, who purchases in the execution of a simple money-decree binding on the family is not entitled to priority over another auction-purchaser of such property in the proceedings taken to execute the maintenance decree: 43 Mad. 800; 2 Bom. 494; 27 Cal. 194; 10 Mad. 283; A.I.R. 1928 Mad. 713; A.I.R. 1927 Mad. 502; A.I.R. 1927 Mad. 1092, *Rel. on*; 4 All. 296 and 5 All. 367, *Dist.* (*Wallace and Ananthakrishna Iyer, JJ.*). SEETHARAMANUJACHARYULA *v.* VENKATASUBBAMMA. **A.I.R. 1930 Mad. 824.**

HINDU LAW—Debts—Liability.

———Neither the minors nor their estate is liable for the debts by a guardian which do not purport to bind their estate: 2 N.L.R 25, *Foll.* (*Subhedar, A.J.C.*). HAZARIMAL *v.* GOVINDA. **119 I. C. 683 (Nag.).**

———Whole joint family property in the hands of the sons, is liable under decree unless debt by father is tainted with immorality: A.I.R. 1924 P. C. 50, *Foll.* (*Stuart, C.J. and Raza, J.*). CHOTKAO SINGH *v.* HASAN BAQAR. **119 I.C. 458= 6 O.W.N. 622=A.I.R. 1929 Oudh 458.**

———The interest of the minor grandson is conveyed by a sale in execution of the decree on the mortgage of the joint property obtained against the grandfather where the mortgage is executed by the grandfather for a business carried on jointly with his son. (*Madgavkar, J.*). VADILAL PURSHOTTAM *v.* KANAILAL INDERLAL. **106 I. C. 46= 29 Bom. L.R. 1441=A.I.R. 1927 Bom. 620.**

———Ancestral property is liable for the debts of a father, unless it can be shown that they were contracted for immoral purposes. (*Shadi Lal, C.J. and Broadway, J.*). MADAN MOHAN *v.* DAULAT RAM. **100 I.C. 17= A.I.R. 1927 Lah. 772.**

———*Debt contracted by father jointly with another member—Son is bound to pay.*

It is difficult to understand on what principle of the law of the Mithila School it is not the pious duty of the son or grandson to pay a debt contracted by the father or grand-father jointly with another who was a member of the joint family.

Where a debt which was charged by the mortgage bond on the joint property of the family was incurred by each of the heads of the then four branches of the joint family, and all the defendants, who were members of the joint family where their sons or grandsons,

Held, that there was no reason why the charges should not be held as binding upon the family property. (*Sir John Edge.*) SOURENDRA MOHAN *v.* HARI PRASAD. **91 I.C. 1033=24 A.L.J. 33= 1926 M.W.N. 49=5 Pat. 135=7 P.L.T. 97= 28 Bom. L.R. 1126=30 C. W. N. 482= 52 I. A. 418=42 C. L. J. 592= A. I. R. 1925 P C, 280=50 M.L.J. 1 (P.C.).**

———Debt by co parceners—Family property sold to satisfy debt—Wife of co-parcener cannot enforce right of residence unless the debt is proved to be immoral: 190 P. R. 1889; 39 P.R 1896 and 36 P.R. 1907, *Rel. on.* (*Campbell, J.*). NANKI *v.* FIRM SHAM DASS SALIGRAM. **89 I.C. 874= A.I.R. 1925 Lah. 638.**

———A man must satisfy out of the family properties in his hands, the debts contracted for legal necessity by his paternal grand-father. (*Das and Adami, JJ.*). LADU NARAIN *v.* GOBERDHAN DAS. **86 I. C. 721=4 Pat. 478=6 P.L.T. 497= 1925 P.H.C. C. 104=A.I.R 1925 Pat. 470.**

———No mortgage can be enforced against property belonging to a joint family, unless it is established that its consideration was taken for the payment of an antecedent debt independent of the mortgage or for legal necessity. (*Kanhaiya Lal, J.C.*). PRAN *v.* SHEO LAL. **26 O. C. 321= A. I. R. 1924 Oudh 135.**

HINDU LAW—Debts—Liability.

———*Father's liability for debts contracted by son.*

Where father borrowed first and then son took upon himself liability and borrowed further,

Held, the father could be made liable for debts contracted by him only if they were not time-barred as against them and for the debts contracted by the son, the father could not be made liable unless these debts were shown to be for necessary joint family purposes. (*Campbell, J.*). BALLA *v.* BARU MAL. **77 I.C. 926=A.I.R. 1923 Lah. 683.**

———*Antecedent debts and debts contracted for necessity are binding on the family.*

Where five mortgage bonds were executed by the *Karta* of a joint Hindu family and by two of his sons, of these bonds four being for antecedent debts of the *Karta* of the family reasonably binding on the family, and one bond being for family necessity, *viz.*, the marriage expenses of the son and daughter of the *Karta* of the family,

Held: that all the five mortgage debts were binding on the joint family property. (*Das and Adami, JJ.*). DEBI LAL SAH *v.* NAND KISHORE GIR. **65 I. C. 315=1 Pat. 266=3 P. L. T. 759= A. I. R. 1922 Pat. 22.**

———*Mortgage by father—Transferee from mortgagor if can question validity of debt—Sons necessary parties.*

A Hindu father mortgaged the family property to *N* and subsequently sold it to *T*. *N* brought a suit on his mortgage for sale of the property against *T* without impleading the sons of the mortgagor. *T* resisted the suit on the ground that the mortgage was not valid as the sum borrowed were not debts binding on the family property,

Held, that no proper decision regarding the validity of the transfer could be reached unless and until the sons of the mortgagor were made parties to the proceedings. (*Gokul Prasad and Lindsay, JJ.*). TIKAM SINGH *v.* NATHU. **36 I. C. 40 (All.).**

———Where a debt was incurred on behalf of the family, though only a single member, not being a manager, deals with the creditor, the creditor being ignorant of the fact that the single member was acting on behalf of the family a suit is maintainable against all the members, though the latter are liable only to the extent of their shares in the family property. (*Oldfield and Ramesam, JJ.*). VENKATA KRISHNIA *v.* A. SUBBIAH. **68 I.C. 462=14 M.L.W. 520=1921 M.W.N. 830= A.I.R. 1921 Mad. 304=41 M.L.J. 554.**

———A partition of a joint family, after a debt is incurred for the benefit of the family, does not relieve the co-parceners from liability for the debt to the extent of the family property in their hands. (*Sadasiva Iyer and Napier, JJ.*). MUTHU REDDY *v.* CHINNASAMI REDDI. **59 I.C. 685=12 L.W. 403= 1920 M.W.N. 613=28 M.L.T. 308=39 M.L.J. 486.**

———Where the ancestor is dead, the pious obligation to pay his debts is not concerned with the question whether those debts are secured or unsecured, but only with the question whether they are lawful debts not incurred for an illegal or immoral purpose. (*Daniels and Wazir Hasan, A.J.Cs.*). RAM SURAN *v.* MANGHAL SINGH. **60 I.C. 219=8 O.L.J. 87=A.I.R. 1921 Oudh 38.**

———Where two families taken together constitute a joint family, every one of them is liable for a debt binding on the joint family, although the two branches may have transactions of their own separately. (*Das and Adami, JJ.*). INDERCHAND *v.* BIDHYADHAR PANDAY. **60 I.C. 282= 2 P.L.T. 111=1921 P.H.C.C. 107= A.I.R. 1921 Pat. 48.**

HINDU LAW—Debts—Manager.

—Debts—Manager.

———*Manager signing promissory note in individual capacity—Family not liable.*

When a person executes a promissory note in his own name and not as agent acting in the name of another, the maker whose name appears in the promissory note can alone be made liable thereunder. Hence members of a joint Hindu family cannot be held liable in a suit filed on a promissory note signed by one of its members in his individual capacity even though the maker of the promissory note may be proved to be the manager of the family. (*Shingne, J.*). MANCHERSHA ARDESAR *v.* GOVIND GANESH JOSHI. **A.I.R. 1930 Bom. 424.**

———*Debts for benefit of joint family bind coparceners.*

Where it is found that a debt was incurred by the manager of the joint family for the benefit of the joint family, namely, for the discharge of a decree which was binding against all the co-parceners, such debt is binding on the share of all co parceners. (*Case-law discussed.*) A. I. R. 1922 Lah. 277, *Expl.* (*Dalip Singh, J.*). JAI KISHAN *v.* RAM CHAND. **114 I.C. 689=A.I.R. 1929 Lah. 270.**

———Bonds executed by adult members—Subsequent borrowing on bond executed by only one such member and executant not described as manager—Creditor must prove that money was borrowed on subsequent bond by him in capacity of manager and that there was necessity, or he made enquiries as to necessity. (*Macnair, Offg. J. C.*). SITARAM *v.* DOMA. **119 I.C. 674=A.I.R. 1929 Nag. 270.**

———*Lender—When to prove necessity for the loan.*

Where money is lent to the manager of joint family the question of enquiry into the necessity or of reason to believe in its existence can only arise when there is no proof of its existence or proof that it did not exist; then the lender is covered by proof that he believed it to exist, even if it did not. When the lender is familiar with all the circumstances of the family to which the money is lent and he knows whether the necessity for borrowing arose or not, the only way in which the family could be made liable in such a case would be by proof that the necessity did exist. (*Hallifax, A.J.C.*). RAMBHAN *v.* WAMAN RAO. **107 I.C. 657=A.I.R 1928 Nag. 251.**

———*Decree against manager—Manager not described as such in suit—No bar to executing decree against family property.*

Where a decree is passed against a manager of a joint family in respect of a debt contracted for family necessity and family purposes, the decree-holder is entitled to realise the debt from the joint property, no matter if the debtor is not described in the plaint as a manager: A.I.R. 1927 Oudh 27; 1 O.L.J. 456 and A.I.R. 1923 Oudh 227, *Foll.* (*Raza and Nanavutty, JJ.*). RAMESHWAR *v.* BHIHAMBARNATH SHEOKUMAR. **111 I.C. 174 (Oudh).**

———*Debt for manager's personal benefit—Other members given benefit by agreement or voluntarily—Debt not binding on family.*

It is not in the power of the *karta* of a joint family to bind the joint family by entering into speculative transactions. The question of benefit to the family must be determined by reference to the nature of the transaction and not by reference to the result thereof, although the result may properly be taken into consideration in determining whether the transaction was one into which a prudent owner would enter. Where a transaction would result in benefit to the manager personally

HINDU LAW—Debts—Manager.

and not to the family, debt incurred for the transaction is not binding. The fact that the manager, either by agreement with the family or voluntarily shares the benefit with the family makes no difference. (*Das and Adami, JJ.*). RAMCHANDRA SINGH *v.* JANG BAHADUR SINGH. **90 I.C. 553= 5 Pat. 198=7 P.L.T. 52=1926 P.H.C C. 70= A.I.R. 1926 Pat. 17.**

———Civil P. C., O. 1, R. 1—Creditor of manager of joint Hindu family suing after manager's death—All members must be impleaded in the suit if family property is to be bound by the decree. If he impleads some members only in the suit, it is not open to him to have the other members joined in execution proceedings. (*Baker, J. C.*). PESTONJI *v.* GANPAT. **89 I.C. 888=8 N.L.J. 73= A.I.R. 1925 Nag. 288.**

———A Hundi executed by manager for family purposes, *e. g.*, marriage expenses of a co-parcener is binding on all members: A. I. R. 1922 All. 116, *Cons.* (*Ryves and Daniels, JJ.*). SAHU RAGHUNATH SINGH *v.* SRINARAIN. **73 I.C. 1018= 45 All. 434=4 L.R.A. Civ. 211=21 A.L.J. 323= A.I.R. 1923 All. 424.**

———*Pro-note by manager of joint Hindu family is binding on all the members.*

The position of the head of the joint Hindu family is not the same as that of an ordinary business agent, and according to the true view, a joint Hindu family being a legal person according to Hindu Law, lawfully represented by and acting through the managing member or head thereof, is included ordinarily in the term "a person." In other words where a manager of a Hindu family executes a promissory note, such joint Hindu family is in fact the maker, and not only a member thereof who happens to have signed the document. (*Piggott and Walsh, JJ.*). KRISHNANAND NATH *v.* RAJA RAM SINGH. **66 I.C. 150=44 All. 393= 20 A.L.J. 233=A.I.R. 1922 All. 116.**

———*Karta cannot agree to pay time-barred debt.*

Karta of a joint family has no power whatever to enter into any agreement to pay a statute-barred debt. (*Das and Ross, JJ.*). SADHU SARAN PRASAD SINGH *v.* BRAHMDEO PRASAD SINGH. **61 I.C. 20= 2 P.L.T. 318=6 P.L.J. 256= A.I.R. 1921 Pat. 99.**

———Manager is one who manages the family and he can incur debts for necessity. (*Jwala Prasad and Ross, JJ.*). DHANUKDHARI SINGH *v.* RAMBIRICH SINGH. **70 I.C. 391=1 Pat. 171= A.I.R. 1922 Pat. 553.**

—Debts—Necessity—Benefit to estate.

———*Beneficial transactions prudently entered into, are binding.*

There is no justification whatever for the suggestion that the transaction entered into by the manager must necessarily be of a "defensive nature" in order to be binding on the estate. If the transaction was to the benefit of the estate and was such as a prudent owner would have carried out with the knowledge that was available to him at the time, it cannot be set aside. The degree of prudence would be the prudence which an ordinary man would excercise with the knowledge available to him; and the transaction would have to be judged not by its results but by what might have been expected to be its results at the time it was entered into. The decree of prudence to be demanded might well be held to be that which would be demanded in ordinary cases from a trustee: A.I.R. 1917 P.C. 33, *Expl.*; 6 M.I.A. 393 (P.C.). *Appl.*; 20 C.W.N. 645 and 19 O.C. 100, *Appr.*; A.I.R. 1925 All. 333; A.I.R. 1923 All. 298; A.I.R. 1928 All. 403 and A.I.R. 1928 All. 447: *held to be not good law.* (*Boys, Kendall and King, JJ.*). JAGAT NARAIN *v.* MATHURA DAS. **116 I.C. 484=50 All. 969= 26 A. L.J. 841=A.I.R. 1928 All. 454 (F.B.).**

HINDU LAW — Debts— Necessity — Benefit to family.

—Debts—Necessity—Benefit to family.

———*Suit to challenge widow's alienation—Expenses therefor are not for family benefit.*

A suit instituted by certain members of a joint family for a declaration that a transfer by a Hindu widow was not binding on them is really one to enforce a personal right of the individual members and so a loan for the purpose of vindicating such a right cannot bind joint family property as it cannot be said that the family was being benefitted by the loan. (*Banerji and King, JJ.*). SUNDAR KUNWAR *v.* BALDEO PRASAD. **117 I.C. 103= 1929 A.L.J. 960=A. I. R. 1929 All. 623.**

———There is no presumption that a debt when contracted by manager is contracted for the benefit of the family. The creditor must prove that it was incurred for the benefit of the whole family: A.I.R. 1922 Lah. 200; A.I.R. 1924 Lah. 44 and A.I.R. 1925 Lah. 141, *Foll.* (*Addison and Agha Haidar, JJ.*). SOTAM RAM *v.* PARDHUMAN RAM. **105 I.C. 785= 8 Lah. 673=9 L.L.J. 362= 28 P.L.R. 561=A.I.R. 1928 Lah. 103.**

———An instalment bond by which payment by easy instalments was spread over 12 years was executed in order to secure the payment to plaintiff of a large sum of rent that had already accrued due to the plaintiff,

Held, the benefit of the family was apparent on the face of the transaction. (*Das and Macpherson, JJ.*). MUNDO SINGH *v.* MAHANTH KRISHA DAYAL GIR. **75 I. C. 98=1924 P.H.C.C. 67= A.I.R. 1924 Pat. 439.**

———Mortgage of family property to obtain money to purchase zemindari shares, the purchase being for the benefit of the family binds all the members. The mortgagee need only prove that he was told that zemindari shares were to be purchased and that he believed it to be true. Mortgage of property to pay off a prior mortgage, the validity of which is admitted, and the prior mortgage, both are binding on the family. (*Banerjee and Sulaiman, JJ.*). TULARAM *v.* TULSI RAM. **60 I.C. 3= 42 All. 559=18 A.L.J. 699.**

———*Father's debt for family benefit—Pious obligation.*

Where a Hindu father incurs debts for the benefit of the family; and the debts are not tainted with immorality, such debts are binding on his son by reason of the pious obligation attaching to him to pay the debts of his father.

A mortgage of family property for the payment of a previous mortgage debt, which saves the family property from sale is binding on the family. (*Piggott and Kanhaiya Lal, JJ.*). LACHMI NARAYAN *v.* DEOKI. **59 I.C. 797 (All.).**

———Debts incurred by rich family for purchasing war bonds in order to be assured of fixed income are binding on family. (*Kotval and Prideaux, A.J.Cs.*). NIMBAJI *v.* KISANLAL. **65 I.C. 668=A.I.R. 1921 Nag. 172.**

———*Loan to save family business—Necessity presumed.*

Where the manager borrows money to save the family property and to remove the fear of disturbance likely to be caused in the family business, the existence of necessity may be presumed, where there is nothing to show that the lender acted

HINDU LAW — Debts— Necessity — Burden of Proof.

otherwise than in good faith. If a previous loan on a pro-note by manager binds the family, a subsequent mortgage in lieu of it cannot be impeached. (*Stuart and Kanhaiya Lal, A.J.Cs.*). BALAK RAM *v.* RAM SUNDAR. **60 I.C. 410=7 O.L.J. 530= 2 U.P.L.R. (J.C.) 168.**

—Debts—Necessity—Burden of Proof.

———Manager has limited authority for borrowing on family property—Burden of proof is on lender to prove that the borrowing and the terms were within the authority. (*Viscount Sumner.*) SUNDER MULL *v.* SATYA KINKAR SAHANA. **108 I.C. 337=7 Pat. 294=55 I.A. 85= 26 A.L.J. 364=9 P.L.T. 203= 27 M.L.W. 461=1928 M.W.N. 242= 5 O W.N. 400=47 C.L.J. 403= 30 Bom. L.R. 793=32 C.W.N. 657= A.I.R. 1928 P.C. 64=54 M.L.J. 427 (P.C.).**

———Where it is sought to bind the joint family property by debts incurred by the manager, the burden of proving necessity for the loan is on the creditor : 6 M. I. A. 393, *Ref.* (*Mr. Ameer Ali.*) GAJADHAR *v.* AMBIKA PRASAD. **87 I.C. 292=6 L.R.P.C. 126=1925 M.W.N. 532= 22 M.L.W. 306=47 All. 459=41 C.L.J. 450= 27 Bom.L.R. 853= A.I.R. 1925 P.C. 169= 49 M.L.J. 238 (P.C.).**

———In suits by creditors for money due from joint family no general and inflexible rule can be laid down; the presumption proper to be made will vary with circumstances and must be regulated by and dependent on them: 23 Cal. 766 (P.C), *Foll.* (*Broadway and Zafar Ali, JJ.*). CHALA RAM *v.* KISHEN CHAND. **88 I.C. 762= A.I.R. 1923 Lah. 462.**

—Debts—Necessity—Interest.

———Rate of interest 2 per cent. per month on an unsecured debt though heavy, is not unconscionable or unenforceable in law : A.I.R. 1918 P. C. 249 *Rel. on.* (*Bhide, J.*). MARYAM SINGH *v.* INDAR SINGH. **116 I.C. 306=A.I.R. 1929 Lah. 242.**

———*Rate of interest higher than ordinary rate—Lender must prove necessity for such rate.*

The necessity for a manager to borrow money confers upon him authority to borrow upon reasonable commercial terms and no further. If the rate does appear to be high, that is in excess of ordinary commercial rates, the lender will have to prove the necessity for such a rate. If the rate does not appear to be high and no evidence has been led on behalf of the borrower to show that it was not justified by legal necessity, according to the circumstances that prevailed at the time when the money was borrowed, there would be no occasion for interference by the Court: 41 All. 571; A. I. R. 1923 P. C. 37 and A. I. R. 1924 P. C. 184, *Foll.* (*Wazir Hasan and Gokaran Nath Misra, JJ.*). GAJRAJ SINGH *v.* MT. MULANKUAR. **105 I.C. 593=4 O.W.N. 981= A.I.R. 1927 Oudh 521.**

———*Debts by manager—Necessity for loan and also for high rate must be established.*

It is incumbent on those who support the mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow but it was not unreasonable to borrow at a high rate and upon particular terms and if it was not shown that there was any necessity to borrow at the rate and upon the particular terms as were contained in the mortgage-deed that rate and those terms cannot stand: 41 All. 571 (P. C.), *Rel. on.* (*Stuart, C. J. and Misra, J.*). KIDAR NATH *v.* BHIKHAM SINGH. **92 I.C. 679=13 O.L.J. 338.**

HINDU LAW—Debts—Necessity—Interest.

———*When lender should justify high rate of interest.*

The manager of a joint family, whether the father or not, is not entitled in law to borrow money at an exhorbitant rate of interest unless there is necessity for such a rate, and if the rate of interest is excessive, the onus will be on the lender to show that there was necessity for such an onerous rate. If the manager, *bona fide* is in urgent necessity for money and cannot get it at a lower figure, then he is in law justified in borrowing at that figure, and the aftermath of that transaction due to the accumulation of the interest to a huge amount on account of the non-payment of interest by the manager is irrelevant to the consideration of whether he was justified or not in borrowing at the rate of interest at which he borrowed. The onerous nature of the interest would only be justified reasonably if the necessity for the money at the time of the loan was really urgent. The more urgent the need the less unjustifiable a high rate of interest will be. Both questions are, questions of fact to be decided by the circumstances of the case. Those attacking the transactions must first show *prima facie* that the rate of interest is unnecessarily high for the circumstances of the case. It may be that in certain cases the original rate of interest is *prima facie* so excessive that proof is practically unnecessary and that the plaintiff must know that it is his duty to show necessity for it. But in other cases it may be that the rate, although high, is not so high that the plaintiff should reasonably take it for granted that he has to explain it, even though the Court does not call upon him to do so. In such a case he cannot reasonably be mulcted if he does not explain it: 35 M.L.J. 614, *Foll. Case-law discussed.* (*Odgers and Wallace, JJ.*). PERRAJU GARU *v.* SITARAMACHANDRARAJU GARU. **90 I. C. 458=22 M.L.W. 568= A.I.R. 1925 Mad. 897=48 M.L.J. 584.**

———Where a Hindu mother acting as the guardian of her minor son borrowed a small sum of Rs. 90 for family necess ity by mortgaging a substantial security and agreed to pay interest at 12 per cent. per annum compoundable every six months,

Held : in the circumstances of the case that there was no justification for the rate of interest undertaken to be paid and that a decree for simple interest at 6 per cent. per annum would serve the ends of justice. (*Wazir Hasan, A.J.C.*). CHANDRIKA PRASAD *v.* RAM SAGAR. **89 I.C. 567= 2 O.W.N. 425=12 O.L.J. 565= A.I.R. 1925 Oudh 459.**

———*Manager, debts by—Creditor should prove necessity for rate of interest as well as for principal sum, as against other co-parceners.*

When a contract entered into by a head member is sought to be enforced against the other members on the ground of necessity, it must be shown not only that there was necessity to borrow the principal sum, but also for the rate of interest agreed upon ; in other words, that it was impossible for the *karta* or head member to obtain loan for family necessity at a rate of interest lower than that agreed upon. The question of necessity is one of fact, and as in the case of principal debt so in the case of interest necessity has to be proved by evidence. (*Jwala Prasad and Kulwant Sahay, JJ.*). PARMESHWAR PANDEY *v.* RAJ KISHORE PRASAD. **80 I. C. 34=3 Pat. 829= 5 P.L.T. 646=A.I.R. 1925 Pat. 59.**

———Where the rate of interest is unduly high, a creditor in order to bind the estate must prove not

HINDU LAW—Debts—Necessity—Litigation.

only the necessity for the loan but the necessity to borrow it at an extravagant rate: 41 All. 571 (P.C.). *Foll.* (*Ryves and Daniels, JJ.*). SAHU RAGHUNATH SINGH *v.* SRINARAIN.
73 I.C. 1018=45 All. 434=21 A.L.J. 323=4 L.R.A. Civ. 211=A.I.R. 1923 All. 424.

—Debts—Necessity—Litigation.

———There is no rule of Hindu Law which recognises that the borrowing of money for the purpose of maintaining a suit to recover an estate which has never belonged to the joint family is a legal necessity. Where the benefit of the compromise of the suit went only to one member, the debt incurred to maintain the suit is not binding on the family. (*Rafique and Lindsay, JJ.*). BHAGWAN DAS *v.* MAHADEO PRASAD. **71 I.C. 959=21 A. L. J. 271=45 All. 390=4 L.R.A. Civ. 156=A.I.R. 1923 All. 298.**

———*Defence of manager in a criminal charge against him is legal necessity.*

Debts incurred by the manager in defending himself against a criminal charge are payable by the family: 34 A. 4 and 4 P.L.J. 653, *Foll.* In such case, it is not the creditor's business to determine the amount the manager chooses to expend in his defence. (*Kotval and Prideaux, A.J.Cs.*). NIMBAJI *v.* KISANLAL. **65 I.C. 668=A.I.R. 1921 Nag. 172.**

—Debts—Necessity—Marriage.

———*Debt for marriage of co-parcener or sister is for legal necessity.*

A debt contracted for the marriage of a co-parcener in a joint Hindu family is binding on other co parceners. By the general principles of Hindu Law a minor is under an obligation to provide out of the family property the funds necessary for performing the marriage of his sister. (*Martineau, J.*). DADAR SINGH *v.* BANSI. **85 I.C. 741=A.I.R. 1925 Lah. 520.**

———Marriage expenses though lavish and improvident from a European's point of view are justified if they are in consonance with the position and prestige of the family. (*Dawson-Miller, C.J. and Bucknill, J.*). HARI PRASAD SINGH *v.* SURENDRA MOHAN SINGH. **66 I.C. 945=1 Pat. 506=3 P.L.T. 709=A.I.R. 1922 Pat. 450.**

———Marriage is obligatory on Hindus and the debts reasonably incurred for the marriages of a twice-born Hindu male are binding on the joint family properties: 37 Mad. 273 (F.B.); 32 All. 575; 32 Bom. 81, *Foll.* (*Das and Adami, JJ.*). DEBI LAL SAH *v.* NAND KISORE GIR. **65 I. C. 315=1 Pat. 266=3 P. L. T. 759=A. I. R. 1922 Pat. 22.**

—Debts—Necessity—Proof of.

———Mortgage suit—Mortgagor pleading want of legal necessity — Mortgage containing no recital showing purpose of debt—Mortgagee's evidence that it was for family expenses believed by trial Court—All adult members were executants—Mortgage being old document and mortgagee being dead—Mortgagors not entering witness box—Trial Court's view that it was for legal necessity was not interfered with. (*Sulaiman and Kendall, JJ.*). HARI RAM *v.* GOKUL PRASAD. **A.I.R. 1930 All. 624.**

———In a case where transaction is very old the evidence required to prove the necessity of the transaction need not be so complete as in the case of a more recent transaction: A.I.R. 1916 P.C. 110, *Foll.* (*Phillipps and Srinivasa Ayyangar, JJ.*). NATESA PILLAI *v.* MEENAKSHISUNDARA MUDALIAR. **109 I. C. 96 (Mad.).**

HINDU LAW—Debts—Necessity—Proof of.

———Where money was first borrowed as early as 1873 and evidence as to the actual necessity had disappeared, subsequent admission of its validity would be a very strong piece of evidence as to necessity. (*Lindsay and Sulaiman, JJ.*). INAYAT ELAHI *v.* HARDEO SAHAI. **74 I. C. 325=45 All. 692=21 A.L.J. 610=5 L.R.A. Civ. 61=A.I.R. 1924 All. 29**

———*Filing suit to set aside alienation at the close of the period of limitation.*

Where a suit to set aside alienation by father on the ground among others, of want of necessity is filed at the close of the period of limitation although it is within limitation, yet the conduct of the plaintiff in instituting the suit after such a long time, that is, just at the close of the period prescribed, is an important factor in determining the nature of the transaction and in finding out whether the alienation was or was not for necessity. The mere fact that the area of the property comprised in the mortgage forming the antecedent debt is not known does not justify an inference of want of necessity. (*Moti Sagar, J.*). DALGIT SINGH *v.* HARI CHAND. **78 I.C. 11=A.I.R. 1923 Lah. 669.**

———Necessity proved—Absence of enquiry is immaterial. (*Broadway and Zafar Ali, JJ.*). CHALA RAM *v.* KISHEN CHAND. **88 I.C. 762=A I. R. 1923 Lah. 462.**

———*Long series of transactions—Chronic need of money is enough proof—Payment of decree is necessity.*

Where there has been a long series of transactions it is not always possible to prove exactly the purposes for which any particular item was borrowed, and, in such a case, it is sufficient for the creditor to show that the family was in chronic need of money and that the moneys were advanced on the representation of the manager that they were needed for such objects. Moreover, where the necessity arises from the pressure of a judgment-debt, the person dealing with the manager of a joint family is entitled to treat the judgment as *prima facie* proof of necessity and he is under no obligation to go behind the judgment in order to enquire whether the debt covered by the decree was for legal and binding necessity of the family. (*Das and Kulwant Sahay, JJ.*). DUKHIT OJHA *v.* JANKI SINGH. **71 I.C. 489=4 P.L T. 377=A.I.R. 1923 Pat. 443.**

———*Long undisturbed possession by mortgagee is enough proof.*

Where in a suit on a mortgage it was proved that the mortgage had been executed to pay off a previous debt of the joint family and that the mortgagee had been in possession of the mortgage land for twenty-five years without objection by the defendants who were adult members of the joint family,

Held, that the conduct of the defendants amounted to acquiescence and no further proof of necessity, was under the circumstances required. (*Adami and Bucknill, JJ.*). RAM CHOWDHRY *v.* TILAK CHOWHDRY. **60 I.C. 387 (Pat.).**

—Debts—Son's liability.
Barred debts.
Commercial debt.
Devolves on successor.
Extent of.
Father's insolvency.
Interest.
Misappropriation.
Mother's debts.
Partition.
Pious duty.

HINDU LAW — Debts — Son's liability—Barred debts.

Pre-birth.
Surety.
When enforceable.
Miscellaneous.

—Debts—Son's liability—Barred debts.

———*Agreement to pay barred debt is legal.*

Son's agreement to pay time-barred debt of his father is not illegal, for the whole estate in the hands of the son would be liable for the father's debts. There was, therefore, a moral obligation to pay the amount, and even if there was no fresh consideration at the time of acknowledgment, the debt would not be illegal. (*Phillips and Odgers, JJ.*). RAJAMIER *v.* SUBRAMANIAM CHETTIAR.
116 I.C. 827=52 Mad. 465=30 M.L.W. 36= A.I.R. 1928 Mad. 1201.

———Pious obligation of sons does not extend to paying time barred debts. (*Stuart, C.J. and Wazir Hasan, J.*). BRAMHADIN *v.* RAM LAKHAN.
99 I.C. 215=3 O.W.N. 980= A.I.R. 1927 Oudh 52.

———Pious obligation of son does not exteud to time-barred debts of father. (*Dawson-Miller, C. J. and Foster, J.*). ACHUTAN AND JHA *v.* SURJANARAIN JHA.
93 I.C. 991=5 Pat. 746= 7 P.L.T. 719=1926 P.H.C.C. 274= A.I.R. 1926 Pat. 427.

———A son is not bound to repay the time barred debts of his father. (*Baker, J.C. and Hallifax, A.J.C.*). CHITNAVIS *v.* NATHU SAO. **79 I.C. 1002= 20 N.L.R. 106= 7 N.L.J. 170=A.I.R. 1925 Nag. 2.**

———*Payment of time-barred debt by father is not immoral.*

The payment of a time barred debt by a Hindu father could not in any sense be treated as an improper act or. to use the stock phrase, a transaction tainted with immorality. Alienation of joint property made for such payment is binding on the sons and grandsons: 13 Mad. 189; 11 Bom. 320; 21 Cal. 190, *Ref.*

Per *Sulaiman, J.*—A mortgage-deed executed by a father of a joint Hindu family in consideration of an antecedent debt which had become time-barred is not binding upon the sons. When a debt has become time barred it has ceased to be a legal debt and, even though the Hindu Law does not recognise the principle of limitation the sons can take advantage of the statute of limitation which makes such debt unenforceable. To hold otherwise would be to extend to an unprecedented extent the exception laid down by Sahu Ram's case to the general rule that if the debt is not for the benefit of the estate, and alienation of the estate for the payment of the debt is bad: 8 A. L. J. 1099, *Foll.* The cases where an alienation by a Hindu widow in lieu of time-barred debts of her husband was supported, may be distinguished on the ground that thereby she had conferred a spiritual benefit on her deceased husband. (*Lindsay and Sulaiman, JJ.*). B. GAURI SHANKER *v.* PDT. SHEO NANDAN. **78 I.C. 911= 46 All. 384=22 A.L.J. 369=5 L.R.A. Civ. 306= A.I.R. 1924 All. 543.**

———*Contract Act, S.* 25 (3).

According to the Hindu Law as well as under S. 25 (3), Contract Act, the execution of bonds by the father in exchange of time-barred debts is binding on the son. (*Gokul Prasad and Stuart, JJ.*). RAM KISHEN RAI *v.* CHHEDI RAI.
68 I.C. 235=20 A. L. J. 577=44 All. 628= A.I.R. 1922 All. 402.

HINDU LAW—Debts—Son's liability—Commercial debt.

—Debts—Son's liability—Commercial debt.

———*Father carrying on new business—Liability of sons for business debts—Pious obligations.*

Where the father carries on a non-ancestral business and it appears that the business is not for the benefit of the family and that the members of the family did not take the benefit thereof, the debts contracted by the father in connection with the business can be enforced against the sons only on the footing of the son's pious duty to discharge the father's obligations. (*Kumaraswami Sastri and Reilly, JJ.*). SUBRAMANIA MOOPANAR *v.* SUBBIAH AIYAR. **1930 M.W.N. 658.**

———Where a Hindu father was conducting an ancestral trading business and the sons were sought to be made personally liable in respect of a trade debt,

Held, that the sons could be made personally liable only if it was established that they were partners in the trade for which the suit debt was contracted. (*Coutts-Trotter, C. J. and Viswanatha Sastri, J*). BALA VENKATA SITARAMA CHETTIAR *v.* SIVAGURUNATHA CHETTY. **1930 M.W. N. 371.**

———*Father—Debt incurred on personal concern—Debt not binding on sons.*

The mortgage created on joint property to meet the debt incurred by the father of a joint Hindu family, not for the purposes of the "joint family business," but for a business started and continued as his own and personal concern, does not bind his minor sons: A.I.R. 1922 P. C. 237, 6 M.I.A 393 and A.I.R. 1917 P.C. 33, *Rel. on*; A.I.R. 1927 P.C. 121; A. I. R. 1928 All. 403; A.I.R. 1929 Bom. 251; A.I.R. 1922 Mad. 236 and A.I.R. 1929 Pat. 422, *Ref.* (*Wazir Hasan and Srivastava, JJ.*). MUNESHWARENDRA NATH *v.* RAM DIN.
7 O.W.N. 112=A.I.R. 1930 Oudh 85.

———*Pious obligation applies even to speculative transactions.*

The father who is also manager of the joint family business can incur debts for the business in speculative transactions as they cannot be said to be immoral, and thus the pious obligation of sons to pay their father's debts extends to commercial debts also: A.I.R. 1926 Lah. 41 and A.I.R. 1926 Mad. 323, *Foll.* (*Addison, J.*). MAULUK CHAND KISHANJI *v.* DAYA KISHAN.
106 I. C. 183 (Lah.).

———Debt for money due for goods supplied for family business binds co-parceners: A.I.R. 1921 Lah. 61, *Foll.* (*Martineau, J.*). RAM GOPAL *v.* BHAN RAM MANGAL CHAND. **94 I.C. 163. (Lah.).**

———*Sons are liable for commercial debts of father.*

The pious obligation of sons to pay father's debts extends to commercial debts.

Per *Coutts Trotter, C.J.*—The whole doctrine of the pious obligation is itself a relic of antiquity based originally on a religious and not a legal conception but it has been controlled and moulded into shape by a series of decisions which make it a working rule which in its actual application is neither inconvenient nor unjust. (*Coutts-Trotter, C.J. and Viswanatha Sastri, J.*). ATCHUTAN *v.* RATNAJI. **92 I.C. 977=49 Mad. 211= 23 M.L.W. 193=1926 M.W.N. 258= A.I.R. 1926 Mad. 323=50 M.L.J. 208.**

———Trade debts incurred by the father are just claims on son's shares. (*Venkatasubba Rao, J.*). ACHYUTAN *v.* SURAYYA. **79 I.C. 902= 1924 M.W.N. 485=A.I.R. 1924 Mad. 845.**

HINDU LAW—Debts—Son's liability—Commercial debt.

———*Ancestral business—Even minor members are liable.*

Obiter.—It is settled law that in the case of an ancestral business all members of a Hindu joint family including minors are liable for debts incurred in the course of business to the extent of their shares in the family property: 34 B. 72, *relied upon.* (*Prideaux, A.J.C.*). RATANLAL *v.* JAIDEO.

75 I.C. 820=A.I.R. 1924 Nag. 123.

———Trading family—Debts for business purposes are binding. (*Kotval and Prideaux, A. J. Cs.*). NIMBOJI *v.* KISANLAL. **65 I.C. 668=A.I.R. 1921 Nag. 172.**

—Debts—Son's liability—Devolves on successor.

———*Widow succeeding to her son is bound to pay her husband's debts.*

There may be no pious obligation on a mother, succeeding to the estate of her son, for the payment of the debts due by her husband but if the son has succeeded to the estate of his father, the person (in this case, the mother) who succeeds such son is as much liable for the payment of the debt due by his father, to the extent of the family property, unless it is tainted with immorality, as a person who would directly succeed to the property on his death. If a son is under a pious obligation to pay the debts of his father; it does not appear how the liability dies on the death of the son, if he leaves property, which had devolved on him on the death of his father, in the hands of those who succeed to his estate, even though it may not have amounted to a charge: A.I.R. 1921 All. 163, *Ref.* (*Kanhaiya Lal, J.C.*). SHEO NANDAN *v.* SHEO BALAK.

71 I.C. 974=10 O.L.J. 303=A.I.R. 1923 Oudh 251.

—Debts—Son's liability—Extent of.

———*Money-decree against father—Properties ambiguously described in execution—Son's share also liable.*

Where money-decrees are obtained against a father and the properties attached, even when there is ambiguity in the description of the properties such as by the use of the words right, title and interest of the judgment-debtor, still it must be taken *prima facie* that the intention in the execution proceedings is to proceed against the whole of the interest that may be proceeded against on account of the Hindu Law rule that a father's debts may be executed against the son. There may be some special circumstances in some cases to show that the execution proceedings were limited to a particular share of interest. Where no such limitation expressly appears, all that the sons can claim is to show that the debt was illegal or immoral or that the debt never existed, and the moment they fail to prove any of the specific circumstances, their claim must fail: 13 Cal. 21 (P.C.); 12 Mad. 142 (P.C.); 17 Cal. 284 (P.C.); 14 Cal. 572 (P.C.) and A.I.R. 1927 Mad. 311, *Foll.* (*Ramesam and Jackson, JJ.*). SUBRAMANIA PILLAI *v.* VENKATARAMA REDDI. **120 I.C. 375=1929 M.W.N. 776=A.I.R. 1930 Mad. 257.**

———Mortgage by father—More than one-fifth consideration found not binding—Mortgage is binding at least to the extent of consideration found binding. (*Staples and Subhedar, A.J.Cs.*). BABURAO *v.* PANDHARINATH. **120 I.C. 326=A.I.R. 1930 Nag. 43.**

———Debts by father—Bombay School—Secured creditor can limit security to father's interests and claim money-decree for balance enforceable against son's share. (*Rupchand and Wild, A.J.Cs.*). GANGARAM RAMDAS *v.* LALUMAL CHANDUMAL. **A.I.R. 1930 Sind 138.**

HINDU LAW—Debts—Son's liability—Extent of.

———*Debts, by father are binding on sons unless they are immoral or illegal*

In a suit brought by a minor son and a wife of a person against him and his creditors for a partition and declaration that certain decrees, attachments and mortgages were not binding on them on the ground that the debts were incurred by the person for immoral and illegal purposes, the whole estate is *prima facie* liable for the debts unless it is proved that the debts were so incurred. (*Jackson, A.J.C.*). BABURAO *v.* NARAYANRAO.

119 I.C. 687=A.I.R. 1929 Nag. 283.

———A son cannot be made liable for debts incurred by his father in a personal capacity such as a lambardar, nor can he be made liable for negligence shown by the father in that personal capacity, unless he has personal assets of the father in his hands: 40 All. 246, *Ref. to.* (*Ashworth, J.*). BHAGWATI SARAN *v.* DEOSARAN SINGH. **107 I.C. 702=9 L.R.A. Rev. 23=A.I.R. 1928 All. 166.**

———*Father's tort—Sons liability.*

A Hindu son can be held liable for torts committed by his father during the latter's life-time only to the extent to which the family estate has been benefited: *Phillips* v. *Homfrey*, (1883) 24 Ch. D. 439. *Foll.* (*Case-law considered.*)

Such liability does not amount to a debt which he is bound to discharge, and is distinct from obligations legally incurred in consequence of a contract or quasi-contract. (*Findlay, J.C. and Macnair, A.J.C.*). DEOBA *v.* BABAIA. **103 I.C. 809=23 N.L.R. 134=10 N.L.J. 251=A.I.R. 1927 Nag. 337.**

———*Liability extends to grandsons and great-grandsons.*

It is beyond question that under the law of the Mitakshara the great-grandson is as much a member of the joint family as a son or grand-son. It is also clear that the right in ancestral property extends to four generations beginning with the father, and that this right springs from "birth."

Under the law of the Mitakshara the rights of descendants are co-extensive with their obligations. Sons and grandsons are expressly declared to have controlling rights in respect of ancestral estate.

The Hindu lawyers appear to have made a difference in the obligations resting upon sons, grandsons and great-grandsons. The son was bound to discharge the ancestral debt as his own, principal and interest, whether he received any assets or not from the ancestor. The grandsons had to discharge the debt without interest and the great-grandson's liability arose only if he received any assets from the ancestor.

The British Indian Courts have held that the son and grandson are not liable for any debt unless they receive assets and that the obligations of each of them, sons and grandsons, are co-extensive. In the case of *Brij Narain* v. *Mangala Prasad*, A.I.R. 1924 P.C. 50; 46 All. 95, the son's liability is expressly laid down, and that rule extends equally to grandsons and great-grandsons: 19 All. 26 (F.B.), *Expl.* (*Mr. Ameer Ali.*) MAIST ULLAH *v.* DAMODAR PRASAD. **98 I.C. 1031=48 All. 518=53 I.A. 204=25 A.L.J. 1=28 Bom. L.R. 1402=44 C.L.J. 321=24 M.L.W. 551=7 P.L.T. 815=31 C.W.N. 293=1926 M.W.N. 816=3 O.W.N. 721=38 M.L.T. 77=A.I.R. 1926 P.C. 105=51 M.L.J. 792 (P.C.).**

HINDU LAW—Debts—Son's liability—Extent of.

———*Sons are bound to pay father's debt if not illegal or immoral.*

If the managing member of a joint undivided estate inours debt, his sons are liable for the payment of the debt to the extent of the estate of the joint family, provided that the debt is not tainted with immorality or illegality: A.I.R. 1924 P. C. 50, *Foll.* (*Shadi Lal, C.J. and Malan, J.*). GIRDHARI LAL *v.* KISHE CHAND. **85 I. C. 463=5 Lah. 511= A.I.R. 1925 Lah. 240.**

———Both son and grandson are equally liable to pay the antecedent debt. (*Wazir Hasan and Kendall, A.J.Cs.*). MADHO PRASAD *v.* NIAMAT. **84 I.C. 501=11 O.L.J. 579=27 O.C. 366= A.I.R. 1925 Oudh 185.**

———*In execution of a mortgage-decree, son's share can be sold.*

It is only when a son seeks to avoid liability, that he has to prove that the debt incurred by his father was an immoral one. A money-decree against a Hindu father when the debt was neither illegal nor immoral, whether it was incurred for family purposes or not, could be enforced in the lifetime of the father by sale in execution of the entire co-parcenary estate and is binding on the sons. Although the share of the minors in the mortgaged property cannot be considered as charged with the debt *qua* mortgage, nevertheless the entire co-parcenary estate can be brought to sale in execution of the money-decree against the father whose share in the mortgaged property would remain charged in any event. However, although the shares of the sons in the mortgaged property are not liable to be proceeded against *qua* mortgage, nevertheless in execution of the decree the entire co-parcenary estate including the property mortgaged can be brought to sale. (*Broadway and Campbell, JJ.*). HARKISHEN SINGH *v.* THE LAHORE BANK, LTD. OF AMRITSAR IN LIQUIDATION. **69 I.C. 552= A.I.R. 1924 Lah. 263.**

———The whole of the ancestral property and not merely father's share can be sold under a decree passed in terms of S. 53 of the Code of Civil Procedure: 43 Bom. 612; 3 P.L.J. 533; 48 Cal. 341; 46 Mad. 64; 44 All. 649, *Ref.*; 16 C.L.J. 85, *Foll.* (*Daniels, J.C. and Wasir Hasan, A.J.C.*). BHAGWATI SAHAI *v.* MAHARAJ PRAGDIN. **81 I.C. 15=27 O.C. 111=11 O.L.J. 202= A.I.R. 1924 Oudh 393.**

———*Pious obligation—Sons to pay all debts of father unless they are immoral or illegal.*

Where the debts contracted by father were not incurred for legal and justifying necessities of the joint family or for the benefit of the sons and it was also not found that the debts were incurred for immoral purposes,

Held: that the minor sons were bound to satisfy their father's debt on the theory of the pious obligation of the sons to pay their father's debt even in the father's lifetime. Their liability is however limited to the extent of the co-parcenary property of the joint family: 41 Mad. 136 and 43 Bom. 612, *Ref*; 39 All. 437 (P.C.), *Disc.* (*Kulwant Sahay and Foster, JJ.*). DEBENDRA CUMAR *v.* FYZABAD BANK LTD. **75 I.C. 53=3 Pat. 63= 4 P.L.T. 516=A.I.R. 1924 Pat. 94.**

———Hindu father dying after decree against him—Decree can be executed against ancestral property in hands of son.

The existence of unsatisfied decree on the date of the (judgment-debtor) father's death is evidence of the existence of a debt which it is the pious duty of the son to satisfy. The ancestral property

HINDU LAW—Debts—Son's liability—Father's insolvency.

in the hands of the son is liable under Hindu Law for the payment of this debt unless and until the son could prove that there was in fact no debt at all or that the debt was tainted with immorality. (*Piggott and Walsh, JJ.*). RAMANAND SHUKUL *v.* CHHOTEY LAL. **71 I.C. 417= 20 A.L.J. 969=4 L.R.A. Civ. 31= A.I.R. 1923 All. 124.**

———*Son to pay debts not illegal or immoral.*

The sons are bound to pay the decreed debt of their father under the Hindu Law. The liability of theirs is a personal one, and it is not barred up to six years from the date of the decree. The rule of Hindu Law is that where a son or a grandson takes ancestral property by survivorship, he is bound to pay out of such property all debts of his ancestor not incurred for immoral or illegal purposes including the judgment-debts. (*Jwala Prasad and Adami, JJ.*). SHEIK KAROO *v.* RAMESHWAR SAS. **62 I.C. 905=3 P.L.T. 43= 6 P.L.J. 451=A. I. R. 1923 Pat. 143.**

———A mortgage by Hindu father to discharge debts contracted for immoral purposes does not bind the son's interest in the family. (*Walsh and Ryves, JJ.*). GOKUL SINGH *v.* GOKUL SINGH. **62 I.C. 111=3 U.P.L.R. (A.) 14.**

———*Personal decree against father—Debt not immoral or illegal—Execution can be levied against the entire property.*

The decision of the Privy Council in *Sahu Ram Chandra's case*, 39 All. 437 (P.C.) has not overruled the long line of cases according to which a creditor who has obtained a personal decree for money against a Mitakshara father, the debt not being tainted with immorality, is entitled to levy execution against the entirety of the joint family property. Hence a decree passed personally against a Mitakshara father for a debt not justified by legal necessity and not immoral or illegal can be executed against the entire joint family property. (*Case-law reviewed*). (*Richardson and Shamsul Huda, JJ.*). MADHUSUDAN DAS *v.* ISWARI DAYI. **61 I. C. 25=48 Cal. 341=A.I.R. 1921 Cal. 152.**

—Debts—Son's liability—Father's insolvency.

———*Property re-acquired by sons after adjudication of father—Only father's share vests in the Receiver.*

Where joint family property passes out of the family, under a genuine transfer, before an application to adjudge the father of the joint family, an insolvent, is made, but after the father is adjudged insolvent the property is re-acquired by the sons from their own exertions and is held by them as co-owners with their father, only the father's share vests in the receiver. A.I.R. 1925 P.C. 18, *Expl.* (*Percival and Patkar, JJ.*). PARBHULAL DULLABHRAM *v.* BHAGNAN PARBHU. **102 I.C. 464=29 Bom. L.R. 473= A.I.R. 1927 Bom. 412.**

———Mortgage by father for paying debts in ordinary course of business—Subsequent adjudication of his being insolvent—Co-parcenary property including minor's share is liable. (*Martineau and Zafar Ali, JJ.*). KHEM CHAND *v.* NARAIN DAS SETHI. **89 I.C. 1022=6 Lah. 493= 26 P. L. R. 848=A. I. R. 1926 Lah. 41.**

———The Official Receiver can exercise the right of the insolvent father to sell his son's shares in immovable property to pay antecedent debts. (*Spencer and Madhavan Nair, JJ.*). SUBRAMANIA AIYAR *v.* OFFICIAL RECEIVER, TANJORE. **93 I.C. 877=23 M.L.W. 300= A.I.R. 1926 Mad. 432=50 M.L.J. 665.**

HINDU LAW—Debts—Son's liability—Father's insolvency.

——Father's insolvency—Sons' shares vest in Receiver though on proof of immorality or illegality of any debts, the shares will not be liable for such debts: 7 Bom. 438 ; 19 Mad. 74 ; A.I.R. 1922 All. 79 ; A.I.R. 1925 All. 221, *Foll.* (*Hallifax, A.J.C.*). SHIOGOPAL *v.* SUKHRU. **87 I.C. 957= A.I.R. 1925 Nag. 418.**

——*Son's property also vests in the Official Receiver.*

By the insolvency of a Hindu father governed by the Mitakshara Law his son's interest as well as his own interest in the joint family estate vest in the Official Assignee and the son's property is to be treated as that of his father so far as the Official Assignee in concerned. The son, no doubt, has his remedy but he has to establish circumstances which would show that his share is not liable for the debts of his father; 3 Lah. 329, *Foll.* (*Scott-Smith, J.*). THE FIRM RALIA RAM GOWANDA MAL *v.* THE OFFICIAL RECEIVER OF THE INSOLVENT'S ESTATE AT GUJRANWALA.

69 I. C. 729= A.I.R. 1924 Lah. 297.

——*Official Assignee can exercise the father's power of sale of son's share for debts not illegal or immoral.*

The Official Assignee, though it cannot be said that the shares of the minors actually vest in him has nevertheless the same rights of disposition of the family property in satisfaction of the debts of the manager as the manager would himself have been entitled to exercise, if he had not been adjudicated an insolvent. Thus the Official Assignee can sell the joint ancestral estate of the insolvent and his sons to pay such of the debts of the insolvent as are not shown by the sons to be illegal or immoral debts even during the lifetime of the (father) insolvent: 39 All. 437 (P.C.) ; 44 All. 308 (P.C.), *Expl.* ; 46 Mad. 54; 43 Bom. 612; 13 Cal. 21 (P.C.) ; 44 Cal. 524 (P.C.), *Foll* ; 42 Mad. 711 (F.B.), *Disappr*; 45 All. 90, *Dist.* (*Schwabe, C.J., CouttsT-rotter and Krishnan, JJ.*). BALUSWAMY IYER, *In the matter of.* **80 I C. 108=47 Mad. 87= 19 M.L.W. 86=1924 M.W.N. 94=34 M.L.T. 317= A. I. R. 1924 Mad. 411=46 M.L.J. 86 (F.B.).**

—Debts—Son's liability—Interest.

——*Interest is payable by grandson.*

The tests of Vishnu and Yajnavalkya do not place any limit on the extent of a grandson's liability for the debts of the grandfather but treat the liability of the son and grandson to discharge the debt of their ancestor as co-extensive. The text of Brihaspati which states that interest need not be paid on debts of the grandfather has not been adopted in the decisions of the Courts and interest must be held to be payable on the debts of the grandfather. (*Das and Adami, JJ.*). LADU NARAIN SINGH *v.* GOBERDHAN DAS. **86 I.C. 721= 4 Pat. 478=6 P. L. T. 497= 1925 P. H. C. C. 104=A.I.R. 1925 Pat. 470.**

—Debts—Son's liability—Misappropriation.

——*Money mis-used by father—Sons are bound.*

Where the father, who was the moniagar of a certain mahant collected a certain sum from the ryots and had to remit it to the mahant, but having mis-used it was compelled to borrow the necessary amount by mortgage in order to remit the sum within time,

Held: that the mortgage was binding on the sons : 37 Mad. 458, *Foll.* (*Ramesam and Jackson, JJ.*). RATNA MUDALIAR *v* ELLAMMAL. **118 I.C. 69= A. I. R. 1929 Mad. 792.**

——*When sons are not liable*

Where a Hindu father becomes liable for money taken by him and misappropriated under circumstances which constitute the taking itself a criminal offence his sons cannot be held, under the rule of Hindu Law as to the pious duty of a son, liable to pay his father's debt, but it must be shown that the debts were incurred as a result of the criminal activities of the father or grandfather : 24 Cal. 672 and 27 Mad. 71, *Rel. on.* (*Broadway and Zafar Ali, JJ.*). RALLIA RAM *v.* BALMOKUND. **101 I.C. 830= 8 Lah. 117=8 L. L. J. 589=28 P.L.R. 45= A. I. R. 1927 Lah. 60.**

HINDU LAW—Debts—Son's liability—Misappropriation.

——*Misappropriation in the capacity of trustee—Sons are bound.*

Where certain sums of money for which a Hindu father, in the capacity of a trustee, was accountable, were not accounted for by him, and in a scheme suit he was ordered to pay the amount which came into his hands,

Held: that that will not amount to misappropriation or breach of trust and the sons' liability to pay father's debts is not discharged, and that even if it is found that he misappropriated the amount which came into his hands, the sons cannot escape the liability to pay their father's debt: 32 Bom. 348 and 35 M. L. J. 661, *Appl.* (*Devadoss and Wallace, JJ.*). VENKATAKRISHNAYYA *v.* BYRAGI. **94 I.C. 634=1926 M.W.N. 194= 23 M.L.W. 714=A.I.R. 1926 Mad. 535= 50 M.L.J. 353.**

——*Unlawful retention of money—Sons are bound.*

The test of liability of son would seem rather to be the purpose for which the father's act was committed than the legality of the act itself. The son is not bound to do anything to relieve his father from the consequence of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, *viz.*, to restore to those, lawfully entitled, money he has unlawfully retained : 16 Mad. 99, *Foll.* (*Ashworth and Neave, A. J. Cs.*). KALLU MAL *v.* PARTAB SINGH. **92 I.C. 787= A.I.R. 1926 Oudh 301.**

——*Debt contracted by criminal misappropriation is immoral.*

Where the debt of father is alleged to be constituted of the money misappropriated by him and it is contended that the debt was tainted with immorality, to determine what constitutes " immorality " of a debt contracted by a Hindu father the test to be applied is whether or not the action of the father which resulted in the debt was infected with an element of criminality. Whether such an element is established or not and the degree of infection which will support a plea of "immorality" must be question for determination on the facts of each case ; and though a conviction for misappropriation or other cognate offence may be good proof of such element, proof of a previous conviction is certainly not essential. The criminality and its degree may be inferred from a consideration of the whole facts. If there was such an element it may be regarded as an immoral debt ; it is otherwise, if there was no such criminal element : 6 All. 234 ; 14 A.L.J. 610 and A I.R. 1924 All. 742, *Ref.* (*Boys and Banerji, JJ.*). JAGANNATH PRASAD *v.* JUGUL KISHORE. **89 I.C. 492=48 All. 9= 23 A.L.J. 882=6 L.R.A. Civ. 518= A.I.R. 1926 All. 89.**

——*Father undertaking to pay money misappropriated by another—Son is liable.*

Where the taking of the money itself is not a criminal offence, a subsequent misappropriation by the father cannot discharge the son from his liability to satisfy the debt. The same principle

HINDU LAW—Debts—Son's liability—Misappropriation.

applies where the misappropriation was not made by the father but by a third person and the father undertook to pay the money for such third person. In such case also the son is liable to discharge the obligation: 39 Cal. 862, *Appl* (*Das and Ross, JJ.*). RAMESHWAR SINGH *v.* DURGA MANDUR.

90 I.C. 454=7 P.L.T. 42=A.I.R. 1926 Pat. 14.

———Misappropriation is a question of intention and the mere keeping back of the money sent to a person for distribution to others or delay in distributing it would not amount to misappropriation. In a suit by the person who sent the money, the sons of the man to whom it was sent cannot plead that the debt was immoral or illegal on the ground of its being misappropriated money. (*Dalal, J.C.*). GANESH PRASAD *v.* JOT SINGH. **87 I.C. 1017=A.I.R. 1925 Oudh 719.**

———*Failure to render accounts as manager—Sons are liable.*

Defendants' father was manager of plaintiff's estates during his minority and while it was under Court of Wards. On attaining majority plaintiff sued for accounts alleging dishonesty and misappropriation and got a decree,

Held, that the decree debt was binding on defendant. Every breach of civil liability does not necessarily involve a moral turpitude and therefore the defendant cannot plead that the debt was contracted for immoral purposes: 39 C. 862, *Appr.* (*Abdul Raoof and Moti Sagar, JJ.*). GURSARAN DAS *v.* MOHAN LAL. **76 I.C. 907=4 Lah. 93=A. I. R. 1923 Lah. 399.**

———Father—Money borrowed to help relation to re-place trust money—No criminal misappropriation—Sons are bound. (*Das and Ross, JJ.*). BENARES BANK LIMITED *v.* JAGDIP NARAYAN PANDE. **62 I.C. 465=6 P.L.J. 198=2 P.L.T. 468=A.I.R. 1921 Pat. 9.**

—Debts—Son's liability—Mother's debts.

———Under Mitakshara sons must pay mother's debts though daughter inherits the balance after paying debts. (*Shah, Ag. C.J. and Fawcett, J.*). MADHAVRAO HARBAJI THAKUR *v.* AMABABAI LAXMAN JADHAV. **85 I.C. 193=26 Bom. L.R. 1210=A.I.R. 1925 Bom. 125.**

———A Hindu father executed a bond in settlement of earlier bonds executed by his mother for him when he was a minor,

Held, the debts were justly due by the father and when no such illegality has been shown in the nature of these debts as would absolve the son from his obligation to pay them out of the joint family property, the son is bound to pay his father's debts: 16 Mad. 99, *Foll.* (*Abdul Raoof and Moti Sagar, JJ.*). RAM RATTAN *v.* BASANT RAI. **64 I.C. 121=2 Lah. 263=3 L.L.J. 563=A.I.R. 1921 Lah. 205.**

—Debts—Son's liability—Partition.

———Bona fide *partition—Subsequent liability of sons.*

Per *Kumaraswami Sastri, J.*—So long as a partition is *bona fide* and so long as provision is made for the payment of the debts and the sharer who agrees to discharge the debt, gets property sufficient to pay off the debts, it is difficult to see why a partition so made should still be subject to any pious obligation of the sons: 51 M. 361; 1928 M. W. N. 346 (F. B.), *commented on.* (*Kumaraswami Sastri and Reilly, JJ.*). SUBRAMANIA MOOPANAR *v.* SUBBIAH ANJAR. **1930 M.W.N. 658.**

HINDU LAW—Debts—Son's liability—Partition.

———*Ordinarily subsequent partition is immaterial.*

Where the debts of the father are held to be neither illegal nor immoral, whether there is a subsequent partition between the father and the son or not, it is open to the creditors to enforce payment of their debts out of the whole family property even during the life-time of their father although their right to enforce it as a mortgage claim is limited to the interest of the father in the family property and nothing more: A I.R. 1924 P.C. 50, *Rel. on*; A. I. R. 1928 All. 596 (F.B.), *Dist.* (*Rupchand and Wild, A. J. Cs.*). GANGARAM RAMDAS *v.* LALUMAL CHANDUMAL.

A.I.R. 1930 Sind 138.

———*Partition does not affect pre-partition liability of sons.*

The liability of the sons which arises before a partition between them and their father and the corresponding right of the creditor to recover his money from them cannot be affected by a partition which the father and sons may choose to make and to which the creditor is not a party: A.I.R. 1928 Mad. 657; A.I.R. 1928 Bom. 232; A.I.R. 1924 P. C. 50 and 40 Cal. 407; A.I.R. 1925 All. 221; A.I.R. 1927 Oudh 180, *Ref.*; A.I.R. 1925 Pat. 688; A.I.R. 1927 All. 714, *Not foll.* (*Mukerji and Niamatullah, JJ.*). KISHAN SARUP *v.* BRIJ RAJ SINGH.

121 I.C. 257=1929 A.L.J. 941=51 All. 932=A.I.R. 1929 All. 726.

———*Father adjudged insolvent—Suit for partition by sons—Sale by Official Receiver—When alienee can retain the property.*

In a sale by the Official Receiver of an insolvent father's property his son's interest would not vest in the purchaser in sale by Official Receiver where a suit for partition had been filed by the sons against their father after his insolvency: A.I.R. 1928 Mad. 735 (F.B.); A.I.R. 1926 Mad. 994 (F.B.) and A.I.R. 1925 P.C. 18, *Foll.*

In such a case the plaintiffs (sons) are *prima facie* entitled to a decree for partition though in effecting it regard will be had to the debts which are payable by the father and which are binding on the sons. Where the debts for which the Official Receiver has sold the property are neither illegal nor immoral regard will be had to the equities of the purchaser from the receiver, to whom they will be allotted on partition, if there are no other intervening superior equities. (*Kumaraswami Sastri and Reilly, JJ.*). VENKATARAMAN *v.* KESAVAN PATTAR. **114 I.C. 225=A.I.R. 1929 Mad. 778.**

———Pious obligation of son is independent of question of jointness of estate. The doctrine is founded on religious considerations to which the question of jointness or separation is entirely irrelevant. (*Daniels and Wazir Hasan, A. J. Cs.*). RAM SURAN *v.* MANGAL SINGH. **60 I.C. 219=8 O.L.J. 87=A.I.R. 1921 Oudh 38.**

———*Son is liable to extent of family property in his hands on partition.*

Son is liable to pay the personal debts of his father out of the joint family property that has come into his hands on partition before the decree for such debts is passed in favour of the creditors against father alone, provided the debts are incurred by father when father and son constituted a joint Hindu family and were neither illegal nor immoral. The liability is with the property and the acts of the members of the family cannot divest the property of that liability: A.I.R. 1928 Mad. 657 (F.B.); A.I.R. 1928 Bom. 232, *Foll.*; A. I. R. 1927 All. 714, *Diss. from*; A.I.R. 1927 Oudh 180; A.I.R. 1926 Oudh 470; A.I.R. 1926 P.C. 105; A.I.R.

HINDU LAW—Debts—Son's liability—Partition.

1924 P.C. 50; 12 Mad. 142 (P.C.); 15 Cal. 717 (P.C.) and 5 Cal. 148 (P.C.), *Ref.* (*Stuart, C. J., Wazir Hasan and Pullan, JJ.*). RAGHUNANDAN *v.* MOTI RAM. **119 I.C. 449=6 O.W.N. 689= A.I.R. 1929 Oudh 406 (F.B.).**

———*Son liable even after partition.*

Even after a *bona fide* partition, the son is liable for the debts of the father, other than those contracted for an illegal or immoral purpose, and whether the father is alive or dead, and the fact that the debts were incurred in trade started by the father does not affect this liability: A.I.R. 1924 P. C. 50; 24 Bom. 555; 38 Mad. 1120 and A.I.R. 1924 Mad. 682, *Rel. on. Case-law discussed.* [Compare A.I.R. 1928 Mad. 657 (F.B.)] (*Patkar and Baker, JJ.*). ANNABHAT *v.* SHIVAPPA. **110 I.C. 269=52 Bom. 376= 30 Bom. L. R. 539=A. I. R. 1928 Bom. 232.**

———*Father adjudged insolvent—Sons suing for partition—Official Assignee's power of sale of son's share extinguished.*

(Per *Ramesam and Madhavan Nair, JJ.*, contra, *Phillips, Offg. C.J.*).—After the adjudication of the father as an insolvent and the vesting of his rights in the Official Assignee, the institution of a partition suit by the sons of the insolvent effects a severance of the joint family status and therefore, the power to sell their shares by private sale, of the Official Assignee, who steps into the shoes of the father, is extinguished, although the Official Assignee by proper proceedings in the insolvency Court may proceed against their shares. (*Phillips, Offg. C. J., Ramesam and Madhavan Nair, JJ.*). OFFICIAL ASSIGNEE, MADRAS *v.* RAMACHANDRA. **112 I.C. 541=51 Mad. 417=1928 M.W.N. 294= 28 M. L. W. 109=A.I.R. 1928 Mad. 735= 55 M.L.J. 175 (F.B.).**

——— *Son's liability continues even after* bona fide *partition.*

Per *Full Bench.*—A simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons even after a *bona fide* partition has taken place between the father and the sons: A.I.R. 1924 Mad. 682, *Appr.*; 41 Mad. 136, *Dist.* (*Coutts-Trotter, C.J. and Srinivasa Ayyangar, J.* Contra.). (*Coutts-Trotter, C.J., Waller, Jackson, Srinivasa Ayyangar and Ananthakrishna Ayyar, JJ.*). SUBRAMANI *v.* SABAPATHI. **110 I. C. 141=51 Mad. 361= 27 M.L.W. 688= 1928 M.W.N. 346=A.I.R. 1928 Mad. 657= 54 M.L.J. 726 (F.B.).**

———A Hindu son cannot be compelled to pay his father's debt out of his separated property either in his father's life-time or after his father's death: A.I.R. 1924 P.C. 50; 28 Bom. 383, *Dist.* (*Pullan, J.*). MATHURA *v.* SHAMBOO DAYAL. **107 I. C. 884= 5 O.W.N. 80=A.I.R. 1928 Oudh 225.**

———*Son's liability does not follow him after separation from father* (Kendall, J.).

The dictum in Mulla's Hindu Law that a son's pious obligation to pay his father's personal debt is not a personal liability, must be interpreted to mean that it will not follow the son after he has been separated from his father by a partition. It is clearly wrong to argue that it is a liability that is attached to his property: 22 Mad. 519 and 41 Mad. 136, *Ref.* (*Ashworth and Kendall, JJ.*). GAYA PRASAD *v.* MURLIDHAR. **104 I.C. 406= 25 A.L.J. 829=A.I.R. 1927 All. 714.**

———Debts by father incurred prior to suit for partition by sons—Debts not incurred for immoral purposes—Sons' shares are also liable.

HINDU LAW—Debts—Son's liability—Partition.

(*Coutts-Trotter, C.J., Krishnan and Curgenven, JJ.*). K. VENKU REDDI *v.* M. VENKU REDDI. **100 I.C. 1018=50 Mad. 535= 1927 M.W.N. 267=25 M.L.W. 784= 38 M.L.T. 342=A.I.R. 1927 Mad. 471= 52 M.L.J. 387 (F.B.).**

———*Sons are liable for pre-partition debt.*

Where a debt is contracted by Hindu father before partition and it is not shown to be illegal or immoral, the shares of sons after partition can be proceeded against to satisfy the debt: A.I.R. 1924 P.C. 50, *Foll*; A.I.R. 1926 P.C. 105; A.I.R. 1924 Mad. 682 and A.I.R. 1927 Oudh 180, *Rel. on.* (*Wazir Hasan, J.*). JAI NARAIN *v.* MAHABIR PRASAD. **102 I.C. 281=4 O.W.N. 494= A.I.R. 1927 Oudh 568.**

———*Decree against father—Partition after decree—Decree cannot be executed against son's share.*

The property which is given to the son on partition may be liable in proper proceedings for the debt incurred by the father, but it does not necessarily follow that the decree against the father can be executed against the son: 47 Mad. 621, *Ref.* A decree must be executed against the judgment-debtor or his legal representative and after partition between father and son, the son cannot be said to be the legal representative of his father as regards his separate property. (*Phillips and Madhavan Nair, JJ.*). SRINIVASA AIYANGAR *v.* ARAVAMUDU IYENGAR. **95 I. C. 304= 23 M.L.W. 693=1926 M.W.N. 331= A.I.R. 1926 Mad. 690.**

———Sons being liable to pay father's debts, property acquired by them at partition of ancestral property can be taken possession of by receiver of their father's estate to satisfy the father's debts unless the sons can show that the debts were tainted with immorality: A.I.R. 1922 All. 79, *Foll.* (*Walsh, Ag. C.J. and Dalal, J.*). SITA RAM *v.* BENI PRASAD. **84 I.C. 790=47 All. 263= 22 A.L.J. 1097=6 L.R.A. (Civ.) 109= A.I.R. 1925 All. 221.**

———While the pious duty attaches to the son even during the life-time of the father, where partition has taken place before the suit is brought, the property of the sons cannot be proceeded against in satisfaction of a simple money debt: 41 Mad. 136, *Foll.* (*Ross and Kulwant Sahay, JJ.*). RAM GHULAM SINGH *v.* NAND KISHORE. **88 I.C. 813=4 Pat. 469=6 P.L T. 613= 1925 P.H.C.C. 341= A.I.R. 1925 Pat. 688.**

———*Son's shares even after partition are liable for the pre-partition debts of their father.*

A son is not liable unless the self-acquired property of the father or property which had been joint between them has devolved upon the son. Ancestral property which descends to a father under the Mitakshara Law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts. The ancestral property in which the son as the son of his father acquired an interest by birth is liable for the father's debts. A son in possession of property which had been joint and which fell to his share in partition is liable in suit brought after partition, impleading also the son, for the father's debts incurred before the partition and which are not illegal or immoral: 24 Mad. 555 and 38 Mad. 1120, *Foll.*; 41 Mad. 136, *Cons.*; 40 M.L.J. 473,

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Diss. (*Ramesam and Jackson, JJ.*). RAMACHANDRA JAGANNATH RAO *v.* VISWESAM.
80 I.C. 223=19 M.L.W. 691=34 M.L.T. 249=47 Mad. 621=A.I.R. 1924 Mad. 682=46 M.L.J. 590.

——Son's sons are liable for the debts incurred by their grandfather after their separation from him only to the extent of any of his assets that have come into their hands. (*Hallifax, A.J.C.*). BED PRASAD *v.* NACKCHED PRASAD. **79 I.C. 884=21 N.L.R. 12=A.I.R. 1924 Nag. 410.**

——Debts incurred by father before partition but not charged on family property would not bind son's share after partition: 41 Mad. 136, *Foll.*

The mere fact that the father had been incurring debts and it was for that reason that the partition was effected by persons interested in the minor's behalf, would not necessarily make the partition other than *bona fide*. (*Abdur Rahim and Oldfield, JJ.*). VENKATA REDDI *v.* SATYANARAYANA MOORTHI. **62 I. C. 980=13 M.L.W. 516=1921 M.W.N. 261=A.I.R. 1921 Mad. 470=40 M. L. J. 473.**

—Debts—Son's liability—Pious duty.

——*Exemption from liability—Onus of proof.*

Under Hindu Law it is the pious duty of the son to pay out of ancestral property the debts of the father incurred by him on account of trade liabilities, even though the trade may have been started by the father. Where the sons claim to exclude a joint family property from the operation of a decree passed against their father, the burden lies upon them to prove that the debt payable under the decree was for an immoral or illegal purpose. (*Shingne, J.*). SHANKAR *v.* PREMCHAND. **32 Bom. L. R. 919.**

——It is well established that the pious obligation upon which the doctrine of antecedency is founded extended to grandsons as well as to sons. (*Dawson-Miller, C.J. and Foster, J.*). KULDIP SAHAY *v.* RAM BUJHAWAN MAHTO. **83 I. C. 385=3 Pat. 425=5 P. L. T. 115=A.I.R. 1924 Pat. 464.**

——A mortgage which is not binding on the estate in the father's lifetime would not be binding on the sons, for the mere circumstance of pious obligation of Hindu sons to pay their father's debts: 21 C.W.N. 957 (P. C.), *Foll.* (*Dalal and Daniels, A.J.Cs.*). RAM SARUP SINGH *v.* JAGESHUR SINGH. **73 I.C. 466=26 O.C. 341=A.I.R. 1923 Oudh 150.**

——*Pious obligation of sons during his lifetime is only contingent.*

Under the Hindu Law, subject to certain exceptions, the whole of the undivided estate of a joint family is liable in the hands of sons for the debts of their father. The sons by reason of their duty to pay their father's debts cannot recover property unless the debts are taken for illegal or immoral purposes. There is a pious obligation on the sons to pay such debts. Where the father is alive, the obligation is only contingent, for the father may discharge the same in his lifetime or there may be ample personal estate belonging to the father available out of which the debts might be discharged or no joint family property left from which their satisfaction might be possible, it makes no difference in principle whether the property passes out by foreclosure or sale, what matters is, that it should have passed out to pay off or satisfy an antecedent debt. (*Kanhaiya Lal, J.C.*). BINDESHARI SINGH *v.* AUDESH PRASAD SINGH. **68 I. C. 283=25 O. C. 16=A.I.R. 1922 Oudh 85.**

HINDU LAW—Debts—Son's liability—Surety.

—Debts—Son's liability—Pre-birth.

——*Debt contracted before son was born, will bind him as an antecedent debt.*

Per *Hallifax, A.J.C.*—Where the son of a Hindu father was not in existence on the date of the mortgage which formed the consideration for a mortgage executed by his father, of the joint ancestral property, the previous mortgage is an antecedent debt such as would bind the share of the son; the question of the interpretation of *Sahu Ram's* case does not arise in such a case as on the date of the conception of the son the property was subject to the mortgage; in other words, the father's debts are incurred in such a case irrespective of the credit obtainable from immovable assets which do not personally belong to him, but which are joint family property. (*Hallifax, Kotval, Macnair and Batten, A. J. Cs.*). SHEONARAIN *v.* NATHU. **65 I.C. 786=5 N.L. J. 114=19 N.L.R. 81=A.I.R. 1922 Nag. 1.**

——A Hindu son is bound by a charge on ancestral property created by his father before his birth. (*Coutts and Ross, JJ.*). RAMCHANDRA PRASAD *v.* MAHABIR PRASAD SINGH. **64 I. C. 247 (Pat.).**

——Debts of father—Sons are liable to pay even in father's life-time: A. I. R. 1924 P.C. 50, *Rel. on.* (*Mullick and Ross, JJ.*). RAGHUNATH PRASAD *v.* BASDEO PRASAD. **88 I.C. 1012=3 P. L.R. 328=6 P. L.T. 764=A.I.R. 1925 Pat. 823.**

——Pious obligation of sons arises in father's life time—Only family property in the hands of the son, is liable. (*Dalal, J. C. and Wazir Hasan, A.J.C.*). KALKA DEVI *v.* GANGA BAKHSH SINGH. **88 I.C. 127=12 O.L.J. 306=A.I.R. 1925 Oudh 435.**

——*Son's pious duty arises only after father's death.*

The pious obligation of sons to pay their father's debts only arises at the death of their father. There is no pious duty on obligation during the life-time of the father to pay whatever debts the father may incur. *See* A. I. R. 1924 P. C. 50 (*Macleod, C. J. and Crump, J.*). SHIVRAO RAMRAO *v.* LAXMIBAI SUBRAO. **76 I.C. 638=A.I.R. 1924 Bom. 523.**

——As long as the father is alive the sons' pious obligation does not arise and their share is not liable to attachment and sale in execution of a money-decree against the father. (*Gokul Prasad, J.*). RAM KISHORE *v.* ABDUL KARIM. **77 I.C. 909=A.I.R. 1923 All. 173.**

—Debts—Son's liability—Surety.

——*Suretyship debt of father binding on sons.*

An undertaking of suretyship for the payment of an amount due to the principal debtor is binding on the sons of the surety both for the principal amount and interest thereon, even if the liability as a surety is accepted by the father in respect of a debt which though not already due but which is promised to be advanced subsequently: 26 All. 611 and 39 Cal. 843, *Foll.* (*Sulaiman and Kendall, JJ.*). CHUKKAN LAL *v.* KANHAIYA LAL. **119 I.C. 86=1929 A. L. J. 199=A. I. R. 1929 All. 72.**

——A surety debt which is neither illegal nor immoral is binding on sons after father's death. (*Kennedy, J.C. and Raymond, A.J.C.*). MOHAN *v.* MT. BHAGBAI. **98 I.C. 136=19 S.L.R. 165=A. I. R. 1926 Sind 294.**

——A Hindu is not bound to pay his father's debts under a contract of suretyship guaranteeing payment of money payable in instalments which are paid after his death, but a Hindu son is liable for his father's liability for the instalments advanced

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before his death. (*Hallifax and Kotval, A.J.Cs.*). KANTICHAND *v.* UDAYABHUSHA. **80 I.C. 349= 22 N.L.R. 158=A.I.R. 1925 Nag. 7.**

———*Liability incurred by father who stood surety for guardian of a minor under Guardians and Wards Act binds son.*

What a guardian appointed under the Act is required to do is to give a bond, with or without sureties, engaging duly to account for what he may receive in respect of the property of the ward. The undertaking is simply an undertaking to make good a sum of money. The person standing surety cannot be said to have stood surety for the honesty of the guardian and his son is bound if liability is incurred under the surety bond. (*Ross and Kulwant Sahay, JJ.*). BRIJ NATH PRASHAD *v.* BINDESHWARI PRASAD. **86 I.C. 791=6 P.L.T. 560= A.I.R. 1925 Pat. 609.**

———Son is liable to pay—Suretyship debt of father: 23 Bom. 454; 26 All. 611: 41 Mad. 1071, *Foll.* (*Hallifax, A.J.C.*). MAYARAM *v.* BHAIRON. **71 I.C. 351=19 N.L.R. 29= A.I.R. 1923 Nag. 115.**

—Debts—Son's liability—When enforceable.

———*Son's pious obligation exists even in life-time of father.*

The Law is now well established that under the Hindu Law the pious obligation of a son to pay his father's debts exists whether the father is alive or dead.

Observations of their Lordships in *Sahu Ramachandra* v. *Bhup Singh*, 44 I.A. 126 regarding the pious obligation of sons as not existing during life-time of father disapproved: 1 I.A. 321; 4 I.A. 247; 13 I.A. 1; 15 I.A. 99; 16 I.A. 1;17 I.A. 11; 44 I.A. 1; 15 All. 75; 28 Bom. 383 and 22 Mad. 49, *Ref.* (*Lord Dunedin.*) RAJA BRIJ NARAIN RAI *v.* MANGLA PRASAD RAI. **77 I.C. 689= 21 A.L.J. 934=5 L.R.P.C. 1=28 C.W.N. 253= 5 P.L.T. 1= 2 Pat. L.R. (Civ) 41= 1924 M.W.N. 68= 19 M.L.W. 72= 33 M.L.T. 457=51 I.A. 129= 46 All. 95= 26 Bom.L.R. 500=11 O.L.J. 107= 1 P.L.R. 1924=41 C.L.J. 232= A.I.R. 1924 P.C. 50=46 M.L.J. 23 (P.C.).**

———Pious obligation of sons and grandsons can be enforced during father's life-time: A.I.R. 1924 P.C. 50, *Foll.* (*Lindsay and Sulaiman, JJ.*). B. GAURI SHANKAR *v.* PT. SHEO NANDAN. **78 I.C. 911=46 All. 384=22 A.L.J. 369= 5 L.R.A. (Civ.) 306=A.I.R. 1924 All. 543.**

———It is now well settled that a son's liability to pay his father's debts arises even before the death of the father and consequently their estate would be liable equally with their father's estate. (*Phillips, J.*). PARTHASARATHI APPA RAO *v.* TURLAPATI SUBBA RAO. **84 I.C. 276= 35 M.L.T. 84= 1924 M.W.N. 517= A.I.R. 1924 Mad. 840=47 M.L.J. 483.**

———*Son's liability to pay father's debts in father's lifetime.*

The principle of Hindu Law that the creditor can bring the ancestral estate to sale in execution of decree against the father for debts not tainted with immorality or illegality and bind the shares of the sons and grandsons is not overruled by the decisions in *Sadhu Ram Chandra* v. *Bhup Singh*, 39 All. 437 (P.C.) and *Chet Ram* v. *Ram Singh*, A.I.R. 1922 P.C. 247. (*Kotval and Prideaux, A.J.Cs.*). AMRAOTI *v.* MITSUI BUSSAN KAISHA LTD. AMRAOTI *v.* PADUMRAO. **76 I.C. 349=A.I.R. 1924 Nag. 232.**

———The doctrine of a pious duty is not independent of the legality of the mortgage by the manager of a Hindu family. The mere circumstance of a pious obligation does not validate the mortgage. (*Dalal, J.C. and Simpson, A. J. C.*). MAHADEO BAKHSH SINGH *v.* SURAJ BAKHSH SINGH. **80 I.C. 447=10 O.L.J. 252=A.I.R. 1924 Oudh 34.**

HINDU LAW—Debts — Son's liability—Miscellaneous.

———The pious obligation of a Hindu son to pay his father's debts cannot be enforced in the life-time of his father and the son has the right to object to the payment of such debts from his share of the family property when the father is alive. (*Gokul Prasad and Lindsay, JJ.*). SHEODAN SINGH *v.* BHAGWAN SINGH. **64 I.C. 75=43 All. 496= 19 A.L.J. 431=A.I.R. 1922 All. 323.**

———*Exists during father's lifetime.*

Where the debt is incurred by each of the heads of the four different branches of the joint family and all the other defendants are their sons and grandsons so that all the interests were involved, the charge would be binding upon the property in the hands of all the defendants. The doctrine of the liability of sons for father's debt during the lifetime of the father is too well established at the present day to admit of its being questioned by a reference to the texts of the commentators: 15 Cal. 717 and 20 Cal. 328, *Foll.* (*Dawson Miller, C. J. and Bucknill, J.*). HARI PRASAD SINGHA *v.* SOURENDRA MOHAN SINGHA. **66 I.C. 945= 1 Pat. 506=3 P.L.T. 709=A.I.R. 1922 Pat. 450.**

———*Ready money debt.*

The son's obligation to pay off his father's debts attaches to an antecedent debt as also to a ready money debt and it can be enforced during the father's life-time by the attachment of the son's share in the joint family property. (*Ayling and Coutts Trotter, JJ.*). RAJARATNAM CHETTY *v.* ADILAKSHMAMMAL. **62 I.C. 218=28 M.L.T. 278.**

—Debts—Son's liability—Miscellaneous.

———*Son bound to discharge father's civil liability and not criminal.*

If the liability of the father arises directly from a criminal act, *i.e.*, an act for which the father may or may not have been successfully prosecuted, but which the evidence on the record is sufficient to prove to have been criminal, the son is not bound, but if there is a civil liability and subsequently the transaction becomes a criminal one, the son is bound to meet the civil liability to the extent of the family property but he is not concerned with the criminal matter. Where it is possible to separate the civil liability from a criminal action, the civil liability itself is not infected with criminality, so as to be not binding on the son: 6 All. 234, *Rel. on*; A.I.R. 1926 All. 89, *Expl.*; 28 All. 718; 14 A.L.J. 610; A.I.R. 1924 All. 745, *Dist.* (*Cases of other High Courts considered.*) (*Kendall and Niamatullah, JJ.*). KRISHNAPAL SINGH *v.* DISTRCT JUDGE OF AGRA. **112 I.C. 748=51 All. 386= 26 A.L.J. 1353=A.I.R. 1928 All. 582.**

———Mortgagor, Karta, father liable to make restitution under Contract Act, S. 65—Son is bound to discharge that liability as any other debt, if debt is not illegal or immoral. (*Raza and King, JJ.*). SHAMBHOO SHUKUL *v.* DHANESHAR SINGH. **101 I.C. 265=4 O.W.N. 256=A.I.R. 1927 Oudh 177.**

———The right to enforce payment of a Hindu's debts against his son is a different matter from that Hindu's right to alienate his son's share in the joint family property himself for the satisfaction of those debts. (*Batten, J. C. and Hallifax, A.J.C.*). RAM PRASAD *v.* MOHAN LAL. **71 I.C. 17=19 N.L.R. 6=6 N.L.J. 121= A.I.R. 1923 Nag. 117.**

HINDU LAW — Debts—Son's liability—Miscellaneous.

———Debts under deed of which father was not executant—Father adopting such debts as joint family debts—Sons are liable. (*Jwala Prasad and Ross, JJ.*). MICHU MISSIR *v.* BALBHADRA PRASTI. **62 I. C. 116=2 P.L.T. 147= A.I.R. 1921 Pat. 367.**

—Debts—Trade.

———*Some members of the family trading in partnership with strangers—Debt of that firm not binding on minors of the family.*

In all joint families if a person who is not the father has the power of management the criterion by which the binding nature of debts should be decided is whether they were borrowed for the benefit of the family and would bind the minors,

A. B and *C*, the deceased father of suing minors, were undivided brothers and formed members of a joint Hindu family governed by the Mitakshara Law. *A* and the son of *B* who was the second executant of the promissory note in suit were the managing members. *A* and his deceased brother *D* had been carrying on a speculative trade for which the suit money was borrowed on behalf and for the benefit of the joint family including the minors along with their partners,

Held, that the business which was started by two members of the family in partnership with strangers was not a business which was of such a nature as would bind the minors of the family: A.I.R. 1922 P. C. 237; 42 Cal. 225; A.I.R. 1922 Mad. 236; A.I.R. 1922 P.C. 397 and 6 C.W.N. 429, *Relon*; A.I.R. 1926 Mad. 323; A.I.R. 1927 Mad. 792 and A.I.R. 1929 Mad. 153, *Ref.*; (1928) M.W.N. 576, *Dist.* (*Kumaraswamy Sastri and Walsh, JJ.*). RAMALINGA CHETTY *v.* VELLORE MERCANTILE BANK. **30 M.L.W. 1036=A.I.R. 1930 Mad. 136= 57 M.L.J. 822.**

—Family arrangement—Binding nature.

———A transaction between the members of the same family who are *sui juris* and understand their own interests and where each party is prepared to press his claim but where they, in order to avoid litigation and for the benefit and preservation of the family property to the peace or security of the family, come to an arrangement amicably and peacefully, such an arrangement is binding on the parties. (*Mukerji and Ashworth, JJ.*). SIDH GOPAL *v.* BEHARI LAL. **107 I.C. 247=50 All. 284= 25 A.L.J. 978=A. I. R. 1928 All. 65.**

———*Family arrangement is valid unless vitiated by fraud, undue influence or coercion.*

A famil settlement is *inter alia* an arrangement by which the method of enjoying the ancestral property comes to be settled between the parties and to family arrangements great importance is attached by the Courts. In the absence of proof of mistake, inequality of position, undue influence, coercion, or like ground, a partition or family arrangement made in settlement of the disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from: and this principle is applicable where some of the members of the family are minors, or where the settlement has been effected by a qualified owner whose act in this respect will bind the reversioner: 34 C.L.J. 323 and 23 C.W.N. 118, *Foll.*

The doctrine of legal benefit is applicable, though at the same time the Court should not be disposed to scan with too much nicety the *quantum* of consideration in case of family settlement. The legal justification of the transaction should be tested on much wider grounds in the cases where

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there is a family arrangement in existence. (*Dawson Miller, C. J. and Foster, J.*). DAUGAL RAM *v.* JAIMANGAL SARAN. **95 I.C. 1051= 5 Pat. 480=1926 P.H.C C. 195= A.I.R. 1926 Pat. 364.**

—Family arrangement—Compromise of doubtful claim.

———Bona fide *settlement of family dispute by widow is binding on reversioners.*

A settlement of family disputes between the widow and a claimant to the estate which took place more than forty years prior to suit and has not been questioned till the date of suit must be held to be a settlement of *bona fide* family disputes binding on the estate, in the absence of anything in the evidence available to suggest the contrary.

Per *Reilly, J.*—"I do not agree with the suggestion made at one stage of the arguments that because there was this dispute so long ago there is a presumption that it was a *bona fide* dispute. In such a case, the circumstances must be examined so far as evidence regarding them is available."

If a person putting forward a claim to the estate believed in good faith that he had some right in the family properties, whether that claim was valid in law or not, and the dispute between him and the widow was compromised with the aid of mediators, that compromise is binding on the reversioners: 51 I.A. 145; 47 M. 181; 46 M.L.J. 172 (P.C.); 44 I.A. 229: 45 C. 17; 34 M.L.J. 1 (P.C.), *Dist.* (*Phillips and Reilly, JJ.*). VEERANNA *v.* SEETANNA. **59 M.L.J. 139.**

———*Abandonment of claim must be by one entitled to it.*

The real consideration and motive of a compromise is not the sacrifice of a right but the abandonment of a claim. There can be no abandonment of a claim except by the person who has the title or set up his own title to the thing claimed. *A*, while compromising with *C*, cannot abandon a claim that may possibly be made by *B*, but not made by *B* and without *B's* knowledge, and, therefore, such a compromise between *A* and *C* is not a *bona fide* family settlement in compromise of a doubtful claim; and whatever surrender is made by *C* is not binding on members of the joint family. (*Ramesam, J.*). VENKATASUBBAYYA *v.* KOTAMMA. **95 I.C. 222=A.I.R. 1926 Mad. 578= 50 M.L.J. 369.**

———Where the transaction is the result of a *bona fide* compromise of genuine dispute between the widow and her daughters on the one hand and the reversioner on the other, an arrangement under which some lands are given to the daughters and widow is given some lands for maintenance, the compromise cannot be impeached. (*Lord Dunedin.*) SURESHWAR MISSER *v.* MST. MAHESHRANI MISRAIN. **57 I.C. 325=43 Cal. 100= 47 I.A. 233=18 A.L.J. 1069= 28 M.L.T. 154=1920 M.W.N. 472= 12 M.L.W. 461=41 C.L.J. 433= 25 C.W.N. 194=3 Pat. L.R. 305= A.I.R. 1921 P.C. 107=39 M.L.J. 161 (P.C.).**

—Family arrangement—Contrary to law.

———*Is not permitted.*

It is perfectly open to the members of a Hindu family when partitioning certain property amongst themselves, to come to an agreement that on the death of any one of them his share should pass to the other or others and that the right of inheritance should devolve on the last survivor after the death of all the others. What it is not competent

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for them to do is to lay down a rule of inheritance for the property in the hands of this last survivor, in derogation of the ordinary rule of Hindu Law: 18 W.R. 359, *Ref.* (*Mears, C.J. and Piggott, J.*). BAGESHAR RAI *v.* MT. MAHADEO. **79 I.C. 514= 22 A.L.J. 419=5 L.R.A. (Civ.) 282= 46 All. 525= A.I.R. 1924 All. 461.**

—Family arrangement—Division of property.

———Where the sons of the cousin of *S*, contested the validity of an arrangement by which the property of *S*, was divided between the cousins and his daughters, and the parties remained in possession for over 14 years under the arrangement,

Held, having been in possession for 14 years after their father's death who was a party to the agreement, the sons were estopped: 40 All. 487, *Foll.*

Held further that the arrangement cannot amount to a family arrangement under the Hindu Law. (*Ryves and Gokul Prasad, JJ.*). BAHADUR SINGH *v.* RAM BAHADUR, SRI RAM.

71 I.C. 405=21 A.L.J. 140= 45 All. 277=4 L. R. A. Civ. 105= A.I.R. 1923 All. 204.

—Family arrangement — Legal necessity unnecessary.

———Where the transaction was really one in the nature of a family arrangement and both the brothers were entitled to a half share in the house and for that purpose to have it partitioned by metes and bounds, but the house could not be partitioned in equal shares without a great inconvenience.

Held, that the only other course to adopt was that one party should take compensation for his share from the other and that it is not necessary, in order to support a transaction of that sort, to show that there was any actual legal necessity for such a course, but that it must be made out by the party challenging the transaction that the course adopted was so detrimental to the interests of those who are interested as minors that it would be inequitable to allow the transactions to stand. (*Dawson-Miller, C.J. and Foster, J.*). DANGAL RAM *v.* JAIMANGAL SURAN. **95 I.C. 1051= 5 Pat. 480=1926 P.H.C.C. 195= A.I.R. 1926 Pat. 364.**

—Family arrangement—Minors bound.

———Dispute regarding management of family trust referred to arbitration by all adult members of the family—Award is binding even on the minor members of the family who were then alive in the absence of fraud: 17 Cal. 557, *Foll.* (*Krishnan and Venkatasubba Rao, JJ.*). KESHAVA RAO *v.* NATHRAVATI. **105 I.C. 837= A.I.R 1928 Mad. 200.**

—Family arrangement—No bona fide dispute.

———*No family arrangement if there is no* bona fide *dispute.*

Where under a deed of settlement between a Hindu widow and her daughters, the latter got some properties which they purported to alienate.

Held, that during the life of the widow, the daughters had no manner of right to the properties, that there could be no *bona fide* dispute between the mother and the daughters in respect of the property, that therefore it was not a family arrangement binding on the grandsons when they become entitled to succeed to the properties. (*Spencer and Devadoss, JJ.*). JOGA YERRAYYA *v.* SALLEYYA PATRUDU. **69 I.C. 389= 16 M. L.W. 752= A.I.R. 1923 Mad. 168.**

HINDU LAW—Family arrangement—Valid arrangement.

—Family arrangement—No transfer.

———*Widow and brother of the last holder—Each taking a share under family arrangement—No transfer.*

Wherever doubts and disputes have arisen with regard to the rights of different members of the same family, and fair compromises have been entered into to preserve the harmony and affection or to save the honour of the family, those arrangements have been sustained by the Court even although they may rest upon grounds which would not have been considered satisfactory, if the transaction had occurred between mere strangers.

There was a contest between a widow and the brother of her deceased husband for possession of the family estate, that dispute was settled by a definite arrangement, under which the widow obtained absolute title in a fractional share of the estate. The widow claimed that as her own property and more besides in her right, and, in consideration of her being allowed to retain that as an absolute property, she gave up her claim to the remaining property. The other party, on his side, consented to the widow retaining the one anna share in the village in question on the latter giving up her claim to the remaining property.

Held, that such a compromise was a legal and enforceable one as it was nothing more than a family settlement in which each party took a share of the family property by independent title and it was not a transaction to which S. 6, T. P. Act, would apply: A.I.R. 1921 All. 248; A.I.R. 1923 Bom. 276; A.I.R. 1918 P.C. 70 and A.I.R. 1914 P.C. 44, *Foll.*; A.I.R. 1927 Nag. 312 and A.I.R. 1921 Bom. 446, *Dist.* (*Findlay, J.C.*). GULJAR *v.* MOHANLAL. **108 I.C. 440=11 N.L.J. 70.**

———The deed of compromise did not expressly purport to transfer or convey anything. The widow was to have the lands for a certain limited interest. This interest was less than that of a Hindu widow's estate, which she claimed, but it was more than the bare right to maintenance which was all the minor was prepared to allow her,

Held, there was no such "transfer" here as is mentioned in S. 10. (*Marten and Fawcett, JJ.*). BASANGOWDA VIRUPAXGOWDA *v.* IRGOWADATI KALLANGOWDA. **73 I.C. 196= 25 Bom. L.R. 293=47 Bom. 597= A.I.R. 1923 Bom. 276.**

—Family arrangement—Stranger.

———*Family arrangement is not possible where one party to it is a stranger.*

Where the defendant is a perfect stranger to the family, he cannot be in possession of the family property under a family arrangement. A family arrangement pre-supposes a claim by some member of the family to part of the family property, which is settled by an arrangement between the members of the family recognising the claimant's real or supposed rights. There can be no question about this in a case where a stranger is in possession of part of the family property. (*Baker, Offg. J. C.*). LALLU PRASAD *v.* BABULAL. **76 I.C. 218= A.I.R. 1924 Nag. 214.**

—Family arrangement—Valid arrangement.

———Settlement between widow and her deceased husband's separated brother claiming, under will, her husband's estate—Widow getting a portion of estate for life with no power of alienation—Brother taking remainder absolutely.

HINDU LAW — Family arrangement — Valid arrangement.

Held: that there was nothing in law to prevent such a settlement from coming into operation. The reversionary estate in the brother which had the character of a mere *spes successionis* was converted into an absolute estate in remainder, which could be sold in a decree against him: A. I. R. 1922 P. C. 356; A. I. R. 1925 P. C. 272 and A. I. R. 1922 Oudh 236, *Foll.* (*Wazir Hasan and Raza, JJ.*). CHINTA RAM *v.* RAM SAMUJH. **99 I. C. 500= 3 O.W.N. 767.**

———*Right of survivorship given up—Transaction is valid.*

Where the document embodied a mutual bargain, supported by legal consideration, by which each party gave up the possibility of his surviving his brother, with the consequential financial advantage in that case, in consideration of obtaining for his wife a far more assured monetary position than she would otherwise have had, as the widow of a deceased Hindu member of a joint family,

Held, the transaction is valid and binding. (*Mears, C. J. and Banerji, J.*). LAXMI CHAND *v.* MUSSAMMAT ANANDI. **71 I.C. 574= 21 A.L.J. 73=45 All. 245=4 L.R.A. Civ. 306= A.I.R. 1923 All. 109.**

—Gift.

Absolute estate.
Construction.
Death bed.
Father's power.
Formalities.
Law applicable.
Objects of.
Powers of donor.
Presumption.
Proof of.
Revocation.
Widow.
Miscellaneous.

—Gift—Absolute estate.

———*Gift to widow of pre-deceased son—No deed to evidence—Nature of donee's interest—Absolute interest held to have been gifted.*

When a property is given to a person whether that person is man or woman the grant must be taken to be an absolute grant. If a person says: "I give this property to a particular woman" there is no rule of Hindu Law which limits that grant to the life time of that particular woman.

A Hindu having no son or adopted son made a gift of a plot of land to the wife of his predeceased son because she wanted to be maintained. There was no document evidencing the gift from which the precise nature of the gift could be construed.

Held, that the gift was of an absolute interest. The gift could not be in lieu of maintenance as the donee was not a person who would be entitled to claim maintenance and the gift to her stood on the same footing as a gift to a stranger: 24 W. R. 395 and 30 All. 84 (P. C.), *Rel. on.* (*Mukerji and Mitter, JJ.*). (SREEPATI) BHUSAN MONDAL *v.* SARBESWAR MONDAL. **34 C.W.N. 409= A.I.R. 1930 Cal. 474.**

———A Gujar, made a gift with all rights to a Gujar widow "*bahamah wajah*"—words which mean literally "with all causes" but which can only be taken to mean "with all rights."

Held, the gift created an absolute estate. (*Stuart, J.*). ABHEY SINGH *v.* HIMTA. **65 I.C. 653= A.I.R. 1923 All. 234.**

HINDU LAW—Gift—Construction.

—Gift—Construction.

———*Wife to hold from generation to generation—No other person to have power of interference—Full proprietary rights including rights of alienation held to have passed to wife.*

If the donor does not confer upon the lady express power of alienation, such power may nevertheless be deduced from the terms of the gift if the words used are sufficient to confer upon her absolute ownership, unless the circumstances or the context show that such absolute ownership was not intended. There is no magic in the use of any particular word or form of words: the document must be construed as a whole and its fair import deduced in the ordinary way and if the conclusion come to is that it confers the estate out and out with no reservation the right of alienation will be included just as much as any of the other incidents of ownership, and just as much where the gift is to a female as where it is to a male.

A sonless Hindu gifted his property to his wife in the following terms that "with a view to safeguard the aforesaid property, I, while in the enjoyment of sound health and unimpaired intellect, without reluctance and coercion, have specifically gifted the zamindari in the aforesaid villages with all the original and accreted rights, cultivated lands Seer, Saer, Jalkar, bankar and all the rights held by me to my wife, and I do hereby covenant and reduce to writing that the said lady shall, generation after generation, remain in possession and enjoyment of zamindari haqiat in the said villages on payment of the Government revenue. Now after the execution hereof, if I or any one of my heirs and co-sharers lays any sort of claim to the aforesaid property against the donee, the same shall be deemed false and untenable. With the exception of the lady donee, no one else shall have any power of interference and meddling with regard to the gifted property."

Held, that reading the deed as a whole it must be construed as conferring upon the wife an absolute, *i.e.*, alienable and heritable estate in the property: 7 Cal. 304 (P.C.) and 24 Cal. 834 (P.C.), *Ref.*; A.I.R. 1928 Oudh 203, *Affir.* (*Other case-law considered.*) (*Sir George Lowndes.*) JAGMOHAN SINGH *v.* PANDIT SRI NATH. **A.I.R. 1930 P.C. 253 (P.C.).**

———*Gift to daughter and after her death to her male heirs—Her heirs take independently and not through her—They take absolute estate—Heirs not living at the date of settlement would be excluded.*

The settlement in relation to her provided: "As to one quarter of the said rents, dividends and profits upon trust to pay the same to my daughter Krishnabai during her life for her sole and separate use and after her death in trust for the male heirs of the said Krishnabai share and share alike." The settlor died and then Krishnabai died after him, leaving six sons, all of whom were living at the date of the settlement. The heirs of the settlor contended that the limitations in favour of her male heirs after her death were contrary to Hindu Law and void, and that in consequence there was a resulting trust in favour of the settlor,

Held, that the true interpretation of the settlement was that the persons who answer the description of male heirs at the date of Krishnabai's death were the persons in whose favour an independent gift was made, that the male heirs of Krishnabai did not take by inheritance from her but that by operation of the Hindu Law there would be excluded from that class people who were not living when

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the deed was executed and that the estate conferred on such heirs was an absolutele estate. (*Lord Buckmaster.*) MADHAVRAO GANPATRAO DESAI *v.* BHALABHAI RAGHUNATH AGASKAR.

107 I.C. 119=52 Bom. 176=55 I.A. 74=47 C.L.J. 198=30 Bom. L.R. 282=27 M.L.W. 400=26 A.L.J. 560=32 C.W.N. 925=A.I.R. 1928 P.C. 33=54 M. L. J. 245 (P.C.).

———*Life-estate with powers of disposition can be created—Deed—Construction.*

There is ample authority in this country as well as in England for holding that there may be a life-estate with powers of disposition.

Where the adoptive mother entered into an agreement which provided "I have, therefore, henceforward given all the property belonging to my husband as per the schedule below, to my adopted son *S*, the said *S*, shall therefore enjoy the said property with all the rights; the remaining property shall be enjoyed independently by myself alone and that the property which remains after being utilised by me during my life-time shall be enjoyed after my death by the said *S*."

Held, that the mother intended to reserve to herself a life-estate with full powers over the corpus during her life and as to whatever property was left the adopted son was to succeed. (*English and Indian case-law discussed.*) (*Krishnan and Odgers, JJ.*). VENKATA CHANDI KAMBA *v.* VENKATA RAO.

105 I.C. 775=1927 M.W.N. 215=A.I.R. 1928 Mad. 39=53 M.L.J. 557.

———"*Donees, wives of the donor, to be responsible for loss or gain*"—*No power to alienate—Only limited estate conveyed.*

Where a deed of gift stated that the donor had made a gift of the property with all its inherent and adventitious rights to his wives *G* and *N* in a certain proportion and that the donor had withdrawn his possession and had put the donees in possession, and the deed finally provided that the donees, while in possession and occupation of the gifted property, would be "responsible for loss or gain" and that neither he nor his heirs shall have any claim whatsoever with regard to the subject-matter of the gift and finally there was a declaration that the donees would have no right to alienate the property.

Held: that the wives took nothing more than the limited estate peculiar to Hindu females. (*Lindsay and Sulaiman, JJ.*). JAVITRI *v.* GENDAN SINGH.

102 I.C. 167=49 All. 779=25 A.L.J. 500= A.I.R. 1927 All. 767.

———*Gift for maintenance—As long as donees live reversioners not to claim—Limited estate is conveyed.*

Where the sole surviving male member of a family, having dependent on him his brother's widow, a daughter's son and the widows of two predeceased sons of his own, executed a deed under which he made a grant of a share in one village to a daughter's son and shares in two other villages to his deceased brother's widow and then granted the shares in all the other villages together with a house to his sons' wives in the following words: "The rest of the shares and the house I have given to my sons' wives on this condition that the said widows should remain in possession of the properties given to them and should maintain themselves with the profit thereof.....My sons' wives and my younger brother's wife should remain in possession of their shares which I have given them for their whole life and on the death of one of the sons' wives the other shall get her share also. In

HINDU LAW—Gift—Construction.

short, so long as the three Musammats are, or any of them is, alive, none of my reversioners shall have a claim to their shares,

Held: that the grant of the entire property to the sons' widows was as life-interest to the ladies and not a widow's estate. (*Banerji, J.*). TIRLOKI NATH *v.* EMPEROR.

100 I. C. 381=7 A.I. Cr. R. 194=8 L. R. A. Cr. 22=28 Cr.L.J. 301=A.I.R. 1927 All. 742.

———*Will in favour of two persons—They take as tenants-in-common.*

When a deed of gift or a Will is in favour of two persons without any definite specification of the extent of their shares, they take as tenants-in-common and not as joint owners.

The principle of joint tenancy is unknown to the Hindu Law except in connexion with the joint Hindu family: 33 All. 665; 26 Bom. 445 and 39 P. R. 1909, *Rel. on.* (*Shadi Lal, C J. and Agha Haidar, J.*). MT. JIO *v.* MT. RUKURAN.

100 I.C. 54=8 Lah. 219=28 P.L.R. 78=A.I.R. 1927 Lah. 126.

———*Donees members of joint family—Joint tenancy—If created.*

Where the deed of gift does not specify the shares of the donees, and beyond stating that the land is gifted to the two donees who are members of the joint Hindu family, does not in any way lay down any conditions as to the future enjoyment of the property,

Held: that the gift does not create a joint tenancy so as to entitle one donee to succeed to the rights of the other by right of survivorship on the death of the latter. *Case-law considered.* (*Jai Lal, J.*). JOWALA RAM *v.* MT. CHANDAN.

96 I.C. 751=A.I.R. 1926 Lah. 677.

———Brothers take under a gift by mother's mother as tenants-in-common and not as joint tenants. (*Kinkhede, A.J.C.*). MT. JIRABAI *v.* MT. RAMDULARIBAI.

89 I.C. 991=A. I. R. 1926 Nag. 48.

———*Gift to woman—Words indicating absolute estate are not affected by sex of the grantee.*

Per *Dawson-Miller, C. J.*—There is nothing in the Hindu Law which prohibits a woman, whether wife or widow, from acquiring an absolute estate in property including the power of alienation. If words of grant are used importing the transfer of full proprietary rights, then effect must be given to them irrespective of the sex of the grantee. It may appear, however, from the context or from the surrounding circumstances that a limited power of disposal was intended to be conferred, even where an estate of inheritance is granted. Where ambiguity exists in the document itself, or where the words are not of sufficient amplitude to confer full powers of alienation, it is legitimate to assume that the grantor had in mind the ordinary disability which the Hindu Law attaches to a woman's rights over property, and this may be considered in determining the intention even where an estate of inheritance is granted. But where words are used which in their context express an intention of transferring full rights of ownership, the other principles of interpretation are of minor importance and should not be allowed to restrict the natural meaning of the words. (*Dawson-Miller, C.J. on difference between Das, J. and Foster, J.*). HITENDRA SINGH *v.* RAMESWAR SINGH.

88 I.C. 141=87 I.C. 849=4 Pat. 510=6 P.L.T. 634=A.I.R. 1925 Pat. 625.

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———*Gift to be construed with due regard to Hindu notions and wishes.*

Per *Das, J.*—In construing a deed of gift by a Hindu to his wife the Court is bound to proceed on the assumption that a Hindu knows that, as a general rule, women do not take absolute estates of inheritance which they are enabled to alienate. This does not mean that, where there are words of sufficient amplitude conveying in the terms of the gift itself the fullest rights of ownership, including the power to alienate, the Court will refuse to construe the deed of gift so as to deny to the donee the right to alienate. But that, in construing a deed of gift executed by a Hindu husband in favour of his wife, the Court would be right in leaning towards a construction, which is in consonance with the ordinary notions and wishes of the Hindus with respect to devolution of property and in harmony with the law by which the parties are governed.

The ordinary notions and wishes of Hindus are well known and have been recognised by the Judicial Committee.

Per *Foster, J*—The Courts should examine the documents of transfer with the eye to the ordinary Hindu's inclinations; he does not usually intend to make a wife absolute owner by a deed of transfer. In the earlier interpretations of this rule of the Privy Council the Courts went almost so far as to import a strong presumption that the grantee was to receive a limited estate, and it was held that something express is necessary to exclude what is tacitly implied, *Expression facit cessare tacitum.* But the rule adopted in modern times is that if by a construction of the document the grant of an absolute estate can reasonably be extracted, there is no need to insist on an express and distinct grant of an absolute estate, *Expressio corum quae insunt nihil operatur.* Express words are not essential: the fact that the donor is a Mithila wife is not fundamental; it is to be seen whether the words are of sufficient amplitude to convey an absolute estate: A.I.R 1922 P.C. 80, *Foll.* (*Dawson-Miller, C.J. on difference between Das and Foster, JJ.*). HITENDRA SINGH *v.* RAMESWAR SINGH.
87 I.C. 849=88 I.C. 141=4 Pat. 510=
6 P.L.T. 634=A.I.R. 1925 Pat. 625.

———Where one of the legatee's wife was given an absolute estate, and the two daughters of the testator also were given estates which were antagonistic to the interest of his wife, the natural inference would be that the nature of the estate given to the wife was also the same. (*Sulaiman and Mukerji, JJ.*). LAKSHMI NARAIN *v.* MT. SUMARNI KUAR. **79 I.C. 389=46 All. 439=**
5 L.R.A. Civ. 342=A.I.R. 1924 All. 731.

———*Gift to adopted son as such is invalid if the adoption is invalid in Law.*

M adopted his illegitimate son *R* and then made a gift of certain properties to him. The gift deed ran thus:—With a view to perpetuate my line and to have an heir to look to the performance of the religious duties and also for the management of the property, I take you in adoption according to our religion and you have been given in adoption by your natural mother of her free will. So I take you in adoption according to Danpratingrah on Margashirsh Sud 2nd shake 1819. You are clothed with all the rights that my natural born son might have got. You should continue our line and lead a prosperous life. You asked me to pass a Malikpatra in your favour and so I have passed it. The property is given to the full ownership of Ramaswami,

HINDU LAW—Gift—Formalities.

Held: that the intention of the donor was to give the property to *R* as his adopted son capable of inheriting in the same way as a natural born son and that since the adoption was invalid the gift also failed and could not take effect. (*Macleod, C.J. and Crump, J.*). KALLYANTAI FATHER APPASWAMI DHARMAR *v.* SHIVAPPA NAGAPPA HARGAPUR. **76 I.C. 405=**
A.I.R. 1924 Bom. 516.

———"Jo waste guzari ke digayi" conveys limited estate: 34 All. 234, *Dist.* (*Scott-Smith and Brasher, JJ.*). MT. MALAN *v.* KISHORE CHAND.
71 I.C. 833=A.I.R. 1923 Lah. 17.

———*Donor to get back property if he returned from Port Blair—Condition is enforceable.*

Where a transfer deed by a person under sentence of transportation provides that the property conveyed shall go to transferee and pass to his heirs in the ordinary course of inheritance subject to the single contingency that if the plaintiff returns, it will go back to him,

Held, the clause providing that in the event of the plaintiff's return all the properties shall revert to him, is legal and enforceable equally upon transferee and upon his heirs: 6 M I. A. 555; 16 Cal. 383; 9 M.I.A. 136, *Foll.* (*Krishnan and Venkatasubba Rao, JJ.*). VENKATARAMA AIYAR *v.* AIYASAMI AIYAR. **69 I.C. 673=**
1922 M.W.N. 657=16 M.L.W. 552=
31 M.L.T. 465=A.I.R. 1923 Mad. 67=
43 M.L.J. 340.

—Gift—Death bed.

———The principles of the Mahomedan Law of *Marz-ul-mauz* are not applicable to the Hindu Law. Under the Hindu Law a deed of gift made by a person during disease is valid. (*Dalal, J.C.*). SAT NARAIN v. KRISHNA DATT. **87 I.C. 900=**
12 O.L.J. 275=2 O.W.N. 243=
A.I.R. 1925 Oudh 383.

—Gift—Father's power.

———Gift of Rs. 15,000 out of estate worth a lac is excessive and if made out of caprice, cannot be upheld. (*Kotval, Offg.J.C. and Prideaux, A.J.C.*). MUKUNDRAO *v.* WAMAN RAO. **98 I.C. 652=**
A.I.R. 1927 Nag. 97.

———Gift of joint family proprety even within the limits of the donor's share is illegal—Reasonable gift by father is allowable in favour of daughter but not of widow or mother. (*Coutts-Trotter, C.J. and Ramesam, J.*). M. SUBBARAO *v.* ADEMMA.
83 I.C. 72=20 M.L.W. 440=1924 M.W.N. 680=
A.I.R. 1925 Mad. 60=47 M.L.J. 465.

———*Gift of money to daughter is valid if reasonable.*

Where a father made a gift to his daughter of a sum of Rs. 5,000 and a usufructuary mortgage,

Held, the father has undoubtedly the power under the Hindu Law of making within reasonable limits, gifts of immovable property to a daughter. Similarly, gift of sums of money, if reasonable, will be upheld. (*Mr. Ameer Ali.*) RAMALINGA ANNAVI *v.* NARAYAN ANNAVI.
68 I.C. 451=45 Mad. 489=1922 M.W.N. 399=
30 M.L.T. 255=26 C.W.N.929 =20 A.L.J. 839=
49 I.A. 168=24 Bom. L.R.1209=16 M.L.W. 639=
37 C.L.J. 15=A.I.R. 1922 P.C. 201=
43 M.L.J. 428 (P.C.).

—Gift—Formalities.

———*Delivery of possession not necessary.*

It is not essential that possession of the gifted property should be actually transferred from the

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donor to the donee especially when the latter is a minor and is living with the former. But before such a gift can be upheld it must be established that there was a real and *bona fide* intention to pass title and that from the date of the transfer the donor was holding the property in trust for the donee. (*Tek Chand and Agha Haidar, JJ.*). SURWAN DAS *v.* MANSA RAM. **119 I.C. 271= 11 L. L. J. 497=A.I.R. 1930 Lah. 145.**

———*Credit entry in accounts in favour of granddaughter—Donor not rendering accounts—Donor manipulating accounts as she liked—No gift to granddaughter.*

One *B*, an Agarwal Jain, credited certain sums in her account books in the name of her grand-daughter *M*, who was a minor, at the time of adopting a son to herself and that of son's marriage. The said sums were not deposited by *M* with *B* after *M* had received them from *B*. Although loans were made from *B's* money to the debtors and the interest from the debtors was credited in *B's* account books in *M's* name, *M* was not charged with any commission. No accounts were rendered and no correspondence passed. Whenever *B* wanted, she manipulated the account and transferred amount as she pleased,

Held, that although among the Agarwal Jain community there was a practice on the occasion of adoptions and marriages to make money presents to relatives on a munificent scale still *B* did not make herself the bailee of *M* by an unequivocal act which may change the character of her own continuous possession. The sums, therefore, never formed the subject of a completed gift. (*Viscount Sumner.*) HARIRAM SEROWGEE *v.* MADAN GOPAL BAGLA. **114 I.C. 565=1929 A. L. J. 406= 49 C. L. J. 335=33 C. W. N. 493= 31 Bom. L. R. 710=1929 M. W. N. 422= 30 M.L.W. 835=A.I.R. 1929 P. C. 77= 57 M. L. J. 531 (P.C.).**

——The Hindu law in case of gifts has been expressly abrogated by S. 129 T. P. Act and a gift to a sentient being under Hindu Law must be made in accordance with S. 123, T. P. Act. (*Kulwant Sahay and James, JJ.*). DEBI SARAN KOIRI *v.* NANDALAL CHAUBEY. **A.I.R. 1929 Pat. 591.**

——Where the father makes a gift in favour of his minor son and as the guardian of the donee, gets donee's name mutated in his place, that constitutes a valid acceptance of the gift on donee's behalf. (*King, J.*). KRISHNA PAL SINGH *v.* SRI RAJ KAUR. **104 I. C. 299=1 L. C. 97= A.I. R. 1927 Oudh 278.**

———*Delivery of possession is unnecessary but acceptance by donee is essential.*

Delivery of possession is not essential for gift. (16 All. 185; 27 Bom. 31; 21 P. L. R. 1901; 52 P.R. 1908, *Foll.*). But there must be acceptance on the part of the donee. Where there is acceptance the mere fact that mutation is not made in the donee's name does not invalidate the gift. (*Scott-Smith and Harrison, JJ.*). BHAGWAN SINGH *v.* KIRPA RAM. **89 I.C. 326=A.I.R. 1925 Lah. 648.**

———Assuming that delivery of possession was essential under the Hindu Law to complete a gift of immovable property, that law has been abrogated by S. 123 of the Transfer of Property Act in cases where the instrument of gift has been registered: 3 C.P.L.R. 37 and 5 C.P.L.R. 63, *Overruled.* (*Baker, J.C. and Prideaux, A.J.C.*). BHAGWAN PRASAD *v.* HARISING. **83 I.C. 41=22 N.L.R. 124= A.I.R. 1925 Nag. 199.**

HINDU LAW—Gift—Law applicable.

———*Acceptance is necessary—Acceptance of the deed of gift is* prima facie *evidence of the acceptance of the gift.*

Under Hindu Law express acceptance is necessary for the completion of a gift even assuming that under Hindu Law acceptance of gift by the donee may be presumed.

Until he signifies his dissent, the Court must be satisfied that there was acceptance by the donee before it can give effect to a deed of gift relied upon by a party to the suit. Acceptance of a deed of gift is *prima facie* evidence of the acceptance of the gift but the donee's whole conduct concerning the acceptance has to be carefully scrutinised in order to determine the question whether there was an acceptance of the gift in fact. The two points ought to be very carefully considered by the Court whenever a question of acceptance is raised, *viz.*, (1) whether the donee is in possession of the deed of gift and (2) whether he is in possession of the properties gifted. (*Das and Ross, JJ.*). JAMUNA PRASAD *v.* SHEORATI KUER. **78 I.C. 469= A.I.R. 1925 Pat. 251.**

———*Gift for religious purposes need not be in writing.*

A dedication of a small portion of the joint Hindu family lands to an idol of a temple by the father or manager of the family on the occasion of the funeral of the deceased member is not by the law of India required to be in writing and is valid and binding on the other members of the family as a gift ordained 'for pious purposes': 24 Mad 440; 37 Cal. 128, *Foll.* (*Prideaux, A.J.C.*). VITHAL DAS MARWARI *v.* GOMA. **79 I.C. 173= 20 N. L. R. 60=A.I.R. 1924 Nag. 254.**

———The question as to delivery of possession being required under the Hindu Law to validate a gift can arise only between the donor and the donee and cannot be raised by a third party: 11 C.P.L.R. 11 and 11 Cal. 121 (P.C.), *Foll.* (*Hallifax, A.J.C.*). MT. KRISHNABAI *v.* DEBI SINGH. **71 I.C. 409=A.I.R. 1923 Nag. 195.**

———Under the law as it existed before the enactment of the Transfer of Property Act mere execution and registration of a document was not sufficient to create a trust. To complete a gift there must be a transfer of ownership from the donor to the donee. (*Mears, C.J. and Banerji, J.*). RAM DHAN *v.* PRAYAG NARAIN. **62 I.C. 862=43 All. 503=19 A.L.J. 447= A.I.R. 1921 All. 37.**

—Gift—Law applicable.

———In respect of family property Hindu Law recognises no perpetuities except in estates dedicated to religious or charitable uses. (*Courtney-Terrell, C.J. and James, J.*). MADHUSUDAN DEB *v.* KHESTABASI SAHU. **121 I.C. 462=8 Pat. 932= A.I.R. 1930 Pat. 137.**

———The doctrine of part performance, which has in certain English cases been applied to pre nuptial settlements in consideration of marriage, cannot be applied to a gift by way of sankalap at the time of the marriage, which is a sacrament and not the outcome of a contract: A.I.R. 1928 All. 641, *Appl.* (*Sen and Weir, JJ.*). HIRA MANI SINGH *v.* ANMOL SINGH. **117 I.C. 351=26 A.L.J. 944= A.I.R. 1928 All. 699.**

——*Gift of an "estate"—Statute with regard to estates applies.*

Obiter—Conditions laid down by Act 1 of 1869 are the only conditions of a valid gift of "estate" property by a taluqdar and no other conditions are necessary for the validity of such a gift, as special

HINDU LAW—Gift—Objects of.

laws override general laws. Therefore, the validity of the gift by a taluqdar of "estate" property should be determined with reference to the special provisions in Act 1 of 1869 and without reference to the general provisions of Hindu Law or of the Transfer of Property Act. (*King, J.*). KISHNA PAL SINGH *v.* SRI RAJ KUAR. **104 I.C. 299= 1 L.C. 97=A.I.R. 1927 Oudh 278.**

—Gift—Objects of.

———A gift to a person not in existence at the time is invalid according to Hindu Law. (*Scott-Smith and Harrison, JJ.*). BHAGWAN SINGH *v.* KIRPA RAM. **89 I.C. 326=A.I.R. 1925 Lah. 648.**

—Gift—Powers of donor.

———Donor can bestow absolute estate and add defeasance clause—Consent of donee unnecessary for validity of the clause : 16 Cal. 383 (P.C.) and 9 M.I.A. 123 (P.C.), *Foll.*; 24 Cal. 834 (P.C.), *Dist.* (*Sen and Weir, JJ.*). HIRA MANI SINGH *v.* ANMOL SINGH. **117 I.C. 351=26 A.L.J. 944= A.I.R. 1928 All. 699.**

———*Gift to nephew or son—Gift to daughter or daughter-in-law—Difference between.*

Cases of gifts to a daughter or a widowed daughter-in-law having some sort of a moral claim on the donor stand on a much higher footing than the sons of a separated brother, at least so far as the question of the quantum of the gift is concerned. A gift that might be reasonable in the case of either of these persons may be unreasonable in the case of a nephew, or possibly even a son: 35 Mad. 628, *Rel. on.* (*Kotval, Offg. J. C. and Prideaux, A.J.C.*). MUKUND RAO *v.* WAMAN RAO. **98 I.C. 652=A.I.R. 1927 Nag. 97.**

———*Widow, full proprietor—Gift subject to usufruct during her lifetime is valid.*

A Hindu widow who is the full proprietor of immovable property, can by a registered document, duly signed and attested, validly make an immediate gift of it, although she reserves to herself the enjoyment of the usufruct or profits of a part of the property for her life-time and without retaining any power of alienation over it. (*Mears, C.J., Piggott, Gokul Prasad, Kanhaiya Lal and Sulaiman, JJ.*). LALLU SINGH *v.* GUR NARAIN. **68 I.C. 798=45 All. 115=20 A.L.J. 744= A.I.R. 1922 All. 467 (F.B.).**

—Gift—Presumption.

———*English presumption of advancement does not apply in India.*

The English Law presumption, of the wife's advancement does not exist in the Indian Law, but on the contrary the presumption here, is that, where a document is taken in the name of a man and his wife, the former providing the money, the transaction is, so far as the wife is concerned, benami for the husband. The mere fact, therefore, that money was deposited in the name of the wife does not justify a presumption that she was the beneficial owner of the money: A.I.R. 1925 P.C. 81, *Rel. on.* (*Phillips and Odgers, JJ.*). PARVATHI AMMAL *v.* M. R. SIVARAMA IYER. **97 I.C. 998= A.I.R. 1927 Mad. 90.**

———The presumption which applies in the case of a Hindu husband's gift to his widow, that only a life-estate is acquired, does not necessarily *proprio vigore* apply in the case of gift to a daughter: 9 C.P.L.R. 95; 32 Cal. 1051; A.I.R. 1923 Mad. 207 and 16 Mad. 466 (P.C.), *Rel. on.* (*Findlay, J.C. and Macnair, A.J.C.*). RAM LAL *v.* INDRAJRAJ SINGH. **102 I.C. 785=10 N.L.J. 146= A.I.R. 1927 Nag. 273.**

HINDU LAW—Gift—Widow.

—Gift—Proof of.

———An oral gift must be established by satisfactory oral evidence. (*Adami and Das, JJ.*). RAMESHWAR NARAIN SINGH *v.* RANI REKNATH KOERI. **67 I.C. 451=A.I.R. 1923 Pat. 165.**

—Gift—Revocation.

———*Conditional gift—Gift can be revoked if condition not justified.*

Under Hindu Law, if a person makes a gift to another in expectation that the donee will do more work in consideration of the gift, it follows that if the donee failed to do that which it has conditioned he should do, gift is revocable : 5 N.W.P.H.C.R. 5, *Rel. on.* (*Sen and Niamatullah, JJ.*). BALBHADAR SINGH *v.* LAKSHMI BAI. **1930 A.L.J. 623= A.I.R. 1930 All. 669.**

—Gift—Widow.

———*Mithila school—Gift by husband to wife for consideration, conferring absolute estate—Wife takes absolute estate.*

Under the Mithila Law a simple and pure gift by the husband to the wife does not convey to her absolute ownership and she takes it only for her life without any right of alienation unless power of alienation is expressly conferred on her.

Where a gift by a husband to his wife was one for consideration and provided : "The said Musammat should have and hold possession of the gift properties and enjoy the produce thereof generation after generation, and I, the executant, and my heirs and representatives neither have nor shall have any demand or dispute with respect to the gift properties or the consideration thereof as against the said Musammat, her heirs and representatives. Should I, the executant, my heirs and representatives make any claim or put forward any demand in respect of the gift properties or the consideration thereof the same shall be deemed null and void,

Held : that it was clear that all the rights of ownership were actually conveyed to the wife : A.I.R. 1925 Pat. 625, *Affir.* (*Mr. Ameer Ali.*) HITENDRA SINGH *v.* RAMESHWAR SINGH BAHADUR. **109 I.C. 858=7 Pat. 500= 55 I.A. 197=28 M.L.W. 12= 9 P L T 295=32 C.W.N. 762= 26 A.L.J. 652=48 C.L J. 83= A.I.R. 1928 P.C. 112=55 M.L.J. 615 (P.C.).**

———*Gift by husband to wife by a deed of gift—Her power to transfer must be determined by construction placed upon it.*

When a husband governed by the Mitakshara law makes a gift in favour of his wife, the property transferred by gift becomes her stridhan and she would ordinarily have the power to transfer it. Such stridhan would descend by intestate succession to her heirs and not to her husband's heirs. But there are peculiar restrictions to the widow's right to transfer landed property if the gift has been made in a particular fashion. Therefore, in order to ascertain whether the widow has not the right to transfer the property, one must look at the deed of gift and find whether full proprietary estate is conferred or not: 12 M. I. A. 448; 30 All. 84 (P.C.); A. I. R. 1916 P. C. 20; A.I.R. 1922 P. C. 193 and A. I. R. 1922 P. C. 63, *Rel. on.* (*Stuart, C. J. and Raza, J.*). JAGMOHAN SINGH *v.* SRI NATH. **107 I.C. 866=3 Luck. 302= 5 O.W.N. 1=A.I.R. 1928 Oudh 203.**

———*Gift to wife—Mithila School—Gift may confer right to alienate gifted property—Construction of the deed of gift.*

HINDU LAW—Gift—Widow.

Per *Dawson Miller, C. J.*—Where the donor (a Hindu governed by Mithila School) made *heba-bil-ewaz* to his wife of his share in taluka Laheri "with trees, fruit-bearing and non-fruit-bearing, and ahar and pokkar and reservoir and tank and katcha and pakka wells and sair and salt sairs and houses occupied by tenants and all his zamindari rights which up to now have (or has) been in his possession without the co partnership of any one," and then recited that he had put the Mst. in possession and directed that by becoming possessed of the property she should spend the produce with sons, generation after generation and the declarant, his heirs and representatives, shall have no concern in demanding the subject of the heba or the consideration money from the Mst. or her heirs and representatives,

Held, the words "with sons, generation after generation" used in their context convey an estate of inheritance and the words zemindari rights and representatives (*qaim moqaimian*) indicated right of alienation.

Held, further that words directing the grantee to spend the produce would not affect the power of alienation. Such words are not uncommonly used in India in conveyances which transfer an heritable and alienable estate: 24 Cal. 834 (P. C.), *Foll.* (*Dawson-Miller, C. J. on difference between Das and Foster, JJ.*). HITENDRA SINGH *v.* RAMESWAR SINGH. **88 I.C. 141=87 I.C. 849= 4 Pat. 510=6 P.L.T. 634= A.I.R. 1925 Pat. 625.**

———*Estate when absolute.*

A Gujar, made a gift with all rights to a Gujar widow "*bahamah wajah*"—words which mean literally "with all causes" but which can only be taken to mean "with all rights."

Held, the gift created an absolute estate. (*Stuart, J.*). ABHEY SINGH *v.* HIMTA. **65 I.C. 653= A.I.R. 1923 All. 234.**

———*Construction—Express words are not necessary to pass full estate.*

It is not the law that in the case of gift to a Hindu widow she has no power to alienate unless such power is expressly conferred. It is possible by the use of words of sufficient amplitude to convey, in the terms of the gift itself the fullest rights of ownership, including, of course, the power to alienate. (*Lord Buckmaster.*) T. B. RAMCHANDRA RAO *v.* A. N.S. RAMCHANDRA RAO. **67 I.C. 408=45 Mad. 320= 30 M.L T. 154=35 C.L J. 545= 16 M.L.W. 1=1922 M.W.N. 359= 26 C.W.N. 713=20 A.L.J. 684= 24 Bom. L.R. 963=49 I.A. 129= A.I.R. 1922 P.C. 80=43 M.L.J. 78 (P.C.).**

—Gift—Miscellaneous.

———The dedication by gift of a small portion of family property to an idol is not invalid. (*James and Chatterji, JJ.*). HARIHAR PRASAD *v.* GURU-GRANTH SAHEB. **11 P.L.T. 658.**

———*Gift by limited owner is valid and binding until it is set aside by next reversioner.*

An alienation by a limited owner is valid and binding until it is set aside, at the instance of the next reversioner. It is merely voidable and therefore remains valid until the person who has a right to challenge it exercises that right. Where, therefore, in a joint Hindu family the person, who has a right to challenge the gift, is the husband of the donee, who gives his express assent to the gift, the donee obtains an absolute title to the property gifted to her by her father-in-law and accordingly the property does not become available in execution of a decree for debts against the husband: 19 Cal. 123 (P.C.); A.I.R. 1924 All. 51; 23 O.C. 234; 106 I.C.816; A.I.R. 1922 Mad. 112; A.I.R. 1928 Lah. 9; A.I.R. 1923 Mad. 46 and A.I.R. 1924 Oudh 138, *Rel. on.* (*Fforde and Johnstone, JJ.*). MT. PIARI *v.* KISHORI RAWANJI. **122 I.C. 734= A.I.R. 1930 Lah. 223.**

HINDU LAW—Impartible Estate—Accretions.

———*Gift by father to son*—Nemo allegans turpitudinem suam est audiendus—*Applicability of the maxim.*

Father made a gift in favour of his minor son. During the donee's lifetime the donor did or said nothing to suggest that the gift was fictitious. On the contrary, all his acts and statements tended to show that he intended to make a real gift. But when the minor donee died, it became convenient to the donor to ignore the gift and to claim that he remained all along owner of the estate and that the gift was meant only to enable the Court of Wards to take charge of the property. He also got a deed of relinquishment executed by the widow of the donee in his favour reciting that the gift in her husband's favour was fictitious.

Held that the maxim *nemo allegans turpitudinem suam est audiendus* would be applicable, and the donor or his representatives cannot be allowed to take advantage of his own wrong doing and deny that the gift was fictitious. (*King, J.*). KRISHNA PAL SINGH *v.* SRI RAJ KUAR. **104 I.C 299= 1 L. C. 97=A. I. R. 1927 Oudh 278.**

———Voidable gift is valid until avoided. (*Kotval, A. J. C.*). BAKARAM *v.* HIRALAL. **71 I.C. 39= A.I. R. 1923 Nag. 96.**

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—Impartible Estate—Accretions.

———The produce of an impartible estate does not necessarily belong to and form an accretion to the original property: A.I.R. 1924 Pat. 451, *Foll.* (*N. R. Chatetrjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PROSAD SINGH. **93 I.C. 385=42 C.L.J. 280= A.I.R. 1926 Cal. 1.**

———Rent which has become due is produce of the impartible estate whether that produce has actually come into the hands of the owner or not. There is no distinction between realized rent and unrealized rent in this respect: A.I.R. 1924 Pat. 451, *Foll.* (*N.R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PROSAD SINGH. **93 I.C. 385=42 C.L.J. 280= A. I. R. 1926 Cal. 1.**

———*Moveable property cannot be incorporated with immovable.*

There can be no incorporation of movable properties with an impartible estate. In order that there may be incorporation, the property to be incorperated must be of the same nature as the impartible property. If the impartible estate is immovable property only immovable property can be incorporated. Incorporation involves altering the ordinary course of succession. Thus the holder

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of the impartible estate by purchasing a cow or a horse, for example, would be altering the course of succession to it by declaring his intention to incorporate it with the estate which is prohibited by law. (*N.R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PROSAD SINGH.

93 I.C. 385=42 C.L.J. 280=A.I.R. 1926 Cal. 1.

———*Land Tenure—Ghatwali—Produce of impartible estate is not necessarily accretion—No distinction between realised and unrealised rents — Unrealised rents are liable to attachment in execution.*

The produce of an impartible estate does not necessarily belong to and form an accretion to the original property, and there is no distinction between realised rent and unrealised rent. In the absence of any intention on the part of the late ghatwal to treat the produce of the estate as an accretion to the ghatwali estate, the unrealised rents are liable in execution to attachment and sale. (*Das and Ross, JJ.*). JUGAL KISHORE *v.* MT. SONABATI KUMARI. **97 I.C. 343=7 P.L.T. 626=A.I.R. 1926 Pat. 518.**

———*Income is no accretion.*

The income received from an impartible Raj is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort or that had come to him in *circumstances entirely dissociated from the ownership of Raj.* It is, therefore, a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character. (*Das and Ross, JJ.*). HON'BLE MAHARAJA BAHADUR KESHO PRASAD SINGH *v.* MADHO PRASAD SINGH. **83 I C 812=3 Pat. 880=5 P.L T. 513=A.I.R. 1924 Pat. 721.**

———*Rent unrealised or realised is produce and is not necessarily accretion.*

The produce of an impartible estate does not necessarily belong to and form an accretion to the original property. Rent which has become due until death of holder is produce of the impartible estate whether that produce has actually come into the hands of the owner or not. There is no distinction between realised rent and unrealised rent in this respect. (*Das and Ross, JJ.*). APARNA DEBI *v.* SHRI SHRI SHIVA PRASAD SINGH.

83 I.C. 623=3 Pat. 367=5 P.L.T. 111=1924 P.H.C.C. 207=A.I.R. 1924 Pat. 451.

———*Property acquired with income from the estate is no accretion.*

The produce of the impartible estate ordinarily does not belong to and form an accretion to the original property. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort, or that had come to him in circumstances entirely disassociated from the ownership of the Raj.

Quaere.—Whether it be possible in any circumstances to treat movable property as an accretion to a landed estate of this character. (*Lord Buckmaster.*) RANI JAGADAMBA *v.* WAZIR NARAIN.

77 I.C. 1041=37 C.L.J. 287=50 I.A. 1=4 P.L.T. 319=2 Pat. 319= 32 M L.T. 157=25 Bom. L.R. 676=1923 M. W.N. 460=28 C.W.N. 98=18 M.L.W. 555=4 L.R.P C. 65=A.I.R. 1923 P.C. 59=44 M L.J. 503 (P.C.).

———*Accretions become also impartible.*

When a Zemindar adds further property to his Zemin all that he can be said to do is to impose on it a condition of impartibility which he is competent to do. He cannot be said to impose

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thereby a new line of descent on the property different from that of the ordinary law. The only question to be decided in such cases is to find out whether it was intended by the acquirer to incorporate them with the original estate. (*Wallis, C.J., and Krishnan, J.*). GURUSAMI PANDIAN *v.* KALAI PANDIA.

61 I.C. 242=44 Mad. 1=A.I. R.1921 Mad. 340.

———*Enlargement of zamin rights in zamin properties—New acquisition are* prima facie *zamin properties.*

Where the properties were zamin properties to start with and the subsequent acquisition only resulted in an enlargement of the zamin rights in them and the new rights acquired were not kept separate they must be taken to have passed as part of the zemindari unless there is clear evidence that they were dealt with as the zemindar's private property. (*Wallis, C.J. and Krishnan, J.*). GURUSAMI PANDIYAN *v.* KALAI PANDIA.

61 I.C. 242=44 Mad. 1=A.I.R. 1921 Mad. 340.

—Impartible Estate—Alienation.

———*Ordinarily impartible estate is alienable unless custom of inalienability is proved.*

In the Madras Presidency zamindaries are impartible by usage as they are descendable only to a single heir, the other persons being entitled only to maintenance and the incidents of inalienability is not a necessary incident of such impartibility. On the other hand, an impartible estate is alienable by the holders unless there is also a custom of inalienability with regard to the particular estate. (*Madhavan Nair and Thiruvenkatachariar, JJ.*). THIRUMALAI SOURI NAICKER *v.* VENKATACHALAM CHETTY. **116 I.C. 571=A.I.R. 1929 Mad. 234.**

———*In the absence of custom estate is alienable.*

The Patia Killa is an impartible estate devolving in primogeniture. Therefore the Mitakshara Law cannot be invoked by members of the family as such by reason of their rights as co-parceners subject to alienation. A custom, however, to the effect that the estate is not alienable except for necessity may be established by evidence.

Held, on the facts that no such custom was made out and that the Patia Raj is freely alienable by the Rajah for the time being. (*Courtney Terrell, C.J. and James, J.*). RAJA MADHUSUDAN DEB *v.* KHESTABASI SAHU. **8 Pat. 932.**

———*Impartible estate is alienable in the absence of a custom to the contrary.*

The general rule is that an impartible Raj is alienable by will as well as *inter vivos* as the title to prevent alienation rests upon the present co-ownership of the person who wishes to retain it, but in the case of an impartible Raj, such present co-ownership does not exist, inasmuch as it is so connected with the right to partition that, where that right does not exist, present co-ownership falls with it. But this general rule might be displaced by proof of a family or local custom restricting alienation, the onus of proving such custom being cast upon the person who alleges it.

That there had been no instance of a will purporting to dispose of a particular impartible estate is no proof of a custom of inalienability in respect of that estate. (*Lord Warrington.*) SRI PRATAP CHANDRA *v.* RAJA JAGDISH CHANDRA.

102 I. C. 599=54 Cal. 955=54 I. A. 289=25 A.L.J. 628=29 Bom. L.R. 1136=31 C.W.N. 943=1927 M.W.N. 513=4 O.W.N. 650=46 C. L. J 136=39 M L.T. 1=8 P.L.T. 623=27 M.L.W. 119=A.I.R. 1927 P. C. 159=53 M.L.J. 30 (P.C.).

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———In a case where for upwards of a century there has been nothing military or feudal in the tenure and the estate has been an ordinary zemindari, no inalienability can result from the ancient nature of the tenure. (*Lord Warrington.*) SRI PRATAP CHANDRA *v.* RAJA JAGDISH CHANDRA.

102 I.C. 599=54 Cal. 955=34 I.A. 289=25 A.L.J. 628=29 Bom.L.R. 1136=31 C.W.N. 943=1927 M.W.N 513=4 O.W.N. 650=46 C.L.J. 136=39 M.L.T. 1=8 P.L.T. 623=27 M.L.W. 119=A.I.R. 1927 P.C. 159=53 M.L.J. 30 (P.C.).

———The question of indivisibility is not the same as the question of inalienability.

All the properties that are indivisible are not necessarily inalienable: 10 All. 272 (P.C.) and 22 Mad. 383, *Rel. on.*

Village of Vellikurichi belonging to the family of Nayaks was held to be alienable: (1851) Mad. S. Ad. 87, *Not accepted*; 21 Mad. 310, *Dist.* (*Ramesam, J.*). VENKATACHALAM CHETTY *v.* VISWANATHA BANGARU. **102 I.C. 618=A.I.R. 1927 Mad. 725.**

———*Impartible estate is alienable by the holder unless there is custom to the contrary.*

The ordinary rule is that the holder of the impartible estate can alienate it at his pleasure: 22 Mad. 383 (P.C.), *Foll.* This clearly affirms the right of his creditors to proceed against the estate for the satisfaction of their claim against him. It follows, therefore that the holder of an impartible estate is not entitled, in answer to an attachment of the estate in execution of a decree against him, to raise the contention that he has no disposing power over the estate held by him unless there is a custom in the family to that effect, and the burden of proving the custom is on him. (*Kinkhede, A.J.C.*). THAKUR RAGHURAJ SINGH *v.* THAKUR DEBI SINGH. **97 I.C. 721=A.I.R. 1927 Nag. 15.**

———Holder has absolute power of disposal—Interest of the holder is not analogous to that of Hindu widow: A.I.R. 1924 Pat. 451. (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PRASAD SINGH. **93 I.C. 385=42 C. L. J. 280=A.I.R. 1926 Cal. 1.**

———*Impartible estate is alienable by will in absence of family custom or tenure otherwise.*

The succession to an impartible estate which is ancestral property of a joint Hindu family governed by the Mitakshara is "designated by survivorship." But where the question is not one of succession, but the power of testamentary disposition over an impartible estate such estate is not inalienable by will or otherwise by virtue only of its impartibility, in the absence of proof of some special family custom or tenure attaching to the zemindari and having that effect. The reason why an impartible Raj has been held to be alienable in various cases is that in such an estate the co-parcenary which under the Mitakshara Law is created by birth does not exist and the reason for restraint upon alienation therefore ceases to exist in the case of an impartible estate. The principle of survivorship, which governs succession in ordinary joint family under the Mitakshara, has to be followed in the case of impartible estates only for a particular purpose, *viz.*, to find out a successor; where one has not been appointed by will and it is only for the purpose of determining who is entitled to succeed, that the estate is to be treated as the property of the joint family. The same rule holds good even where according to family custom the members of the joint family not only got maintenance but education and marriage expenses also, so that there was actual enjoyment by the members of the family so far as was consistent with the impartibility of the estate and thus the jointness was not only notional but actual. For as there is no coparcenary in law, and the estate is to be treated as joint only for a particular purpose, the distinction is not material. (*N. R. Chatterjea and Chotzner, JJ.*). PROTAP CHANDRA DEO DHABAL DEB *v.* SRI RAJA JAGADISH CHANDRA DEO DHABAL DEB. **82 I.C. 886=40 C.L.J. 331=A.I.R. 1925 Cal. 116.**

———*Alienation in* 1794 *and* 1819 *are governed by* 10 *All.* 272.

It was the settled law in India until the decision of the Judicial Committee in 10 All. 272, that the holder of an impartible estate had only a limited estate and except for special justifiable causes had no power of alienation beyond his life-time. The subsequent holder might indeed confirm the grant and such confirmation operated as confiscation and re-grant and the grantee could not claim to hold under the original grant upon the death of the grantor. The reversal of this accepted interpretation of the law does not displace its application to the contract contained in the transaction of 1794 and 1819 since the parties must be deemed to be bound by the law as then understood: 27 Mad. 141 (P.C.), *Foll.* (*Das and Ross, JJ.*). DEBI SINGH *v.* F.E. CHRISTIAN. **84 I.C. 429=1924 P.H.C.C. 201=A. I. R. 1924 Pat. 776.**

———*Suit against estate—Only the holder need be made a party.*

The plaintiffs took objection to the sale held in execution of a decree in a mortgage suit on the ground that the property mortgaged formed part of the estate in which the plaintiffs were interested as co-owners and that they were not made parties to the mortgage suit The evidence, oral and documentary, proved that the estate was impartible, and the revenue records, settlement proceedings and judicial decisions showed that the mortgagor or his lineal ancestors were each the sole proprietor.

Held, the estate was impartible and the objection therefore could not be allowed, as the members other than the owner of the impartible estate have no manner of interest in the estate and were consequently not necessary parties to the mortgage suit. (*Das and Adami, JJ.*). DWARKA PRASAD MARWARI *v.* JAI BARHAN. **67 I.C. 686=A.I.R. 1922 Pat. 322.**

—Impartible Estate—Custom.

———*Pachchis Sawal is document of superior authority for proving customs of descent.*

"Pachchis Sawal" is a record of great authority for the purpose of proving customs of descent in respect of estates referred to in that document and stands on higher footing than the inferences to be drawn from the historical accounts of the nature of the Raj given by Sterling, Hunter, Maddox or Toynbee: (1825) 4 Sel. Rep. of S.D.A. 49; 32 Cal. 158; 47 I.C. 36; 6 Sel. Rep. of S.D.A. 49 and 3 W. R. 116, *Ref.* (*Jwala Prasad and Scroope, JJ.*). AMARENDRA MANSINGH *v.* BANAMALI SINGH. **123 I.C 770=11 P.L.T. 268=A. I. R. 1930 Pat. 417.**

———*Custom as to inalienability—Proof of—Nature of evidence.*

The fact that there is no evidence of a sale of any portion of the estate is in favour of the existence of custom of inalienability but this is not sufficient. The absence of evidence of an alienation without evidence of any facts which would make

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it probable that an alienation would have been made cannot be accepted as proof of a custom of inalienability. Also, evidence which is as consistent with there being a custom as with there being no custom at all is not evidence of a custom modifying or varying the general law.

Where the estate has remained intact for several centuries, the fact is no doubt to be borne in mind, but it also must be remembered that according to the law as understood prior to the decision in the case of *Sartaj kuari* in 1889, an impartible Raj had always been considered as inalienable. And if the Rajas were following what they believed to be the law, it was not the custom because custom is something in derogation of the law. Hence that fact by itself cannot he held to be sufficient proof (in the absence of custom) of inalienability.

In considering whether the evidence proves the custom of inalienability, Courts have to bear in mind that if there was any occasion when having regard to human nature, there was likelihood of alienation, and alienation was not effected, it would be evidence of inalienability.

The fact that the bulk of the estate has existed from ancient times and that it has not been split up and dissipated in the course of centuries is certainly in favour of inalienability by custom. But it is useless to refer to the state of affairs before the British Government was established, because at the time these Rajas were in the position of military chiefs, and Courts have no materials of that period for determining the question of custom. After British Administration was established and before Sartaj Koeri's case was decided in 1889, the law as laid down by the Courts was that an impartible estate was inalienable. But where a supposed custom has followed the ordinary law as laid down by the Courts, though it was wrongly assumed to be ordinary law, that supposed custom which did not modify the understood general law and which had, therefore not independently the force of law, cannot be recognised by Courts as a custom having the force of law, even after it is established that the supposed ordinary law which it was alleged to have followed was not the ordinary law: 43 I.C. 871, *Foll.* (*N.R. Chatterjee and Chotzner, JJ.*). PROTAP CHANDRA DEO DHABAL DEB *v.* SRI RAJA JAGADISH CHANDRA DEO DHABAL DEB. **82 I. C. 886= 40 C.L J. 331=A.I.R. 1925 Cal. 116.**

———*Custom as to inalienability—Proof of.*

The fact that no instance is available of special provision having been made by any holder of the estate for the benefit of his wife or children, during a long course of years does not prove the custom of inalienability of the estate in a case where in the majority of cases the succession devolved upon the eldest son, or where there was no son, upon the brother, and it was only in the last case on the death of the last holder and under special circumstances that it devolved upon a somewhat distant agnate: 18 Mad. 287, *Foll.* (*N. R. Chatterjee and Chotzner, JJ.*). PROTAP CHANDRA *v.* JAGADISH CHANDRA. **82 I.C. 886=40 C.L.J. 331= A.I.R. 1925 Cal. 116.**

———*Is creature of custom but does not show that family does not follow Hindu Law.*

An estate only becomes impartible by custom, and the custom has in each case to be proved. But it is a custom which is usually found to exist where the estate belongs to a King or independent Chief, or a semi-dependent Chief of sufficient importance. The Prince, to use a neutral term, regards the whole

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estate which his predecessor had as necessary for the support of his dignity or gadi, and he takes it of his princely power and keeps it, giving appanages or maintenance to junior members of the family. The custom of impartibility in such a case affords no *indiciae* whereby to determine that a family does not follow Hindu Law as a whole. Regulation X of 1800 points to the frequency of this custom among Hindus in parts of Bengal. (*Lord Phillimore.*) SAHDEO NARAIN *v.* KUSUM KUMARI. **71 I. C. 769=2 Pat. 230= 4 P. L. T. 217=50 I.A. 58=37 C. L. J. 369= 25 Bom. L. R. 560=1923 M.W.N. 377= 32 M.L T. 121=27 C.W.N. 901= 18 M.L.W. 597=A. I. R. 1923 P.C. 21= 44 M.L.J. 476 (P.C.).**

—Impartible Estates—Debts.

———The debts of a previous holder are not binding unless charged upon the estate. (*N.R. Chatterjea and Chotzner, JJ.*). PROTAP CHANDRA DEO DHANBAL DEB *v.* SRI RAJA JAGADISH CHANDRA DEO DHANBAL DEB. **82 I.C. 886= 40 C.L.J. 331=A.I.R. 1925 Cal. 116.**

—Impartible Estate—Incidents of.

———An impartible estate is by its very nature incapable of common enjoyment or being the subject of co-ownership, and in that sense there can be no jointness in estate. But the receipt of maintenance (whether under the law or under custom) may, in the absence of other circumstances be the only mode in which jointness in estate may be kept up in an impartible estate. (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PROSAD SINGH. **93 I.C. 383=42 C.L.J. 280= A. I. R. 1926 Cal. 1.**

———No co-parcenery exists in an impartible zemindary, which is merely a creative of custom. (*Viscount Cave.*) BISHEN PRAKASH NARAYAN SINGH *v.* JANKI KOER. **62 I. C. 289= 24 C.W.N. 857=28 M. L. T. 105= 12 L.W. 349 (P. C.).**

—Impartible Estate—Maintenance.

———A khorposh grant heritable in the male line and revertible to the grantor on failure of male line of descent does not carry with it the right to sub-soil, in the absence of clear words or necessary implication: 33 Cal. 203 (P.C.) and 19 C.W.N. 102. *Foll.* (*Case-law reviewed.*) (*Dawson Miller, C. J. and Kulwant Sahay, J.*). UDAI PARTAB NATH *v.* JAGAT MOHAN. **106 I. C. 399=6 Pat. 633=9 P.L.T. 25= A. I.R. 1928 Pat. 66.**

———A member is not entitled to maintenance from an impartible estate unless he establishes a right to maintenance by custom or relationship or in any other way: 45 I.A. 148 and A.I.R. 1921 P.C 62, *Rel. on.* (*Lord Warrington.*) SHRI PRATAP CHANDRA *v.* RAJA JAGADISH CHANDRA. **102 I.C. 599= 54 Cal. 955=54 I.A. 289=25 A.L.J. 628= 29 Bom. L.R. 1136=31 C.W.N. 943= 1927 M.W.N. 513=4 O.W.N. 650=46 C.L.J. 136= 39 M.L.T. 1=8 P.L.T. 623=27 M.L.W. 119= A.I.R. 1927 P.C. 159=53 M.L.J. 30 (P.C.).**

———*Minor member's right to maintenance—It shows jointness.*

If a junior member's right to maintenance is based upon law the receipt of maintenance shows jointness because that is the only way in which he can participate in the family property (the impartible estate). The mere receipt of maintenance, in all circumstances is not sufficient to constitute jointness. But in the absence of other circumstances going to show separation, the receipt of maintenance indicates jointness. Whether it does

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so or not depends upon the circumstances of each case. (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PROSAD SINGH.

93 I.C. 385=42 C.L.J. 280=A.I.R. 1926 Cal. 1.

———In all cases of korposh grants, there is always the possibility of a reversion to the parent estate on the extinction of heirs of the grantee. (*N. R. Chatterjee and Paton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PROSAD SINGH.

93 I.C. 385=42 C.L.J. 280=A.I.R. 1926 Cal. 1.

—Impartible Estate—Proof of.

———The mere fact that rents are credited to the account books of the impartible estate or treated as part of the income of the estate is not sufficient to affect the property with the character of impartibility: 44 Mad. 1, *Foll.* (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v* SIVA PRASAD SINGH. **93 I.C. 385=42 C L J. 280= A. I. R. 1926 Cal. 1.**

———In each case for partition of a Deshgat watan, the question must be determined whether it is impartible. Experience has shown that in case of these watans, impartibility is the rule rather than the exception and so evidence is admissible to show that the custom exists in other families, not being in any way conclusive by itself but as assisting to show that the custom set up in a particular case is not an unusual one in the District of the parties: 11 Bom. 94, *Ref.* (*Macleod, C. J. and Crump, J.*). MAHADEVAPPA *v.* KASHIRAO.

77 I.C. 92=25 Bom. L.R. 797= A.I.R. 1923 Bom. 467.

———The evidence based merely on the fact that the witnesses have never known a case of partition does not afford in law sufficient proof of a valid custom, which would suffice to rebut the presumption of law that the property is partible. (*Schwabe, C. J. and Wallace, J.*). KUNHI KUTTY *v.* RAMAN.

72 I.C. 145=46 Mad. 597=18 M.L.W. 525= 1923 M.W.N. 173=A.I.R. 1923 Mad. 432= 44 M.L.J. 274.

—Impartible Estate—Rights of junior members.

———*Right of maintenance is by custom—Maintenance grants do not convey full proprietary rights.*

Per *Dawson Miller, C.J.*—The right of the junior members of the family to maintenance out of an impartible estate does not arise out of co-ownership but out of the custom which is a modification of the ordinary Mitakshara Law. The right to maintenance is a personal and not a real right and a khorposh estate goes back to the parent raj on the extinction of male line of descent not by survivorship but by reversion.

Per *Kulwant Sahay, J.*—In an impartible raj the junior members of the family have not the ordinary co-parcenary rights which members of a joint Hindu family have; and the grant of maintenance by the holder of the raj to the junior member of the raj cannot and does not amount to a partition and such grants do not by themselves amount to a conveyance of full proprietary rights including rights to minerals and sub-soil rights: 10 All 272 (P.C.), *Foll.*; A.I.R. 1921 P.C. 62, *Dist.* (*Dawson Miller, C. J. and Kulwant Sahay, J.*). UDAI PRATAP NATH *v.* JAGAT MOHAN.

106 I.C. 399=6 Pat. 638=9 P.L.T. 25= A.I.R. 1928 Pat. 66.

———The junior members of the family by an agreement may give up their rights to the impartible estate just as they may do with respect to partible property. (*N. R. Chatterjee and Panton,*

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JJ.). PRAYAG KUMARI DEBI *v.* SIVA PRASAD SINGH. **93 I. C. 385=42 C. L. J. 280= A.I.R. 1926 Cal. 1.**

———*Junior members have only the right of contingent succession.*

From the very nature of an impartible estate it cannot be the subject of joint ownership. Joint enjoyment with a right to partition cannot exist in such an estate. Apart from the right of the junior members to maintenance the junior members can have no present interest in the estate; they can only have a contingent right of succession. (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PRASAD SINGH.

93 I. C. 385=42 C. L. J. 280= A. I. R. 1926 Cal. 1.

———*Junior members cannot insist on joint residence.*

In the case of impartible estates, the junior members cannot insist upon joint residence and mess, and the fact, therefore, that such a member is residing or messing separately, does not necessarily raise a presumption of separation though taken along with other facts it may do so. The question of onus of proof would depend upon how far the facts are admitted by each side. (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PRASAD SINGH.

93 I. C. 385=42 C. L. J. 280= A. I. R. 1926 Cal. 1.

———*Junior members have no interest by birth.*

In an ordinary joint Mitakshara family the junior members have an interest accruing by birth in ancestral property, and such interest carries with it a right to maintenance until partition is effected. Such a right is a real right and can be enforced against a stranger. In an impartible estate, however, the junior members do not acquire an interest by birth. There being no joint ownership in the sense of joint enjoyment with a right to partition; the question is:—has a junior member any right to maintenance and if so, whether under the law or under custom. (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PROSAD SINGH. **93 I. C. 385=42 C. L. J. 280= A.I.R. 1926 Cal. 1.**

———*Right of maintenance is under custom.*

An impartible estate is a creature of custom, and the right of junior members to maintenance is also under the same custom. The custom has origin in an agreement by which the members agree that one of them (the eldest) in certain order of succession should hold the estate, the other members being entitled to maintenance. (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PROSAD SINGH. **93 I. C. 385=42 C. L. J. 280= A.I.R. 1926 Cal. 1.**

———In impartible estates junior members get maintenance in the form of grants, but they are ordinarily grants for life. (*N.R. Chatterjee and Panton, JJ.*) PRAYAG KUMARI DEBI *v.* SIVA PROSAD SINGH. **93 I.C. 385=42 C.L.J. 280= A.I.R. 1926 Cal. 1.**

———Mere grant of mouzahs for maintenance does not show the junior member's right to maintenance. (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PROSAD SINGH.

93 I.C. 385=42 C.L.J. 280=A.I.R. 1926 Cal. 1.

———*No right to the corpus of the estate nor income therefrom.*

The holder of the impartible estate can alienate it at his pleasure: 10 All. 272 (P.C.) and 22 Mad.

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383 (P.C.), *Foll.* If therefore the holder of the impartiable estate sells a portion of it and converts in into money, it is no longer a part of the impartible estate. It is not a question of an intention to sever but actual conversion of the estate into money. The junior members have no right whatsoever to what is not impartible estate, and the money to which it is converted is freed from the rights of the junior members whatever they may be, and becomes the absolute property of the estate. If the junior members have no proprietary right to the corpus, they have none to the money to which the corpus may be converted nor to the income of the estate. Moneys received on account of mining leases, or royalties from mines or compensation under the Land Acquisition Act at the best stand on the same footing as a sale, and junior members cannot have any right to any of them as the holder of the estate has an unrestricted power of alienation. (*N.R. Chatterjee and Panton, JJ.*).' PRAYAG KUMARI DEBI *v.* SIVA PROSAD SINGH. **93 I.C. 385=42 C.L.J. 280= A.I.R. 1926 Cal. 1.**

———*No right to maintenance under the law.*

Before *Sartaj Kuari's* case, 10 All. 272 (P.C.) the junior member's right to maintenance from an impartible estate was recognized ; such right seems to have been based upon the very nature of an impartible estate, *viz.*, that one person was to hold the estate and the others were entitled only to maintenance. But after it was laid down in *Sartaj Kuari's* case, 10 All. 272 and in the 1st *Pittapur* case, 22 Mad. 383 (P.C.) that there is no co-parcenary in an impartible estate, the right of the junior members to maintenance under the law was expressly negatived in two cases and the view was modified in 43 All. 228 (P.C.). (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PRASAD SINGH. **93 I. C. 385= 42 C.L.J. 280= A. I. R. 1926 Cal. 1.**

———Junior members have no right of maintenance by law in the Zemindari Maintenance grants not made in recognition of any rights but made as matters of grace cannot be relied on as keeping alive any right of succession. (*Wallis, C. J. and Krishnan, J.*). GURUSAMI PANDIYAN *v.* KALAI PADIA. **61 I.C. 242=44 Mad. 1= A.I.R. 1921 Mad. 340.**

———Relation of former Zamindar—Right to maintenance—Custom must be proved. (*Macnair, A.J.C.*). DHARAMSINGH *v.* LAKNATH SINGH. **62 I.C. 198=4 N.L.J. 1= A.I.R. 1921 Nag. 56.**

—Impartible Estate—Separation.

———*Evidence of separation—Nature of.*

A mere separation in food, mess or worship that is in the general status of the family or even a partition of partible property *inter se* would not destroy that national jointness which entitles a member of the junior branch to succeed to the impartible estate and that the presumption of jointness can be rebutted only by showing that there was an intention expressed or implied on behalf of the junior members of the family to give up their chance of succession to the impartible estate. Such intention can be implied both from circumstantial evidence and from the conduct of the parties. But the conclusion must be irresistable and the circumstances must point not to mere separation in general but separation relating to immovable property itself, that is to say, an abandonment of the right to succeed to it,

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Held, on the evidence in the case that in respect of the Majhauli Raj the two branches had not separated in such a manner so as to destroy the right of succession. Value of circumstances such as distance of relationship, separation in worship and existence of enmity discussed. *Case-law reviewed.* (*Sulaiman and Kendall, JJ.*). RAM SUNDAR MAL *v.* COLLECTOR OF GORAKHPUR. **1930 A.L.J. 724= A.I.R. 1930 All. 797.**

———*Mere separation in general status does not destroy notional jointness—Presumption of jointness can be rebutted by express or implied intention to give up chance of succession.*

A mere separation in food, mess or worship. that is to say, in the general status of the family, or even a partition of the partible property *inter se* would not destroy that notional jointness which entitles a member of the junior branch to succeed to the impartible estate, and the presumption of jointness can be rebutted only by showing that there was an intention express or implied on behalf of the junior members of the family to give up their chance of succession to the impartible estate.

But in the case of impartible property where the estate cannot be divided and a separated junior member cannot get any share on a partition, ordinary facts, which would be some evidence of separation with regard to partible property, would not be sufficient. Separation of the general status of the family does not necessarily imply a clear intention to renounce or surrender the right to succeed in case succession opens. There must be such evidence, direct or circumstantial, as would show an intention express or implied to give up the right to succession. It is not correct to say that in the absence of direct and positive evidence showing a clear abandonment or renunciation of the right to succeed, mere circumstantial evidence and inferences deducible from conduct would be wholly insufficient to prove an expression of an intention to give up such right. Such intention can be implied both from circumstantial evidence and from the conduct of the parties. But the conclusion must be irresistible and the circumstances must point not to mere separation in general status but separation relating to the impartible property itself that is to say, an abandonment of the right to succeed to it.

In the case of a partible estate distant relationship would indeed leave but a very weak presumption of jointness. But if in the case of an impartible estate no occasion for such succession has so far arisen, the presumption of law cannot disappear. The burden still is on the party who alleges that the estate was the separate property of the last male holder. Mere separation of the place of worship does not imply any intention on the part of the junior members to give up their right of succession to the estate.

The mere existence of strained relations would not be tantamount to an abandonment by the junior branch of their right of succession. On the other hand, they might very well entertain the hope of ultimate succession and look forward to the day when the last holder who had no male children died leaving a widow whom they could supersede.

Separation or partition *inter se* among the members of the junior branch of their partible property is no evidence of the abandonment of their right of succession The junior members are entitled to deal with their partible property in any way they like, and their action cannot imply any intention on their part to give up their chance of succession

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to the impartible estate itself: A.I.R. 1928 P.C. 68, *Foll.*; 9 M. I. A. 539 and 13 M. I. A. 113, *Dist.*; A.I.R. 1921 P. C. 62; 10 All. 272; 38 All. 590; A. I. R. 1915 P.C. 30, *Distinguished in* 38 All. 590; A. I. R. 1923 Mad. 402; 1 Cal. 153 (P.C.); 29 Cal. 828 (P.C.); 9 M.I.A. 66 (P.C.) and 13 M.I.A. 333, *Ref.* (*Sulaiman and Kendall, JJ.*). RAM SUNDAR MAL *v.* COLLECTOR OF GORAKHPUR. **1930 A.L.J. 724= A.I.R. 1930 All. 797.**

———Though general status is divided there may be jointness as to impartible estate unless there is renunciation by junior members: 1 Cal. 153 (P. C.), *Foll.* (*N.R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PRASAD SINGH.

93 I.C. 385=42 C.L.J. 280=A.I.R. 1926 Cal. 1.

———Since a partition of partible properties does not effect a separation the fact that a junior member had separate properties or that he dealt with them without reference to the impartible estate cannot necessarily effect a separation. (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PRASAD SINGH. **93 I.C. 385= 42 C.L.J. 280=A.I.R. 1926 Cal. 1.**

———*Strong evidence is required to establish separation.*

It is competent to a member of a joint family to separate himself from the family by a clear and unequivocal intimation of his intention to sever, and this is also true with regard to an impartible estate; but as in that case, the person separating forfeits his chance of inheriting the whole of the estate by survivorship, it requires strong evidence to establish such separation. (*Lord Buckmaster.*) RANI JAGADAMBA *v.* WAZIR NARAIN.

77 I.C. 1041=37 C L.J. 287=50 I.A. 1= 4 P.L.T. 319=2 Pat. 319=32 M.L.T. 157= 25 Bom. L.R. 676=1923 M.W.N. 460= 28 C.W.N. 98=18 M.L.W. 555= 4 L.R.P.C. 65=A.I.R. 1923 P.C. 59= 44 M.L.J. 503 (P.C.).

—Impartible Estate—Succession.

———With regard to Killayat and Garhjat estates of Orissa, Pachchis Sawal records the custom of exclusion of females from succession to the estate. (*Jwala Prasad and Scroope, JJ.*). AMARENDRA MAN SINGH *v.* BANAMALI SINGH.

123 I.C. 770=11 P.L.T. 268= A.I.R. 1930 Pat. 417.

———*Senior most collateral succeeds.*

Unlike ordinary joint Mitakshara family, in joint impartible estate governed by Mitakshara Law, the members do not acquire any right by birth, but have *spes successionis* and upon the death of the present holder the estate devolves on the senior most collateral by survivorship. The mother or any other female member is excluded without any proof of custom. (*Jwala Prasad and Scroope, JJ.*). AMARENDRA MAN SINGH *v.* BANAMALI SINGH.

123 I.C. 770=11 P.L.T. 268= A.I.R. 1930 Pat. 417.

———*Customary law of succession applies—Impartible estate is presumed to be joint for purposes of succession.*

Impartible estates are the creatures of custom, and where no special custom is proved, the customary law of succession applies with such qualifications only as flow from the impartible nature of the subject, and consequently for purposes of succession, and impartible estate must be considered joint family property unless it were shown to be separate, and in order to establish that an impartible estate has ceased to be joint family property for the purpose of succession, it is necessary to

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prove an intention expressed or implied on behalf of the other members of the family to give up their chance of succession to the impartible estate: A. I. R. 1921 P. C. 62, *Rel. on.* (*Cases fully discusssd.*)

The fact that the members of the joint family or of any branch of the family have exercised their right of partition over their other partible property, should not be held to divest them of their interest in the impartible estate. (*Sir John Wallis.* KONAMMAL *v.* ANNADANA JADAYA GOUNDER.

108 I.C. 354=51 Mad. 189= 55 I.A. 114=27 M.L.W. 497= 5 O.W.N. 411=1928 M.W.N. 252= 30 Bom. L.R. 802=47 C.L.J. 488= 9 P.L.T. 347=26 A.L.J. 642= 32 C.W.N. 983= A.I.R. 1928 P. C. 68= 54 M.L.J. 504 (P.C.).

———Females are not excluded by any family custom or usage from succession to the Jheria Raj. (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PRASAD SINGH.

93 I.C. 385=42 C.L.J. 280= A.I.R. 1926 Cal. 1.

———Rule that joint and self-acquired properties follow different course of succession applies to impartible estate also: 9 M.I.A. 539, *Foll.* (*N.R. Chatterjee and Panton, JJ.*). PRYAG KUMARI DEBI *v.* SIVA PRASAD SINGH.

93 I.C. 385= 42 C.L.J. 280=A.I.R. 1926 Cal.1.

———Rule of survivorship applies—Joint stepbrother can succeed in preference to the deceased's widow. (*N.R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PRASAD SINGH.

93 I.C. 385=42 C.L.J. 280=A.I.R. 1926 Cal. 1.

———In cases of impartible estate "successor" does not necessarily mean successor by survivorship." (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PRASAD SINGH.

93 I.C. 385=42 C.L.J. 280= A.I.R. 1926 Cal. 1.

———*Junior line succeeding under agreement—Rights of senior line not affected—By a unilateral act like giving notice, the holder cannot terminate joint status with regard to impartible property.*

It is a well-settled proposition of law that the succession to an impartible estate is governed by the rule of survivorship if it is joint family property and by the rule of inheritance to separate property if it is separate property.

Where the result of the arrangement was practically to substitute the junior line for the senior line to succeed to the estate but there was no evidence of any further interference with the right of senior line,

Held, it did not affect the Jaghir being held as joint family property and the right of survivorship subsisting in the senior branch as well as in the junior branches. The possession of the second line being consistent with the joint family rights continuing, it cannot be treated as making the Jaghir the separate property of the 2nd line by adverse possession. The effect of that possession is no more than that of the arrangement itself. Where that line becomes extinct, a new position would arise and there is nothing to prevent the senior line from claiming the Jaghir by survivorship.

It is very doubtful if the owner of an impartible estate can get himself divided in status with reference to that estate by a mere unilateral declaration so as to destroy the joint family right of succession by survivorship to it which the members have.

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To show that an impartible estate has become the separate property of the holder it is not absolutely necessary to prove that there was some express division in which that property was involved or that the rights of others in it were abandoned. Each case has to be decided on its own facts.

If an impartible estate is the joint property of a family, the junior members have a right in it which, however unreal it may be for the purposes of actual enjoyment and preventing alienation, is still real and gives a chance of succession by survivorship.

The case of *Satraj Kuari* v. *Deoraj Kuari*, 10 All. 272 which has stood "too long to be now touched" and First *Pittapur* case 22 Mad. 383 must be confined to alienation and cases in 41 M. 778; 24 C.W.N. 226; 37 M.L.J. 188 and 24 C.W.N. 857 may be ignored. An impartible zamindari (1) may be the self-acquired property of a particular member and therefore his separate property as in the *Sivagunga* case or (2) might be renounced by a member of the family as in the *Padamatur* case so that he becomes completely separate from other members of the family *quoad* that property or (3) might be wholly allotted to a member in a family partition dealing with it and other properties of the family as in the case in *Vadrevu Ranganayakamma* v. *Batti Ramaiya*, 5 C.L.R. 439.

The holder of an impartible estate cannot, by giving a registered notice to the junior members that he intends to be divided in status as regards all the partible properties and impartible properties, put an end to the rights of junior members over the impartible estate. Such a notice destroys the undivided status only as to the partible properties, the principle being, one member cannot compel another member of the joint family to continue undivided when the latter wishes to divide and is willing to *share the property*.

A junior member may, while dividing himself as to partible properties, also separate himself even as to the impartible estate. (*Krishnan and Ramesam, JJ.*). ANNADANA JADAYA *v.* KONNAMMAL.
71 I.C. 533=17 M.L.W. 107=1923 M.W.N. 15=A. I. R. 1923 Mad. 402.

———*In absence of special custom ordinary Hindu Law applies—If property is co-parcenary property, nearest co-parcener of senior line will succeed—If it is separate property, ordinary rule of nearness in blood applies though senior line will be preferred as between claimants of same degree.*

In the case of impartible estates, in the absence of a special custom governing the succession to it, the rule of succession must be taken to be that of the ordinary Hindu Law by which the parties are governed with such modifications only as flow from the impartible character of the estate. The difference recognised in the Mitakshara between succession to ancestral or self-acquired property must arise with regard to succession to impartible estates also. To apply the rules of succession to impartible property one must treat it for a moment as ordinary partible property and see to whom it would pass as such. If it passes to a single individual he or she would be the person entitled to the zemindari. But if it passed to two or more as equally entitled to it further rules have to be applied to determine which one of them should be selected as the zamindar as only one person can be the zemindar at a time.

If the zamindari is property in which the right of survivorship subsists, it would pass like ordinary joint family property by the rule of survivorship, and when there are more persons than one coming within that rule it will pass to the nearest co-parcener of the senior line and not to the co-parcener nearest in blood to the propositus. If on the other hand the zemindari is taken to be the separate property of the last zemindar the Mitakshara rule of succession to separate or self acquired property will apply and on the death of the last zemindar his mother will succeed if there are no nearer heirs and on her death it must pass to this zemindar's nearest reversioners under the rule that the nearest in blood excludes the more remote. But whereas both claimants fall in the category of nearest in blood, a further rule has to be applied to choose between them. In a case of collateral succession though the rule of seniority of line is not applicable in the first instance but the ordinary Mitakshara rule of nearness in blood applies, the former rule applies for the choice of one from among those equal in degree. (*Wallis, C. J. and Krishnan, J.*). GURUSAMI PANDIYAN *v.* KALAI PANDIA. **61 I. C. 242=44 Mad. 1=A.I.R. 1921 Mad. 340.**

———*Estate may be separate or joint family—If latter, succession is by survivorship.*

The fact that a raj is impartible does not make it separate or self-acquired property; a raj, though impartible, may in fact be self-acquired or it may be family property of a joint undivided family; if it is the latter, succession will be regulated according to the rule which obtains in an undivided joint family, so far as the selection of the person entitled to succeed is concerned, *i. e.*, the person will be designated by survivorship, although then according to the custom of impartibility, he will hold the raj without the others sharing it. (*Case-law fully discussed.*) 10 All. 272 (P.C.); 41 Mad. 778 (P.C.), *Dist.* The eldest of the senior branch would be the head of a joint family and he is entitled to succeed by survivorship. (*Lord Dunedin.*) BAIJNATH PRASAD SINGH *v.* TEJ BALI SINGH. **60 I.C. 534=43 All. 228=48 I.A. 195=19 A.L.J. 317=23 Bom. L.R. 654=33 C.L.J. 383=25 C.W.N. 564=1921 M.W.N. 300=2 P.L.T. 257=A.I.R. 1921 P.C. 62=40 M. L. J. 387 (P.C.).**

———*Partition proved—Succession is as between divided members.*

A general partition between the Zemindar and the other members of hisjoint family putting an end to their co-parcenary must be held to put an end to their interests if any in the impartible estate also. When that fact is found and it is decided that when the succession opened there was no co-parcenary between the last holder and the person who claims to be his successor, the ratio of the rule of succession by survivorship is gone and succession must then be traced as between divided members. (*Wallis, C.J. and Krishnan, J.*). GURUSAMI PANDIYAN *v.* KALAI PANDIA. **61 I.C. 242=44 Mad. 1=A.I.R. 1921 Mad. 340.**

———The Munagala Zemindari in the Kishna District is impartible and the succession is according to the custom of primogeniture. (*Wallis, C. J. and Sadasiva Aiyar, J.*). KESARA VENKATAPPAYA *v.* NAYANI VENKATARANGA RAO. **59 I.C. 978=43 Mad. 288=38 M.L.J. 149.**

—Impartible Estate—Miscellaneous.

———The Dompara Raj is an ancient impartible estate coming down from the Hindu period. (*Jwala Prasad and Scroope, JJ.*). AMARENDRA MANSINGH *v.* BANAMALI SINGH. **123 I.C. 770=11 P.L.T. 268=A.I.R. 1930 Pat. 417.**

HINDU LAW — Impartible Estate — Miscellaneous

———*Income Tax Act, S.* 12.

The income of an impartible estate is that of the incumbent for the time being and the fact that he is bound to maintain his sons does not entitle him to treat the income as that of the undivided family.(*Dawson-Miller, C.J. and Foster, J.*). RAJA SHIVA PRASAD *v.* EMPEROR.

82 I.C. 633=5 P.L.T. 497=1924 P.H.C.C. 234=2 P. L. R. Cr. 233=4 Pat. 73=A. I. R. 1924 Pat. 679.

———The rule of impartibility so far as has been known, never attaches itself to small estates. (*Ashworth, J.C. and Simpson, A.J.C.*). THAKUR RUDRA PRATAP NARAIYAN SINGH *v.* V. NIRMAN PRASAD SINGH. **74 I. C. 225=9 O. L. J. 552=A.I.R. 1923 Oudh 61.**

—Joint family.
Alienation.
Ancestral property.
Benami.
Breaking of.
Constitution of.
Contract.
Customary Law.
Dancing Girl.
Dayabhaga.
Exclusion.
Family property.
Father.
Law as to.
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—Joint family—Alienation.
Attachment.
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Consent.
Father.
Liability.
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Necessity.
Partition.
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What is.

—Joint family—Alienation—Attachment.

———The attachment of the undivided interest of a co-parcener creates a charge on his interest which is not extinguished by the death of that co-parcener : 5 Cal. 148 (P.C.); 16 All. 449, *Foll.* (*Sulaiman and Daniels, JJ.*). FAQIR CHAND *v.* SAINT LAL. **89 I C. 291=48 All. 4=23 A.L.J. 877 =6 L.R.A. Civ. 511=A.I.R. 1926 All. 157.**

———*Decree against undivided son—Liability of share to attachment depends on son's right to enforce partition.*

A decree-holder holding a decree against an undivided son only has the right to attach and sell the undivided share in the possession of the father only if the son has the power to bring about a partition in his father's lifetime. The general rule of Hindu Law in the Punjab is that the son cannot enforce such partition : 113 P. R. 1886 and 58 P.R. 1880, *Foll.*; 105 P. R. 1917 (F.B.), *Expl.* (*Campbell, J.*). GAHRU RAM *v.* TARA CHAND. **89 I.C. 176=A.I.R. 1926 Lah. 85.**

—Joint family—Alienation—Benefit.
See HINDU LAW—ALIENATION—NECESSITY—BENEFIT TO ESTATE.

—Joint family—Alienation—Consent.
See HINDU LAW—ALIENATION—NECESSITY—CONSENT OF CO-PARCENERS.

—Joint family—Alienation—Father—Benefit.

———Sale of joint property for purchasing better land is one for benefit of family. (*Krishnan and Odgers, JJ.*). MUTHUSWAMI PILLAI *v.* SANDANA VELAN. **101 I.C. 619=A.I.R. 1927 Mad. 649=53 M.L.J. 218.**

—Joint family—Alienation—Father—Burden of proof.

———Where joint family property is mortgaged by a Hindu father, and the property is sold in execution of a decree on the mortgage, the onus of proving that the debt had been contracted for an immoral purpose lies on the son of mortgagor: 13 Cal. 21, *Foll.*; 39 All. 437, *Foll.* (*Dalal, J.*). BISHUNATH RAI *v.* JODHI RAI. **82 I.C. 180=5 L.R. A. Civ. 690=A.I.R. 1925 All. 120.**

—Joint family—Alienation—Father—Gift.

———Gift by father of 1-8th share of entire property to a Brahmin richer than himself and a legal practitioner is not valid. It is not a gift of a reasonable portion of the family property for charitable purposes. (*Dalal, J.*). SOHAN LAL *v.* PEARE LAL. **117 I.C. 826=A.I.R. 1929 All. 865.**

———Gift of portion of family property by father—Gift beyond authority and so invalid—Son not avoiding gift—Still donee cannot sue father's representatives for possession : 33 All. 783 (F.B.); A.I.R. 1917 P.C. 61, *Rel. on* ; 19 Cal. 123, *Discussed* : 10 A.L.J. 112, *Dist.* (*Dalal, J.*). SOHAN LAL *v.* PEARE LAL. **117 I.C. 826=A.I.R. 1929 All. 865.**

—Joint family—Alienation — Father — Immoral debt.

———Mortgage by father for immoral purposes—Personal money-decree passed against father—Joint ancestral estate attached in execution—Fathers's share cannot be released, but the son's share is to be released : 3 Cal. 198 (P.C.); 5 Cal. 148 (P.C.) and 16 All. 449, *Rel. on* ; 27 All. 16 (F.B.) and A.I.R. 1925 All. 327, *Ref* ; A.I.R. 1924 P. C. 50, *appl.* (*Sulaiman and Daniels, JJ.*). SHIVA NATH PRASAD *v.* TULSI RAM. **89 I.C. 480=48 All. 1=23 A.L.J. 865=6 L.R.A. Civ 523=A.I.R. 1925 All. 801.**

—Joint family—Alienation—Father—Powers of.

———The father of an undivided family subject to the Mitakshara law has full power of disposition over his self-acquired immovable property : 20 All. 267 (P.C.) and 10 Bom. 528, *Foll.* (*Zafar Ali and Campbell, JJ.*). WAZIR SINGH *v.* MOTI SINGH. **94 I.C. 492=7 Lah. 522=27 P.L.R. 846=A.I.R. 1926 Lah. 395.**

———After adoption, adopted son becomes co-parcener with adoptive father—Latter cannot dispose of joint family property. (*Shadi Lal, C. J. and Le Rossignol, J.*). PARMA NAND *v.* SHIV CHARAN DAS. **59 I.C. 256=2 Lah. 69=3 L.L.J. 82=21 P.L.R. 1921=A. I. R. 1921 Lah. 147.**

HINDU LAW—Joint family—Alienation—Father—Son bound.

—Joint family—Alienation—Father—Son bound.

———Property gifted to wife—She mortgaging it and borrowing money for payment of previous debts binding on the family, in payment of her own debts and in payment of debts incurred on account of expenses for defence of her husband in a criminal case—Decree is binding on sons for the amounts excepting the debts incurred by the mother on her own behalf : 24 Bom. 135 and 34 Mad. 188, *Foll.* (*Sulaiman and Kendall, JJ.*). TARA KISAN *v.* HARKISHEN DAS. **108 I.C. 114=50 All. 447=26 A.L.J. 116=A.I.R. 1928 All. 251.**

———A man who is a single owner and has no co-parcener can dispose of property whether it is ancestral or not in any manner he pleases. An alienation made by the father at a time when there was no co-parcener is a valid alienation and is binding on a subsequently born son. (*Lindsay, J.C.*). KANAHAI LAL *v.* B. NAWAB BEGAM. **62 I.C. 811=8 O.L.J. 285=A.I.R. 1921 Oudh 171.**

—Joint family—Alienation—Father—Validity of.

———Mortgage by father to recover his self-acquired property—Sons are not bound—But if a decree is passed against father sons are bound unless they prove immorality or illegality of debt: 17 O.C. 318; A.I.R. 1924 Oudh 394; A.I.R. 1923 Oudh 227 and A.I.R. 1924 Oudh 34, *Appl.* (*Hasan and Raza, JJ.*). NAND LAL *v.* UMRAI. **93 I.C. 655=29 O.C. 260=3 O.W.N. 359=1 Luck. 360=A.I.R. 1926 Oudh 321.**

———*Mortgage neither for necessity nor to discharge antecedent debt—Only father's share is liable.*

The words "would not bind more than his own interest" appearing in the third proposition of law laid down by the Privy Council in *Brij Narain* v. *Mangal Prasad*, A.I.R. 1924 P.C. 50 do not mean that the father is declared, to be competent to bind his own interest in a joint family estate by executing a mortgage deed to discharge his debt even though the debt is not incurred for legal necessity and is not an antecedent debt. All that the words mean is that if the deed is not found to be valid as a mortgage a simple money decree will be passed and the share of the father alone and not the whole estate will be available to the decree-holder in execution. (*Kendall, A.J.C.*). JOKHU PANDE *v.* MATA PRASAD TEWARI. **83 I.C. 1044=27 O.C. 161=A.I.R. 1925 Oudh 94.**

———No mortgage can be enforced against property belonging to a joint family unless it is established that its consideration was taken for the payment of an antecedent debt of the father independent of the mortgage or for legal necessity. (*Kanhaiya Lal, J.C.*). RATAN *v.* SHEO LAL. **76 I.C. 1055=A.I.R. 1925 Oudh 35.**

———The mere circumstances of the pious obligation of a Hindu son to pay the father's debt does not validate a mortgage which is invalid for want of legal necessity or of the necessity for the payment of antecedent debt : A.I.R. 1923 Oudh 150; A.I.R. 1924 P.C. 50, *Foll.* (*Wazir Hasan and Neave, A.J.Cs.*). GAJADHAR BAKSH SINGH *v.* BAIJNATH. **79 I.C. 104=27 O.C. 133=11 O.L.J. 264=A.I.R. 1925 Oudh 9.**

———*Alienation by father for debt barred at date of alienation binds sons.*

A right to receive the payment of a debt, as distinct from a right to enforce its payment, subsists, even after the remedy by action has become barred by time ; and if the debt exists and the debtor is willing to pay it by an alienation of the family property, such an alienation, if otherwise valid, can bind his sons and grandsons to the same extent as if the said debt had been received by the debtor, and was sought to be recovered by the creditor by the atttachment and sale of the family estate : 33 Mad. 308; 6 Mad. 293; 43 All. 604; A.I.R. 1922 All. 402, *Foll.* ; 8 A.L.J. 1099; 35 All. 207; 41 Bom. 347, *Dist.* (*Walsh, Ag. C.J., Piggott, Kanhaiya Lal, Daniels and Mukerji, JJ.*). GAJADHAR *v.* JAGANNATH. **80 I.C. 684=22 A.L.J. 601=5 L.R.A. Civ. 458=46 All. 775=A.I.R. 1924 All. 551 (F.B.).**

HINDU LAW — Joint family — Alienation — Necessity.

—Joint family—Alienation—Liability.

———*Joint mortgage by some members—One of them can be made liable for the whole debt.*

Where some of the members of the joint family mortgage the joint properties, each of them representing to the mortgagee that he had whatever share or interest did not belong to the others, it is no defence to a suit on the mortgage against one of them that the suit is time-barred as against others in view of the covenant to pay jointly and severally. In such a case one of the mortgagors can be made liable for the whole debt and he can have his remedy by contribution against other mortgagors. (*Rankin, C.J. and Majumdar, J.*). BEHARI LAL *v.* INDRA NARAYAN. **104 I.C. 206=45 C.L.J. 571=31 C.W.N. 985=A.I.R. 1927 Cal. 665.**

—Joint family—Alienation—Manager.

———Suit on mortgage by manager of joint family property—Court has power to enquire into propriety of transaction as also question of rate of excessive interest, onus of proving which lies on mortgage : A.I.R. 1919 P.C. 12 and A.I.R. 1923 P.C. 37, *Rel. on.* (*Wazir Hasan, C.J. and Srivastava, J.*). RAM SARAN MISRA *v.* JHULLAR SINGH. **7 O.W.N. 479=A.I.R. 1930 Oudh 333.**

—Joint family—Alienation— Necessity.

———A creditor who lends after satisfying himself as to the existence of necessity is not bound to see to the application of the money in the case of an alienation by the manager of joint Hindu family. (*Ramesam and Jackson, JJ.*). GANGADHARA PRAHARAJ *v.* SRI DINABANDHU SANTRA. **1929 M.W.N. 845.**

———*Enquiry by alienee—When necessary.*

In the case of an alienation of joint family property where the existence of the debts turns out to be true *bona fide* enquiry on the part of the lender as a mode of justifying the transaction is necessary. It is only where the debt turns out not to be true and the representations made to the creditor turn out to be false that a second heading namely whether the lender made *bona fide* enquiries and got satisfied by his enquiries that there is a necessity becomes material. (*Ramesam and Jackson, JJ.*). GANGADHARA PRAHARAJ *v.* SRI DINABANDHU SANTRA. **1929 M.W.N. 845.**

———A sale-deed by the manager of a joint Hindu family of ancestral property without any legal necessity is void from its inception: A.I.R. 1922 Oudh 257; A.I.R. 1923 P.C. 189, *Rel. on.* (*Wazir Hasan, Ag. C.J. and Pullan, J.*). SHEO RAJ *v.* AJUDHIYA. **116 I.C. 195=6 O.W.N. 213=4 Luck. 503=A.I.R. 1929 Oudh 284.**

———Alienation by a junior member, though not a karta, if for necessity is valid: A.I.R. 1921 Pat. 48 and A.I.R. 1922 Pat. 553, *Rel. on.* (*Kulwant Sahay and Macpherson, JJ.*). RAMDAS SINGH *v.* TANAK SINGH. **111 I.C. 51=9 P.L.T. 758=A.I.R. 1928 Pat. 557.**

HINDU LAW — Joint familiy — Alienation — Necessity.

———*Son's liability.*

The managing co-parcener of a joint undivided estate cannot alienate or burden the estate *qua*-manager except for purposes of necessity; but if he is the father and reversioners are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt: A.I.R. 1924 P.C. 50, *Foll.* (*Tek Chand and Agha Haidar, JJ.*) KALI CHARAN *v.* JAGANNATH. **103 I.C. 227= A.I.R. 1927 Lah. 812.**

———Where the facts were: firstly, that the alienor was a man of excellent character; secondly, that he had a son whose interests he was not likely deliberately to prejudice; thirdly, that the alienation remained unchallenged for a long time, and fourthly, the other property of the alienor was under mortgage,

Held, that necessity for alienation may be inferred from these facts. (*Fforde and Campbell, JJ.*). SUCHA SINGH *v.* KALOO. **96 I.C. 5 (Lah.).**

———*Alienation by manager—If sale for consideration is not much over the legal necessity and the transaction is not an improper one, sale should not be set aside.*

In cases where the part of the consideration not justified on the grounds of legal necessity is small, sale should not be set aside, and where it is insignificant the sale should even be upheld: 48 All. 183, *Rel. on.*

Where it is necessary to sell property in order to discharge a binding legal obligation, the purchase price must occasionally exceed the actual cash requirements, and unless it appears that the transaction itself was an improper one or that some more advantageous arrangement could have been made, the Courts should be slow to set aside a sale to a *bona fide* purchaser merely because the consideration paid is somewhatgreater than the actual requirements of the joint family. (*Dawson-Miller, C.J. and Foster, J.*). ACHUTAN AND JHA *v.* SURJANARAIN JHA. **95 I.C. 991= 5 Pat. 746=7 P.L.T. 719=1926 P.H.C.C.274= A.I.R. 1926 Pat. 427.**

———*Mortgage by some members—Legal necessity must be proved for rate of interest also.*

It is incumbent on those who support a mortgage made by some of the members of a joint Hindu family to show not only that there was necessity to borrow but that it was not unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage that rate and those terms cannot stand. (*Wazir Hasan and Neave, A.J.Cs.*). BAKHTAWAR SINGH *v.* BAKHTAWAR SINGH. **78 I.C. 232=A.I.R. 1925 Oudh 235.**

———*Alienee must prove at least* bona fide *enquiry.*

The lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. If he does so enquire, and acts honestly, the real existence of alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and under such circumstances, he is not bound to see to the application of the money. (*Scott-Smith and Fforde, JJ.*). RODHA RAM *v.* AMAR CHAND. **77 I.C. 333=4 Lah. 208= A. I. R. 1924 Lah. 141.**

HINDU LAW—Joint family—Alienation—Partition.

———*Legal necessity—Recitals are sufficient where evidence is impossible.*

A recital is not a substitute for evidence of the facts which a creditor must prove. No party can be asked to prove what is impossible and when the proof of the facts justifying legal necessity of representations in respect of such a necessity has become impossible by lapse of time, the recital would be sufficient evidence to support the deed, provided that there are independent circumstances which are such as would justify a reasonable belief in the truth of the recital: 36 All. 187 and 44 Cal. 186, *Foll.* (*Wazir Hasan, A.J.C.*). RAM NATH *v.* RAM HARAKH. **75 I.C. 770= 80 I.C. 471=10 O.L.J. 245= A.I.R. 1924 Oudh 49.**

———*Mortgage by Karta for business—Onus is on mortgagee to prove necessity for business.*

When the manager of a joint Hindu family mortgages joint estate, it must still be incumbent on the parties supporting the mortgage to prove that the money raised on the mortgage was required for family purposes No doubt if the family is carrying on trading business, it would be very much easier to prove that the money was required for the purposes of that trade, and so for family purposes, than if the family were mere agriculturists. But it is not necessary inference that because the manager was carrying on business and because he raised moneys by mortgaging family property, that the money was necessarily required for the purpose of the joint family business. (*Macleod, C.J, and Crump, J.*). VITHAL YESHWANT *v.* SHIVAPPA MALLAPPA. **72 I.C. 659=25 Bom. L.R. 323=47 Bom. 637= A.I.R. 1923 Bom. 265.**

———A co-parcener in a joint Hindu family cannot be predicated to have any share of his own in the joint family property until partition and therefore any alienation by him of the joint family property without any benefit to the family cannot be upheld even to the extent of his share: 21 P.R. 1912, *Foll.* (*Le Rossignol and Wilberforce, JJ.*). MUNSHI LAL *v.* SOHAN LAL. **66 I.C. 831= 3 L.L.J. 137.**

———*Mortgagee praying for personal decree against executants—No question of legal necessity arises.*

Where joint family property is mortgaged but the mortgage debt is not sought to be enforced against the mortgaged property and only a simple money decree is asked for in respect of it, then no question of legal necessity arises and in the absence of fraud, undue influence, or other circumstances which would invalidate the contract, the members who entered into the mortgage, are clearly liable and the representatives of the executants who are dead are liable to the extent of the assets of the executants who are dead which have come into their hands: 39 All. 437, *Rel. on.* (*Daniels and Lyle, A.J.Cs.*). PRAG DIN *v.* BHAGWATI SHAI. **66 I.C. 687= 8 O. L. J. 418=A.I.R. 1921 Oudh 193.**

—Joint family—Alienation—Partition.

———*Alienee's right to get vendor's share is only equitable.*

The right of the purchaser to have the property of his purchase allotted exclusively to his vendor's share is not an absolute right, but is in the nature of an equitable right and the Courts do as a matter of fact take this into consideration in adjusting the equities between the parties, as far as

HINDU LAW—Joint family—Alienation—Partition.

possible. (*Kinkhede, Offg. A.J.C.*). BHANRAO *v.* GANGI. **95 I.C. 734=23 N.L.R. 184= 9 N.L.J. 170=A.I.R. 1926 Nag. 453.**

———Where a member of a Hindu joint family mortgaged his undivided share and in the subsequent partition the property to which the mortgage related was allotted wholly to another member of the family but was sold in execution of the mortgage decree obtained by the mortgagee,

Held,—he (the member to whom the property had been allotted in partition) could recover the property sold. (*Daniels and Neave, JJ.*). NARAIN *v.* RAM SARAN. **85 I.C. 490=22 A.L.J. 853= 5 L.R.A. Civ. 751=A.I.R. 1924 All. 871.**

———Mortgage by one member—Partition—Mortgaged property allotted to another and other property allotted to mortgagor—Substituted property comes under the mortgage. (*Prideaux and Kinkhede, A.J.Cs.*). BALIRAM SINGH *v.* RAMCHANDRA. **78 I.C. 77=A.I.R. 1924 Nag. 393.**

—Joint family—Alienation—Rights of alienee.

———*Purchaser of undivided share is not entitled to joint possession.*

A purchaser of an undivided share of a joint Hindu family, if out of possession, should not be given joint possession with the other co-parceners but should be left to his remedy of a suit for partition : A.I.R. 1926 Bom. 399 and 39 Mad. 265, *Rel. on.* (*Macnair, A.J.C.*). KAMTA PRASAD *v.* MADHAVRAO. **116 I.C. 648= 12 N.L.J. 1=25 N. L. R. 28= A.I.R. 1929 Nag. 60.**

———Alienation by the manager—Vendee is justified in insisting on other adult members to be parties to the contract. (*Fforde and Addison, JJ.*). SHAM DAS *v.* KISHAN CHAND. **110 I. C. 850= 9 Lah. 67=29 P. L.R. 310= A.I.R. 1928 Lah. 154.**

———The purchaser of an undivided share of a Hindu co-parcener gets only an equity to enforce partition and takes the share when partitioned subject to all the liabilities on it in the hands of his vendor. (*Coutts Trotter, C.J.. Krishnan and Curgenven, JJ.*). K. VENKU REDDI *v.* M. VENKU REDDI. **100 I.C. 1018=50 Mad. 535= 1927 M.W.N. 267=25 M.L.W. 784= 38 M.L.T. 342=A. I. R. 1927 Mad. 471= 52 M.L.J. 387 (F.B.)**

———Family divided in status but property not divided—Alienation by one member—Alienee need not sue for general partition. (*Spencer, J.*). VENKIAH *v.* GURAVIAH. **96 I.C. 290= 23 M.L.W. 604=A. I. R. 1926 Mad. 757= 50 M.L.J. 669.**

———*Execution purchaser of co-parcener's interest gets under certain circumstances good title to what he purchases.*

It is well established law that in families governed by the law of the Mitakshara no co-parcener has in the joint family property any separate and defined share, although in Northern India at least a co-parcener of such joint family property has a right to obtain a partition and on such partition he will obtain a separated and defined share of the joint family property. A creditor of a co-parcener may, under certain circumstances, obtain a partition of his debtor's share in joint family property, and when in execution of a decree a Court sells what is joint family property, as the property of the judgment-debtor the purchaser at the Court sale may under certain circumstances obtain a good

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title to what he purchases. (*Sir John Edge.*) SAT NARAIN *v.* BEHARI LAL. **84 I. C. 883= 1925 M.W.N. 1=23 A.L.J. 85=6 L.R.P.C. 1= 6 Lah. 1=21 M.L.W. 375=27 Bom. L.R. 135= 52 I.A. 22=29 C.W.N. 797=26 P.L.R. 81= A.I.R. 1925 P. C. 18=47 M.L.J. 857 (P.C.).**

———Sale of his share by a co-parcener—Suit for partition by the purchaser—Suit lies—Share purchased from the vendor to be given to him if possible : 11 Bom. H. C. 72 and 11 Bom. H. C. 76, *Foll.* (*Macleod, C. J. and Shah, J.*). DHULABHAI DABHAI *v.* LALA DHULA. **64 I.C. 115= 46 Bom. 28=23 Bom. L. R. 777= A. I. R. 1922 Bom. 137.**

———Sale by co-owner of specific portion and delivery of possession—Alienee's possession is adverse to other co-owners—A co-owner's possession of the area cannot be adverse to his co-sharers until he has definitely declared to them his intention of holding on his own behalf, but this principle does not applly to the alienee of a co-sharer whose possession must be regarded as adverse to the co-sharers from its commencement. (*Broadway, J.*). ANWAR *v.* KISHAN SINGH. **71 I.C. 171= A.I.R. 1922 Lah. 205.**

———*Purchaser's right is only on equity to work out his rights by partition suit—Courts must decree possession to co-parceners.*

A purchaser has only an equity as against the other members of the co-parcenary to work out his interests by a suit for a general partition. In cases where possession of the property is claimed by a co-parcener on the ground of the invalidity of the alienation as against him, the Court must decree possession and simply declare the right of the purchaser to a partition. (*Kumaraswami Sastri and Devadoss, JJ.*). SUBBE GOUNDAN *v.* KRISHNAMACHARI. **68 I.C. 869=45 Mad. 449= 1922 M. W. N. 269=15 M L.W. 537= 30 M. L.T. 217=A.I.R. 1922 Mad. 112= 42 M.L.J. 372.**

———Vendee from some of the members—Transferee from all the members can challenge the sale —No condition to re-pay the sale price to the former, can be imposed for his obtaining possession. 33 All. 783, *Rel. on.* (*Dalal and Wazir Hasan, A. J. Cs.*). RAGHUBAR PANDE *v.* GOKUL PRASAD. **65 I.C. 107=24 O. C. 307= A.I.R. 1921 Oudh 188.**

—Joint family—Alienation—Setting aside.

———*Mesne profits from alienee—When can be claimed.*

In a suit to set aside a sale by a member of a joint Hindu family which is voidable no mesne profits can be allowed up to the date of suit when no notice is given to the alienee questioning the alienation: A.I.R. 1924 Mad. 81, *Foll.* (*Ramesam, J.*). (NAGUR) PICHAI ROWETHER *v.* RAKAPPA. **100 I.C 202=A.I.R. 1927 Mad. 528.**

———*Binding portion of consideration must be distributed over all shares.*

Three brothers. one of them being a minor, formed a joint family. The major brothers and their mother, on behalf of the minor brother, sold the joint family property. The minor, on attaining majority, brought a suit to set aside a sale for want of necessity. It was found that two-thirds of the consideration was not for necessity and the remaining one-third had benefitted the plaintiff.

Held, that according to accepted equitable principles, in the absence of anything appearing to the contrary, the consideration for the sale must be

HINDU LAW — Joint family — Alienation — Setting aside.

distributed over the whole of the property sold in proportion to the value of each part. There is no ground for supposing that one portion of the consideration is allocated to a particular share and the other portion to the other share or shares. The valid portion of the consideration, as well as the invalid portion, must be distributed over the shares of the three brothers equally. The consequence of this apportionment is that the plaintiff's one-third share must be treated as charged to the extent of one-third of the valid portion of the consideration: A. I. R. 1924 Nag. 109 and 37 Mad. 435, *Foll.*; 12 N. L. R. 161, *Diss. from.* (*Kinkhede, A.J.C.*). RADHA KISHAN *v.* BISAN SINGH. **101 I.C. 262= A.I.R. 1927 Nag. 379.**

———*Mesne profits against alienee—When allowed.*

Where a sale-deed, challenged as being one without necessity, has not been unconditionally set aside, but the plaintiff is held entitled to get it set aside on payment of his quota of the valid portion of the consideration, the vendee must necessarily be deemed to be lawfully in possession until the sale is set aside, and he is therefore not accountable for mesne profits: A.I.R. 1918 P. C. 118, *Foll.* (*Kinkhede, A. J. C.*). RODHA KISAN *v.* BISAN SINGH. **101 I.C. 262= A.I.R. 1927 Nag. 379.**

———Mortgage set aside—Court may in equity order payment of certain amount as condition precedent to recovery of property. (*Wazir Hasan, A.J.C.*). GAURI SHANKAR *v.* BADRI NATH. **88 I.C. 474= A.I.R. 1925 Oudh 635.**

———Right of the co-parcener to challenge alienation is not lost even where a manager is able to give discharge: 31 All. 156, *Foll., though doubted*; 35 All. 380, *Appr.* (*Daniels, J.*). ISH DAT TEWARI *v.* TAMESHAR. **79 I.C. 296= 5 L.R.A. Civ. 357= A.I.R. 1924 All. 916.**

—Joint family—Alienation—Subsequent birth.

———Members of a joint Hindu family born after the alienation of the family property by another member of that family cannot question the validity of that alienation: 33 All. 283; A.I.R. 1925 P.C. 33 and A.I.R. 1924 All. 798, *Ref.* (*Tek Chand and Agha Haidar, JJ.*). BELI RAM *v.* SARDARI LAL. **A.I.R. 1930 Lah. 613.**

———*Subsequently born co-parceners get neither a new cause of action nor a new starting point for limitation.*

Where a suit is brought to contest an alienation of joint family property it is from the date on which the cause of action arose that period of limitation must be reckoned. Subsequent birth of a co-parcener does not create a fresh cause of action or a new starting point from which limitation should be reckoned. By the express terms of the section the extended period of three years after majority can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned. A person who was not in existence at the time does not come within this description and therefore is not entitled to the three years' extension. (*Sir Lawrence Jenkins.*) RANODIP SINGH *v.* PERMESHWAR PERSHAD. **86 I.C. 249=23 A.L.J. 176= 27 Bom. L.R. 175=21 M.L.W. 236= 52 I.A. 69=6 L.R.P.C. 47=1925 M.W.N. 262= 12 O.L.J. 74=2 O.W.N. 1=47 All. 165= 27 O.C. 343=29 C.W.N. 666=26 P.L.R. 113= A.I.R. 1925 P.C. 33=48 M.L.J. 29 (P.C.).**

———*No new cause of action, nor new starting point for limitation.*

HINDU LAW — Joint family — Alienation — Validity of.

A son born in a joint Hindu family acquires by birth interest in ancestral property but does not acquire any interest in any right to sue. The cause of action accrues after an alienation when the purchaser takes possession (see Art. 126, Limitation Act), and a new cause of action does not accrue upon the subsequent birth of a son in the family.

The after-born son does not acquire a fresh cause of action and a fresh period of limitation does not start from the date of his birth. In his case the time from which the period of limitation is to be reckoned is the date of the transfer and when he was not born on that date and was under no disability he cannot obtain the benefit of the provisions of S. 6 of the Limitation Act. He can take advantage of any cause of action existing at his birth and sue within the period of limitation but cannot start a fresh period at his birth: 8 W.R. 285; 4 All. 120, *Foll.*; 24 O.C. 330; 1 Lah. 558, *Ref. to.* (*Dalal, J.*). SIKANDAR SINGH *v.* BACHCHU PANDE. **82 I.C. 307=5 L.R.A. Civ. 663= A.I.R. 1925 All. 54.**

———A co-parcener not born on date of alienation by his father and uncle and who separated before suit can't set aside the alienation: A.I.R. 1922 All. 342, *Dist.* (*Daniels, J.*). ISH DAT TEWARI *v.* TAMESHAR. **79 I.C. 296=5 L.R.A. Civ. 357= A.I.R. 1924 All. 916.**

———*No new cause of action.*

Although it cannot be disputed that a subsequently born Hindu son has a right to avoid an alienation which took place at a time when other members of the family, not parties to the deed, were alive, it does not follow that he has a fresh start for the purpose of limitation from the time of his birth. When an alienation is made which is not justified by necessity a cause of action arises in favour of the other members to have it set aside and to recover possession from the alienee but there is only one cause of action in favour of the other members of the family. Successive causes of action cannot arise as new members are born year after year: 33 All. 654; 19 A.L.J.R. 978, *Dist.* (*Sulaiman and Kanhaiya Lal, JJ.*). SITA RAM *v.* CHEDDI SINGH. **83 I.C. 1052=5 L.R.A. Civ. 634= 22 A.L.J. 809=46 All. 882=A.I.R. 1924 All. 798.**

———*Mortgage after birth, to discharge mortgage executed before birth is binding.*

Where the entire consideration for the mortgage deed in suit consisted of money due on a previous deed executed by persons who were on that date sole owners of the property, the minor members born after the previous mortgage but before the mortgage in suit cannot dispute the consideration of the mortgage in suit: 33 All. 283 and 20 A.L.J. 333, *Ref.* (*Mears, C.J. and Piggott, J.*). PARTAP SINGH *v.* BOHRA NATHU RAM. **79 I.C. 234= 45 All. 49=A.I.R. 1923 All. 197.**

—Joint family—Alienation—Suit to enforce.

———Mortgage suit against family—All members joined as parties, and not only the Karta—Suit by minor members to set aside mortgage decree—Mortgagee cannot plead that they were not necessary parties. (*Das and Adami, JJ.*). GANGANAND SINGH *v.* RAMESHWAR SINGH BAHADUR. **102 I. C. 449=6 Pat. 388= 8 P.L.T. 730=A.I.R. 1927 Pat. 271.**

—Joint family—Alienation—Validity of.

———*Manager—Alienation by—Subsequent assent of junior members, if can validate.*

Quaere.—Whether in the case of alienation of joint family property the later assent by the mem-

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bers will help to validate a transaction which was void at its inception. (*Ramesam and Jackson, JJ.*). GANGADHARA PRAHARAJ MAHAPATRO *v.* SRI DINABANDU SANTRA MAHAPATRO.

1929 M.W.N. 845.

———A member of a Hindu joint family who was never in exclusive possession of a plot cannot transfer it by the deed of 'birth' which generally implies an under-proprietary right: 14 O. C. 41; A.I.R. 1924 Oudh 60; A. I. R. 1927 Oudh 467, *Rel. on.* (*Raza, J.*). DUKHI SINGH *v.* SARJU DEVI.

107 I.C. 178=4 O.W.N. 1225= A.I.R. 1928 Oudh 113.

———*Transfer by one member to another member is void.*

A member of a joint undivided Hindu family cannot legally transfer a portion of the joint family property to another member of the family. No interest can pass under such transfer and it need not be set aside: 41 Mad. 612, *Dist.* (*Rafique and Stuart, JJ.*). RAM CHAND *v.* MATHURA CHAND.

60 I.C. 896=19 A.L.J. 299= A.I.R. 1921 All. 298.

—Joint family—Alienation—What is.

———Permanent lease is an alienation—Legal necessity or the benefit of the joint family estate must be proved: A.I.R. 1917 P.C. 33, *Foll.* (*Kendall and Niamatullah, JJ.*). BASDEO NARAIN *v.* MUHAMMAD YUSUF. **116 I.C. 491=51 All. 285= 26 A.L.J. 1313=9 L.R.A. Rev. 321= A. I. R. 1928 All. 617.**

—Joint family—Ancestral property.

———*Ancestral property of sole surviving co-parcener and self-acquisition—Difference between.*

Per *Patkar, J.*—"There is a substantial difference between the self-acquired property of a person and the ancestral property which comes into his hands and of which he is possessed as the sole surviving co-parcener. He can make a gift or a bequest of the self-acquired property even though a son born or adopted be in existence, but in respect of the ancestral property of which he is possessed as the sole surviving co-parcener, he cannot make a gift or bequest as soon as a son is either born or adopted." (*Marten, C.J. and Patkar, J.*). BHIKUBAI CHUNILAL *v.* MANILAL.

32 Bom. L.R. 1217=A.I.R. 1930 Bom. 517.

———A substantial nucleus of ancestral property in certain property owned by a person gives the character of ancestral property to all the property owned by him. (*Tek Chand and Agha Haidar, JJ.*). BELI RAM *v.* SARDARI LAL.

A.I.R. 1930 Lah. 613.

———The mere fact that the name of common ancestor appears in the settlement pedigree table is, by itself and without more, insufficient to prove that the land in possession of his descendants was once held by him: A. I. R. 1927 Lah. 477, *Rel. on.* (*Tek Chand, J.*). KISHAN SINGH *v.* LACHHMAN DAS. **122 I.C. 109=A.I.R. 1930 Lah. 238.**

———There is no presumption that the property in the hands of a member of a Hindu family is joint or ancestral property. The character of such property must be established by the plaintiff who seeks to lay a claim to it: 8 N. L. R. 82 and A.I.R. 1926 Nag. 389, *Foll.* (*Findlay, J.C. and Subhedar, A.J.C.*). TRIMBAKDAS *v.* MT. MATHABAI. **124 I. C. 609=A.I.R. 1930 Nag. 225.**

———*House is no nucleus.*

A house in which the members reside cannot in law furnish a nucleus for acquisitions so as to clothe them with the character of ancestral property: A.I.R. 1926 Nag. 389, *Foll.* (*Findlay, J.C. and Subhedar, A.J.C.*). TRIMBAKDAS *v.* MT. MATHABAI. **124 I. C. 609=A.I.R. 1930 Nag. 225.**

HINDU LAW—Joint family—Ancestral property.

———Even the joint acquisitions of two brothers without the aid of any income from the ancestral nucleus would not make the property in their hands "ancestral property." (*Findlay, J. C. and Subhedar, A.J.C.*). TRIMBAKDAS *v.* MT. MATHABAI. **124 I.C. 609=A.I.R. 1930 Nag. 225.**

———There is no presumption in Hindu Law about any property being ancestral: 12 Bom. 122, *Rel. on.* (*Stuart, C. J. and Srivastava, J.*). MT. BRIJ KUNWAR *v.* SANKATA PRASAD. **123 I.C. 849= 6 O.W.N. 963=A.I.R. 1930 Oudh 39.**

———*Additions to ancestral house—When not ancestral property.*

No doubt where a Hindu father and son live together and have an ancestral house any addition made to that house is to be presumed to have been built out of the nucleus of joint family property. But this does not apply to a case where the father and son carry on their independent callings and are not shown to have any common fund or funds or to have pooled their incomes: A.I.R. 1927 Mad. 676, *Rel. on.* (*Broadway and Harrison, JJ.*). THARESHER *v.* RAM CHAND. **119 I.C. 239= 11 L.L.J. 85=A. I. R. 1929 Lah. 468.**

———*Nature of the property must be proved—No presumption either way.*

There is no presumption that the property in the hands of a separated member of a Hindu family is joint family or ancestral property. The joint or ancestral character of the property in dispute must be established by one who claims a share in such property.

Where the Courts below accepted as true the evidence that *S* and *C* were separate in mess as well as in property in the absence of any evidence to prove that the property in dispute originally belonged to a common ancestor of *S* and *C* or that it was acquired by *S* with the aid of ancestral nucleus, the lower Courts were perfectly justified in holding that the property in suit which admittedly stood recorded in the sole name of *S* was his self-acquisition and not joint ancestral property in which *C* or his descendants had any interest: 8 N. L. R. 82 and A. I. R. 1926 Nag. 389, *Foll.* (*Subhedar, A.J.C.*). HARI *v.* BANGH.

120 I. C. 402 (Nag.).

———*Suit for recovery of possession of ancestral property—Burden of proving that property is ancestral is on plaintiffs.*

Ordinarily as between two Hindu brothers there is a presumption of jointness; but once a suit is brought for the recovery of possession of a certain property that has passed out of the family of which the plaintiffs are members, and when in that suit it is contended by the defendants, that the property sought to be recovered by the plaintiffs was not the ancestral property of the plaintiffs, the burden of proving that the property was ancestral lies on the plaintiffs: 35 Cal. 1039 (P.C.), *Foll.* (*Iqbal Ahmad, J.*). LACHMAN DUBE *v.* AMBIKA DUBE. **100 I. C. 444= A.I.R. 1927 All. 366.**

———The share which a co-parcener takes as the share of him and his branch on his separation is ancestral property. (*Sir John Edge.*) HARI BAKHSH *v.* BABU LAL. **83 I.C. 418= 22 A.L.J. 254=34 M.L.T. 70=5 Lah. 92= 5 L.R.P.C. 113=51 I.A. 163=28 C.W.N. 953= 1924 M.W.N. 650=20 M.L.W. 406= 26 Bom. L.R. 1108=A.I.R. 1924 P.C. 126= 47 M.L.J. 938 (P. C.).**

HINDU LAW—Joint family — Ancestral property.

——Per *Bucknill, J.*—Property from mother is not : 25 M. 678; 35 Cal. 1039; 3 P.L.J. 188, *Foll.* (*Dawson Miller, C. J. and Bucknill, J.*). HARI PRASAD SINGH *v.* SOURENDRA MOHAN SINGH.
66 I.C. 945=1 Pat. 506=3 P.L.T. 709= A.I.R. 1922 Pat. 450.

—Joint family—Benami.

——Property standing in wife's name is not presumed to belong to her husband unless it is proved that husband advanced money for its purchase : 8 Mad. 214, *Rel. on* ; A I.R. 1925 P. C. 181, *Expl.* (*Krishnan and Venkatasubba Rao, JJ.*). OFFICIAL ASSIGNEE OF MADRAS *v.* NATESA GRAMANI.
98 I. C. 660=38 M. L. T. 153= A. I. R. 1927 Mad. 134.

——There is no presumption that a property standing in the name of a Hindu female, who is a member of joint Hindu family belongs to the joint family and is not her stridhan property ; 26 Cal. 871 (P.C.); 13 Cal. 181 (P.C.); 8 Mad. 214; 29 Bom. 306, 3 Pat. L. W. 341 and 33 C.L.J. 201, *Foll.* (*Mookerjee and Chotzner, JJ.*). BHUBAN MOHINI DASI *v.* KUMUD BALA DASI.
82 I.C. 934=28 C.W.N. 131=39 C.L.J. 140= A.I.R. 1924 Cal. 467.

——Where property is purchased by a joint Hindu family in the name of a female member thereof who has right to maintenance out of joint family property, she cannot be said to have such an interest in the purchase as would take her case out of S. 66, C.P. Code: 12 Bom. L. R. 317 and 29 All 557, *Foll.* (*Tudball and Sulaiman JJ.*). BAIJNATH. DAS *v.* BISHEN DEVI. **63 I.C. 676=43 All. 711= 19 A. L. J. 787= A.I.R. 1921 All. 185.**

——*Property standing in the name of a daughter-in-law cannot be presumed to be joint family.*

As the normal state of a Hindu family is one of jointness in mess, worship and estate, the presumption is that all property acquired by or in the possession of a joint member is joint property. But it is well settled that as such presumption is founded on the fact of union, there can be no presumption where the disputed property stands in the name of a non-co-parcener, such as a son-in-law, or a female member of the family. Thus because the property stands in the name of a daughter-in-law of the family, it cannot be presumed that she is not the beneficial owner. (*Mookerjee, Ag. C. J. and Fletcher, J.*). PROTAP CHANDRA *v.* SARAT CHANDRA. **62 I.C. 348=33 C.L.J. 201= 25 C. W.N. 544= A.I.R. 1921 Cal. 101.**

—Joint family—Breaking of.

——*Effect of conversion.*

Where a member of a joint Hindu family becomes a convert to another religion, there is a break in the joint status of the famliy: 29 All. 487 and 33 All. 356 (P. C.), *Rel. on.* (*Sulaiman and Kendall, JJ.*). MT. BHAGWAN DEI *v.* SHIB SINGH.
A.I.R. 1930 All. 341.

—Joint family—Constitution of.

——Under the Hindu Law there can be no joint family consisting of two females. All that can happen is that a female can succeed as an heir in certain cases. (*Misra and Raza, JJ.*). KHUSHWAQT RAI *v.* JAGANNATH PRASAD SANDAN.
119 I.C. 872= A.I.R. 1930 Oudh 184.

——*Illegitimate sons—If co-parceners with father —Joint family.*

A father and his illegitimate sons living with him do not form a joint Hindu family with all its legal implications and consequences nor has the father power to admit his illegitimate son as a co-parcener. But on the death of the father the illegitimate sons form a joint Hindu family in regard to the properties which they inherit from him and they have no power to dispose of the property by will. (*Madgavkar and Patkar, JJ.*). SHAMU *v.* BABU ABA. **110 I. C. 116= 52 Bom. 300=30 Bom. L.R. 438= A.I.R. 1928 Bom. 153.**

HINDU LAW—Joint family—Customary Law.

——*Existence of property is not a necessary incident, to joint status.*

There is nothing in Hindu Law which states that the properties to be called joint family properties should be immovable properties or that there should be any minimum value which is required to constitute a joint family. Nor is there anything in Hindu Law which says that possession of property is necessary requisite for the constitution of a joint family.. A joint family is composed of persons who live together and who are joint in food and worship and the possession of property is not a condition precedent to the establishment of their status. (*Kumaraswami Sastri and Krishnan, JJ.*). JANAKI RAM CHETTY *v.* NAGAMONI MUDALIAR. **93 I.C. 662= 49 Mad. 98=22 M.L.W. 801= A.I.R. 1926 Mad. 273=50 M.L.J. 413.**

——There is no rule of Hindu Law under which a daughter's son and his maternal grandfather are deemed to be members of a joint Hindu family. (*Sulaiman, J.*). DUNGAR *v.* JAHANGIR.
87 I.C. 698= A.I.R. 1925 All. 775.

—Joint family—Contract.

——Manager of joint family can enter into a valid contract on behalf of the joint family. (*Shadi Lal, C. J. and Broadway, J.*). GHULAM HUSSAIN *v.* TULLA SHAH RAM SARAN.
120 I.C. 170= A.I.R. 1930 Lah. 142.

——*Contract in favour of manager personally— Not enforceable by other members of his family after his death.*

Where A executed an agreement to sell in favour of *B* personally and received Rs. 2,000 as earnest money, and thereafter *B* died,

Held, that the other members of the joint family of which *B* was the manager cannot sue to enforce the contract against *A* but that *A* was bound to refund the earnest money received by him. (*Das and Macpherson, JJ.*). RAMDULARI KUER *v.* JANG BAHADUR. **77 I.C. 378=1923 P.H.C.C. 247= A.I.R. 1923 Pat. 589.**

—Joint family—Customary Law.

——*Son in Punjab is entitled to claim joint possession with father.*

In the Punjab a son is entitled to sue at any rate, for joint possession of the family property, although he is not entitled to claim partition of such property during the lifetime of his father: A.I.R. 1923 Lah. 255, *Foll.* ; 105 P. R. 1917, *Ref.*; 85 P.R. 1915, *Rel. on.* (*Bhide, J.*). HARDAYAL MAL *v.* MULK RAJ. **113 I.C. 344= A.I.R. 1928 Lah. 911.**

——The Courts are not bound to convert a sale executed by the manager of a Hindu joint family into a mortgage, even if necessity for one-fifth or one-sixth of the total consideration has not been established. (*Shadi Lal, C.J. and Johnstone, J.*). NATHU *v.* FATTU. **110 I.C. 269 (Lah.).**

——Mere attachment of ancestral property of a joint family, governed by the customary law which imposes a restriction on alienation by proprietor of his ancestral property does not give a cause of action to his sons to get a declaration that their

HINDU LAW—Joint family—Dancing girls.

reversionary rights should not be affected. (*Shadi Lal, C.J. and Lumsden, J.*). CHET RAM *v.* SPEDDING AND CO., LTD. **74 I. C. 479= 5 L.L.J. 234= A.I.R. 1924 Lah. 52.**

—Joint family—Dancing girls.

———Three dancing-girls living together—One only earning and purchasing property in her own name—No joint funds available for purchase—Purchase is not for the whole family. (*Krishnan and Venkatasubba Rao, JJ.*). KANNAMMAL *v.* RAMATHILAKAMMAL. **97 I. C. 632= A. I. R. 1927 Mad. 38.**

—Joint family—Dayabhaga.

———*No joint family of father and sons.*

Under the Dayabhaga there cannot be a joint family consisting of the father and the sons because so long as the father is alive he is the master. The sons may acquire separate properties of their own but they have no concern whatsoever with the joint family property if any property can be so called during the life-time of the father. Sons after the death of the father may form a normal Hindu joint family. But the test is whether they are joint in food, worship and estate. (*B. B. Ghose and Panton, JJ.*). GOURANGA SUNDAR MITRA *v.* MOHENDRA NARAYAN. **104 I. C. 694= 46 C.L.J. 175= A.I.R. 1927 Cal. 776.**

———A person in more affluent circumstances supporting his brothers—Poor brothers do not form joint family with him. (*B. B. Ghose and Panton, JJ.*). GOURANGA SUNDAR MITRA *v.* MOHENDRA NARAYAN. **104 I. C. 694=46 C.L.J. 175= A. I. R. 1927 Cal. 776.**

———Self-acquisitions—Dayabhaga— Presumption that all property acquired during the time the family remains joint does not apply when family consists of father and his sons : 31 Cal. 448, *Expl.* (*Greaves and Mukerji, JJ.*). JASODA SUNDARI *v.* LAL MOHAN. **91 I. C. 681=42 C. L. J. 486= A. I. R. 1926 Cal. 361.**

———*New trade started by* Karta—*Adjudication of adult members—Minor's share in family property is not liable.*

In a joint family governed by the Dayabhaga School carrying on ancestral trade the inability of a *Karta* to impose on a minor co-parcener the risks and liabilities of a new business started by himself is well-established. No property belonging to the minor can vest by the adjudication in the Receiver. (*Sir Lawrence Jenkins.*) SANYASI CHARAN MANDAL *v.* KRISHNADHAN BANERJI. **67 I.C. 124= 20 A.L.J. 409=24 Bom. L.R. 700=35 C.L.J. 498= 1922 M.W.N. 364=30 M.L.T. 228= 49 Cal. 560=26 C.W.N. 954=16 M.L.W. 536= 49 I.A. 108= A.I.R. 1922 P.C. 237= 43 M. L. J. 41 (P.C.).**

———*Acquisition in the name of a member—Presumption is, it is self-acquisition.*

Under the Dayabhaga School of Hindu Law where one of the members of a joint family acquires property in his own name during the life-time of his father the burden of proving that the property was not the self-acquired property of that member, but in reality belonged to the father, lies on the party making the assertion. (*Newbould and Abdul Majid, JJ.*). NIBARAN CHANDRA SEN GUPTA *v.* SASHI BHUSAN SEN. **60 I.C. 729 (Cal.).**

—Joint family—Exclusion.

———*Ouster—When presumed.*

Where for a long series of years the income payable to the tenants-in-common of a Hindu family is in fact enjoyed by them in shares contrary to those to which they are entitled originally by law, the members acting on that view not by an agreement with each other but by way of admission in certain documents or proceedings, neither an ouster of co-tenants resulting in adverse possession of properties, nor some conveyance or agreement regarding the same can be presumed : A.I.R. 1928 Bom. 287, *Rel. on* ; 29 Bom. 300 ; 20 Bom. L. R. 967 ; A. I. R. 1922 Bom. 150 ; 18 Cal. 10 (P. C.) ; 47 Cal. 274 and 8 B. H. C. (A. C.) 166, *Ref.* ; *Fisher and Taylor* v. *Prosser*, (1774) 1 Cowp. 217, *Dist.* (*Marten, C.J. and Murphy, J.*). MULJI NAROTAM *v.* MIRALAL RAMCHANDRA. **121 I.C. 439= 31 Bom. L.R. 1067= A.I.R. 1929 Bom. 424.**

HINDU LAW—Joint family—Family property—Burden of proof.

———*Notice—Ouster—What is.*

Mere notice by one co-sharer who redeemed mortgaged joint property to the other to the effect that, if he did not pay his share of the amount required for paying off the mortgage, he will have no right over the property redeemed is not sufficient to constitute ouster. If since the date of the notice the defendant has not been in possession of the family property sufficiently long, it cannot be presumed that such long possession amounts by itself to an ouster. (*Macleod, C.J. and Shah, J.*). KESHAV NARAYAN SHASTRI PRABHAVE *v.* RAMCHANDRA GANESH PRABHAVE. **77 I. C. 521= A. I. R. 1922 Bom. 156.**

—Joint family—Family property—Accretions.

———Properties purchased with the assistance of the joint funds are joint properties liable to be divided amongst the members of the family: 29 All. 244, *Foll.* (*Wazir Hasan and Neave, A.J.Cs.*). GAYA PRASAD *v.* GIRJA SHANKAR. **78 I.C. 574=11 O L.J. 286= A.I.R. 1924 Oudh 360.**

—Joint family—Family property—Burden of proof.

———*No presumption as to possession of property—* Onus *is on the person alleging its existence.*

While there is a presumption that a Hindu family is joint until the contrary is proved, there is no presumption that a Hindu family is possessed of property. The party alleging that the property held by an individual member of a joint family is family property, must show that the family was possessed of some property with the aid of which the property in question could have been acquired. If this is shown, and only then, the *onus* shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate : A.I.R. 1927 Mad. 38, *Foll.*; 33 All. 677 ; A.I.R. 1923 Mad. 262 ; A.I.R. 1929 P. C. 1; 32 I. C. 12 and 35 Cal. 1035, *Rel. on*; 3 Cal. 315 (P.C.), *Disc.* and *Dist.* (*Ananthakrishna Ayyar, J.*). C. SANKARANARAYANA MUDALIAR *v.* TANGARATNA MUDALIAR. **A.I.R. 1930 Mad. 662.**

———*Burden of proof as to property being joint depends upon circumstances.*

The *onus* of proof in a case where the property is said to be the joint property of a joint family must depend upon the circumstances of each particular case. Where the family was joint in mess and estate at the time of the acquisition and there was a nucleus of joint fund, however small it may be, the *onus* is undoubtedly upon a member of the family to prove that the property, though purchased in his name, was not a joint property. But the only fact that two brothers lived together alone does not throw any burden of proof on the plaintiff more than is to be borne by him as plaintiff in a case to prove that the property was purchased by

HINDU LAW—Joint family—Family property —Common stock.

one through whom he claimed. (*Suhrawardy and Graham, JJ.*). TRAILOKYANATH *v.* CHINTAMANI DATT. **95 I.C. 426=30 C.W.N. 588= A.I.R. 1926 Cal. 813.**

—Joint family — Family property — Common stock.

———*Property thrown in common stock is joint property.*

Whether property is joint family property does not merely depend upon whether it is acquired with joint family funds or whether there is a nucleus of the joint family property. Even property acquired by one of two joint brothers by his own exertions and thrown into common stock is to be regarded as joint family property, and their male issue necessarily acquires a right in it by birth: A.I.R. 1926 Bom. 408, *Rel. on.* (*Jackson, A.J.C.*). PUNJI *v.* GOVIND. **122 I.C. 446= A.I.R. 1930 Nag. 7.**

—Joint family—Family property—Conduct of members.

———Property treated by the members as joint family property will be so treated by the Court also. (*Napier and Odgers, JJ.*). KRISHNASWAMI BATTAR *v.* SREENIVASA BATTAR. **76 I. C. 881= 30 M.L.T. 168=A.I.R. 1922 Mad. 341= 42 M.L.J. 124.**

—Joint family—Family property—Exchange.

———Where the gift was in consideration of the money derived from the joint family fund,

Held, this property must bear the character of the source of its acquisition and be deemed joint family property. (*Wazir Hasan and Neave, A.J.Cs.*). GAYA PRASAD *v.* GIRJA SHANKAR. **78 I.C. 574= 11 O.L J. 286=A.I.R. 1924 Oudh 360.**

—Joint family—Family property—Joint acquisitions.

———*Brothers may make property joint without nucleus—It is a question of their intention.*

Where property is acquired in the course of a business carried on by members of a Hindu family by their joint labour, the property so acquired may become joint family property, notwithstanding the fact that it was acquired without the aid of ancestral nucleus. In such cases it is a question of proof whether they intended to acquire the property as partners or as members of a joint family.

Two brothers carried on a joint trade for 25 years and during the whole of that period they had a common mess, they lived with their mother under the same roof and conducted themselves in every particular as members of a co-parcenary. From the funds of the joint trade they acquired immovable properties, obtaining sale-deeds indifferently in the name of one or the other and later on they executed deed of partition as between themselves:

Held, that the brothers must be deemed to have traded jointly and acquired the property not as partners but as members of a co-parcenary: A.I.R. 1926 Bom. 408, *Ref.* (*Venkatasubba Rao, J.*). VASUDEVA RAO *v.* SAKARAM RAO. **108 I.C. 301= 27 M.L.W. 750=A.I.R. 1928 Mad. 412= 54 M.L.J. 239.**

———*Brothers acquiring property by joint labour—Property is presumed to be joint family property and not merely joint.*

Where the members of a joint family acquire property by or with the assistance of joint family funds or by their joint labour, such property is the joint property of the persons who have acquired it, whether it is an increment to ancestral property or

HINDU LAW—Joint family—Family property —Nucleus.

whether it has arisen without any nucleus of descended property. If a single individual acquires a fortune by his own exertions, without any assistance from the ancestral property his issue would certainly take no interest in it. If several brothers did the same, the property would, in the absence of any indication of any intention to the contrary, be owned by them as joint family property, and in that case their male issue would acquire a right in it by birth, for under Mitakshara system there can be no joint family property in respect of which the male issue of the joint owners do not take a share by birth. If there is satisfactory evidence of an intention to treat the property not as joint family property but as joint property only, *i.e.*, as the joint self-acquisition of the acquirers, it will be given effect to. But the presumption is in favour of its being regarded as joint family property: 25 Mad. 149 and 34 Mad. 211, *Ref.* (*Baker, J.C.*). MOTILAL *v.* HARJIMAL. **87 I. C. 809= A.I.R. 1926 Nag. 146.**

—Joint family—Family property—Liability to attachment.

———The liability of the estate of a joint Hindu family to be taken in execution proceedings is not removed by the subsequent filing of the suit for partition: A.I.R. 1927 Oudh 180, *Foll.* (*Stuart, C. J. and Raza, J.*). BALBHADDAR SINGH *v.* HARDEI. **108 I.C. 111=5 O.W.N. 91.**

—Joint family—Family property —Nucleus.

———*Small nucleus—No presumption that subsequent acquisitions are joint.*

Where the nucleus proved is very small no presumption of jointness of subsequently acquired property arises. In order to raise any presumption based on family nucleus it must be shown that it was possible to have incurred the cost of the property claimed as joint, from that family source: A. I. R. 1926 Lah. 333; 29 All 244; A. I. R. 1923 All. 574 and A.I.R. 1926 Nag. 389, *Foll.* (*Addison and Coldstream, JJ.*). KAUSHI RAM *v.* SHANKAR DAS. **111 I.C. 596=10 L.L.J. 93= A. I. R. 1928 Lah. 397.**

———*No nucleus—Joint brothers purchasing property—Presumption is that they are joint tenants.*

Joint family property can come into existence without a pre-existing nucleus: 32 Bom. 479, *Foll.*

Where three brothers are joint at the time of a purchase there is no presumption that they are each possessed of separate property and that each contributes from his separate property to make up the purchase money. On the other hand, the inference from the facts, that the brothers are joint, that there are no other co-sharers and that the brothers, after the purchase, own the property in equal shares, is that the purchase is made with joint funds. (*Macnair, A. J. C.*). MOHANSINGH *v.* PUNJI. **103 I.C. 812=A.I.R. 1927 Nag. 327.**

———Property acquired jointly by father and son is joint family property even though there is no nucleus: 9 Bom. 438, *Disappr.* (*Macleod, C. J. and Coyajee, J.*). HARIDAS *v.* DEVKUVARBAI. **97 I.C. 820=50 Bom. 443=28 Bom. L.R. 637= A.I.R. 1926 Bom. 408.**

———It is necessary to establish the existence of a nucleus of joint family property before the property in the possession of any one member can be presumed to be joint family property. (*Suhrawardy and Graham, JJ.*). TRAILOKYANATH CHAR *v.* CHINTAMONY DUTT. **95 I.C. 426= 30 C. W.N. 588=A.I.R. 1926 Cal. 813.**

HINDU LAW—Joint family—Family property —Nucleus.

———Where the nucleus of ancestral property is very small there cannot be any presumption that any subsequent acquisitions were made with the assistance of that nucleus: 29 All. 244 (P.C.); A.I.R. 1923 All. 574, *Dist.* (*Scott-Smith and Le-Rossignol, JJ.*). IQBAL SINGH *v.* JANG BAHADUR. **93 I.C. 634=A. I. R. 1926 Lah. 333.**

———Where there is a nucleus of groves of joint family property acquisition of land by the eldest member and planting a grove thereon will be deemed to be joint family property. (*Wazir Hasan, J.C.*). HAR DATT LAL *v.* DHANDHI SINGH. **84 I.C. 1011=11 O.L.J. 660=28 O.C. 113= A.I.R. 1925 Oudh 93.**

———*Nucleus insufficient to acquire property—No presumption arises as to its being joint family property.*

If there is a large family nucleus and if the property in the possession of a member of the joint family can be ordinarily traceable to the income of the family nucleus, such property would be considered joint family property till it is affirmatively shown that that property was acquired without the help of and without detriment to the family nucleus. When it is found that the family nucleus is of such a character that it could not have yielded any appreciable income and when there is no proportion between the family nucleus and the fortune acquired in the course of a few years, the matter does not rest with mere presumptions alone. The Court has to see whether the acquisitions were made by a member unaided by the family nucleus. (*Case-law discussed.*) (*Spencer and Devadoss, JJ.*). VADAMALAI *v.* SUBRAMANIA. **71 I. C. 130= 16 M.L.W. 936=1923 M.W.N. 57= A. I. R. 1923 Mad. 262.**

———Properties acquired by the Karta of a joint family in the benami name of a third person with the income of ijmali properties, must partake of the nature of a joint family estate. (*Chaudhuri and Newbould, JJ.*). BISWAMBHAR HAIDAR *v.* GIRIBALA DASI. **25 C.W.N. 356=A.I.R. 1921 Cal. 571.**

—Joint family—Family property—Partibility.

———*Joint property cannot be impartible even by custom, as such a custom would be unreasonable.*

To hold that the property belonging absolutely to several members of the family is indivisible between them is opposed to all fundamental principles of law: 4 Mad. H.C.R. 447, *Rel. on.*

Such a custom, even if it exists, is unreasonable. A single family cannot create such a custom by not alienating property for 50 or 100 years. (*Ramesam, J.*). VENKATACHALAM CHETTY *v.* VISVANATHA BANGARU. **102 I.C. 618= A.I.R. 1927 Mad. 725.**

—Joint family—Family property—Practice.

———*Document in the name of the senior member—Property belongs to family.*

It is within the knowledge of the common course of human affairs of every Judge in India that in a very large number, if not the majority, of documents to which a joint Hindu family is a party as a whole, the name of the senior member alone is entered as the representative of the family more especially if all the members of the family are brothers. (*Hallifax, A.J.C.*). GANIA *v.* GANGA PRASAD. **77 I.C. 738=6 N.L.J. 269= A.I.R. 1924 Nag. 112.**

—Joint family—Family property—Presumption.

———*Property jointly acquired without family funds—Character.*

HINDU LAW—Joint family—Family property— What is.

Property jointly acquired by members of a joint family, though without the assistance of joint family property must be presumed to be joint family property, unless the acquirers intended to hold the property as co-owners between themselves in which case it would be their joint property. (*Shingne, J.*). RANGU *v.* LAKSHMAN. **32 Bom. L.R. 948= A.I.R. 1930 Bom. 438.**

———*Properties in the hands of a member—Presumption, whether ancestral.*

There is no presumption that the properties in the hands of a member of a joint Hindu family is joint family or ancestral property but the joint or ancestral character of property must be established by the person who claims a share in such property. (*Subhedar, A.J.C.*). HARI *v.* BANGA. **120 I.C. 402 (Nag.).**

———Property standing in the name of any one member may be presumed to be joint—Such presumption can, however, be rebutted. (*Kulwant Sahay and Macpherson, JJ.*). BAKSIRAM MULCHAND *v.* DWARKA PRASAD. **115 I. C. 237= 10 P.L.T. 474=A.I.R. 1928 Pat. 438.**

———Where there is property standing in the name of a junior member, the presumption is that it is a joint family property: 26 M.L.J. 248 (P.C.), *Foll.* (*Ramesam, J.*). NATESA AIYAR *v.* SAHASRANAMA AIYAR. **103 I.C. 814= A.I.R. 1927 Mad. 773= 53 M.L.J. 550.**

———Property purchased while family is joint would presumably be joint family property. (*Napier and Odgers, JJ.*). KRISHNASWAMI BATTAR *v.* SREENIVASA BATTAR. **76 I.C. 881= 30 M.L.T. 168=A.I.R. 1922 Mad. 341= 42 M.L.J. 124.**

———All the property in the hands of the members of a joint Hindu family is to be treated as a joint property, but it is open to any member to show that any particular property is his separate property. (*Shadi Lal, C. J, and Le Rossignol, J.*). PARMA NAND *v.* SHIV CHARAN DAS. **59 I.C. 256= 2 Lah. 69=3 L.L.J. 82=21 P.L R. 1921= A.I.R. 1921 Lah. 147.**

—Joint family—Family property—Tenancy.

———Onus *of proving self-acquisition applies to tenancy also.*

The ordinary rule of Hindu Law that properties acquired while the family was joint and with the help of joint family property should be regarded as joint family property and that the burden of proof that it was self-acquired property of a single member should be on that member, is applicable where the property in question is a tenancy. (*Mukerji and Boys, JJ.*). ACHARJI AHIR *v.* HARAI AHIR. **1930 A.L.J. 974.**

—Joint family—Family property—What is.

———*Acquisitions from income of family property are also family property.*

Where Brit Mahabrahmani is ancestral property and the income derived therefrom goes to support the entire family, the income derived by any member of the family, therefrom is not his exclusive property and therefore any property acquired or built upon such fund forms joint family property. (*Misra and Raza, JJ.*). GAYA DIN *v.* GUR DIN. **118 I.C. 87=6 O.W.N. 249= A.I.R. 1929 Oudh 257.**

The property in the hands of the adoptive father inherited by him from his maternal grandfather is joint family property in the sense that the son has a right in it, as a co-parcener by adoption:

HINDU LAW—Joint family—Father—Acknowledgment.

27 Mad. 382 ; 39 Mad. 930, *Ref.* and 35 Cal. 1039, *Foll.* (*Ramesam and Jackson, JJ.*). VENKATA SESHAMMA *v.* APPA RAO. **80 I. C. 79= 20 M.L.W. 181=A.I.R. 1925 Mad. 125,**

—Joint family—Father.
Acknowledgment.
Compromise.
Decree against.
Duties of.
Insolvency of.
Manager.
New business.
Powers of.
Representation.
Right to sue.
Self-acquisitions.
Suit for accounts.
Will.

—Joint family—Father—Acknowledgment.

———The father in a joint Hindu family is an agent duly authorised to acknowledge a debt binding on the family so as to extend the period of limitation: 17 Bom. 512; 37 Cal. 461, *Ref. to.* (*Dalal, J.C.*). SITLA BAKHSH SHUKLA *v.* JAGATPAL SINGH. **86 I.C. 693=12 O.L.J. 114= A.I.R. 1925 Oudh 394.**

—Joint family—Father—Compromise.

———Compromise made by Hindu father as the manager of the joint family in good faith is binding upon his sons unless it is proved that the father did not act *bona fide* in making it: A.I.R. 1927 Lah. 620, *Foll.* (*Zafar Ali, J.*). MT. RAM RAKHI *v.* BRIJ BHUSHAN. **110 I.C. 118= 29 P.L.R. 50=A.I.R. 1928 Lah. 235.**

———A Hindu father has full authority to act on behalf of his adopted son and to enter into a compromise in a suit on mortgage of joint family property in respect of his interest in the property. (*Lord Blanesburgh.*) SAIYID MEHDI ALIKHAN *v.* CHAUDHRI GHANSHIAM SINGH. **104 I. C. 375= 46 C.L.J. 209=4 O.W.N. 837= 1927 M.W.N. 723=29 Bom. L.R. 1376= 32 C.W.N. 93=39 M.L T. 300= A.I.R. 1927 P.C. 204=53 M.L.J. 345 (P.C.).**

———*Bona fide* settlement of doubtful claim by father as manager is binding upon sons: 24 I.C. 491, *Foll.* (*Shadi Lal, C. J. and Zafar Ali, J.*). MT. MAYA WANTI *v.* SALIG RAM. **103 I. C. 372= A. I. R. 1927 Lah. 620.**

———*Compromise not binding on son living—Sons born subsequently are not also bound.*

One Rajaram's share was decreed in a partition suit along with a considerable amount. Rajaram's minor son was a party to the partition suit. Rajaram for himself and his minor son, released the right to the sum, on his opponent Tuljaram agreeing not to prosecute the appeal against the partition decree. The appeal was therefore not prosecuted. The minor son of Rajaram on attaining majority filed a suit for recovering the sums, which was dismissed by both the Courts in India but the Privy Council, holding that the arrangement by Rajaram did not bind Rajaram's son remanded the case for ascertainment of son's share. Before the suit came on for trial Rajaram got two more sons who were added as co-defendants. The new born sons pleaded that the arrangement by Rajaram failed wholly,

Held, that what the agreement purported to do was to release the whole of the debts that were then owing to the joint family in consideration of Tuljaram not prosecuting his appeals and when the attempted arrangement failed so far as the infant was concerned, it failed, in the events that have happened, to convey any of the joint estate at all. The appellants are therefore entitled to succeed. (*Lord Buckmaster.*) T.R. VENKATA RAO *v.* T. V. TULJARAM RAO. **74 I C 765=26 C.W.N. 646= 45 Mad. 298=1922 M.W.N. 392=30 M.L.T. 272= 49 I.A. 91=36 C.L.J. 319=24 Bom. L.R. 1191= 20 A.L.J. 833=A.I R. 1922 P.C. 69= 43 M.L.J. 298 (P.C.).**

HINDU LAW—Joint family—Father—Decree against—Execution sale.

———The minor sons of a Hindu father are bound by a *bona fide* compromise of a doubtful claim entered into by their father as Manager of the joint family. (*Scott-Smith and Leslie Jones, JJ.*). SHAMBU NATH *v.* DWARKA DAS. **60 I.C. 524 (Lah.).**

—Joint family—Father—Decree against—After-born son.

———The subsequent birth of a son does not operate retrospectively so as to affect a sale in execution of a decree passed against the father, where the sale took place before his birth: A.I.R. 1922 Nag. 101, *Foll.* and 26 M.L J. 576, *Dist.* (*Baker, J.C.*). NARAYAN *v.* DHUDABAI. **92 I.C. 663= 21 N.L.R. 38=A.I.R. 1925 Nag. 299.**

—Joint family—Father—Decree against—Binding nature.

———*How far binding, must be decided on the facts of each case.*

The question how far the sons are bound by a decree against the father must be decided with reference to the particular facts of the case; if the father is manager and the question in issue is one which equally affects him and the other members of the family and if the suit is properly defended the adjudication will bind all the persons interested along with the father for the reason that in that case it must be presumed that the father represents the interests of all. If the sons are of full age and are aware of their litigation and take no steps to be brought on the record but acquiesce in the conduct of the litigation by the father, the case will be still stronger and they will be clearly bound by the decision, and the case is still stronger, where not only is the son of full age and aware of the litigation and takes no steps to be brought on the record and acquiesces in the litigation, but actually conducts the litigation of the father: 14 M.I.A. 367, *Rel. on.* (*Ramesam, J.*). KANYADHARA TATAYYA *v.* K. RAGHAVAYYA. **99 I.C. 539=38 M.L.T. 107=A.I.R. 1927 Mad. 406.**

—Joint family—Father—Decree against—Death of father.

———Father—Decree against father passed—Father dying—Property which father could have sold while alive, is attachable under decree. (*Sulaiman and Mukerji, JJ.*). BINDA PRASAD *v.* RAJ BALLABH. **91 I.C. 785=48 All. 245= 24 A.L.J. 273=A.I.R. 1926 All. 220.**

—Joint family—Father—Decree against—Execution sale.

———*Omission to state whether son's share was being sold is not conclusive that his interest was not sold.*

Although the proclamation of sale in execution of a decree against the father may not state that the son's interests are being put up for sale yet the circumstances may be such as to fully justify a Court in holding that those interests were actually sold: 22 Bom. L.R. 970, *Rel. on.* (*Fawcett and Madgavkar, JJ.*). DAYANAND PANDURANG *v.* DAJI NARAYAN. **98 I. C. 754=50 Bom. 793= 28 Bom. L.R. 1082=A.I.R. 1926 Bom. 548.**

HINDU LAW — Joint family — Father—Decree against—Execution sale.

———Decree against father—Sons' shares can be sold unless debt is tainted with immorality: A.I.R. 1924 P.C. 50 (P.C.), *Foll.*

The question is not what the judgment-creditor could have attached, but what the Court intended to and did actually sell at the Court-sale. This must in each case be a question of fact, on which it would be impossible for the Courts to lay down any rule of law. (*Fawcett and Madgavkar, JJ.*). DAYANAND *v.* DAJI. **98 I. C. 754= 50 Bom. 793=28 Bom. L.R. 1082= A. I. R. 1926 Bom. 548.**

———Auction sale of family property—Son's share also passes—Son must challenge it within limitation if he wants to avoid. (*Devadoss and Wallace, JJ.*). NARAYAN *v.* VENKATASWAMI. **98 I. C. 31=24 M.L.W. 475=1926 M.W.N. 767= A.I.R. 1926 Mad. 1190=51 M.L.J. 845.**

———*When son's share also passes.*

When the decree which is executed is made in a suit to which the sons were not parties and the property sold is the joint property of the father and the son, the sale is good on the principle of Hindu Law that it is the pious duty of a Hindu son to pay his father's debt in respect of which the decree was made was contracted by the father to the knowledge of the lender for the purposes of immorality. (*Sir John Edge.*). SAT NARAIN *v.* BEHARI LAL. **84 I. C. 883=1925 M.W.N. 1= 23 A.L.J. 85=6 L.R.P. C. 1=6 Lah. 1= 21 M.L.W. 375=52 I A. 22=29 C. W. N. 797= 26 P. L. R. 81=27 Bom. L. R. 135= A.I.R. 1925 P. C. 18=47 M. L. J. 857 (P.C.).**

———*Whole interest of family passes under the sale unless proclamation states otherwise.*

Where a decree is passed against the father carrying on business in the name of the family as manager, the whole of the family property is liable for the family debt, and when the property of the debtor is put up for sale, the whole interest of the family passes to the purchaser unless it is clearly stated in the proclamation that the interest of the father alone is sold under the decree. (*Macleod, C.J. and Crump, J.*). AMOLAKCHAND LADURAM *v.* MOTILAL AGIARIRAM. **87 I. C. 953= 27 Bom. L. R. 437=A.I.R. 1925 Bom. 497.**

—Joint family—Father—Decree against—Liability of son's property.

———In execution of a decree against the father of a joint family the property both of himself and his sons in the joint family property can be taken in execution: A.I.R. 1924 P.C. 50, *Foll.* (*Rowland, J.*). JIWAN RAM RAMCHANDRA *v.* SITA RAM KHEMKAR. **118 I. C. 141 (Pat.).**

———Where a father has contracted a debt for his own personal benefit, the creditor may obtain a personal decree against the father alone and may enforce the decree by attachment and sale of the entire co-parcenary property including the interest of the son therein. The son cannot recover the property unless he proves that the debt was tainted with immorality or illegality. (*Shadi Lal, C. J. and Dalip Singh, J.*). MADAN MOHAN SINGH *v.* DAULAT RAM. **110 I.C. 730 (Lah.).**

———*Son's share is liable unless debt is proved to be immoral or illegal.*

A manager cannot partition or alienate the estates qua-manager except for purposes of necessity, but where the family consists of father and sons, the father may lay the estate open to be taken in execution proceedings upon a decree for payment of a debt incurred by him, so long as it is not incurred for an immoral purpose: A.I.R. 1924 P.C. 50, *Foll.* (*Macleod, C. J. and Coyajee, J.*). DE SOUZA *v.* WAMANRAO. **91 I.C. 984=27 Bom. L.R. 1451= A. I. R. 1926 Bom. 117.**

HINDU LAW — Joint family — Father—Decree against—Rights of son.

———If the managing member of joint undivided estate is the father and the other members are the sons, he may by incurring debt so long as it is not for an immoral purpose lay the estate open to be taken in execution proceedings upon a decree for payment of that debt: A.I.R. 1924 P. C. 50 (P.C.). *Foll.* (*Wazir Hasan and Neave, A.J.Cs.*). GOKARAN SINGH *v.* JOKHU SINGH. **79 I.C. 21=11 O.L.J. 405= A.I.R. 1924 Oudh 407.**

———In execution of a decree against the father personally the shares of the sons cannot be attached and sold during the life-time of the father. (*Stuart and Kanhaiya Lal, JJ.*). KISHAN SINGH *v.* CHHAJJU SINGH. **79 I. C. 238=45 All. 90= A.I.R. 1923 All. 206.**

———*Decree against father can be executed against sons' interest also.*

It is competent for the holders of a simple money-decree against father to attach the joint family property of father and his minor sons in the hands of their judgment-debtor and to bring to sale the right, title and interest of the father and of the sons in satisfaction of their decree; 30 All. 156, *Foll.* (*Piggott and Walsh, JJ.*). MOHAN LAL *v.* BALA PRASAD. **69 I.C. 754=44 All. 649= A.I. R. 1922 All. 310.**

—Joint family—Father—Decree against—Mortgage-decree.

———*Money decree against father is binding on son unless debt is immoral or illegal.*

A money-decree against the father of a joint family in satisfaction of debt not incurred for an illegal or immoral purpose is binding on the son: A.I.R. 1924 Oudh 394 and A.I.R. 1925 All. 180, *Ref.*

Where a mortgage decree provides for the recovery of the balance due from the mortgagors, if the mortgaged property was found insufficient to discharge the decretal amount there is a declaration in the decree that a debt is due from the mortgagor to the mortgagee for which mortgagor's son can be made liable. (*Shadi Lal, C.J. and Dalip Singh, J.*) KRISHNA KISHORE *v.* HEM RAJ. **116 I.C. 182= A.I.R. 1928 Lah. 815.**

—Joint family—Father—Decree against—Necessity immaterial.

———*Taint of immorality should be proved.*

When the property is sold in auction in execution of a decree against the father it is not open to his sons and grandsons to have the sale set aside on the mere ground that the debt on the basis of which the decree had been obtained had been contracted without any legal necessity or was not in lieu of any antecedent debt. It is further necessary for the plaintiffs then to establish that that debt had been tainted with illegality or immorality: A.I.R. 1923 All. 591, *Ref.*; A.I.R. 1924 P.C. 50, *Foll.* (*Sulaiman and Mukerji, JJ.*). GAJADHAR PANDE *v.* JADUBIR PANDE. **85 I. C. 31=47 All. 122= 22 A.L.J. 980=5 L.R.A. Civ. 780= A. I. R. 1925 All. 180.**

—Joint family—Father—Decree against—Rights of son.

———If the auction-purchaser buys the shares of the sons in execution of the decree against the father, the sons cannot claim their shares without

HINDU LAW — Joint family — Father—Decree against—Sons bound.

setting aside sale. (*Devadoss and Wallace, JJ.*). NARAYANA *v.* VENKATASWAMI. **98 I.C. 31= 24 M. L. W. 475=1926 M.W.N. 767= A.I R. 1926 Mad. 1190=51 M.L.J. 845.**

—Joint family—Father—Decree against—Sons bound.

———*Father not described as manager—Yet the decree binds sons.*

The circumstances that neither the father of *A*, *B* and *C*, nor *C* himself, who were parties to a prior suit, was described expressly as manager of the family, does not by itself make the decision in the prior suit not binding in a subsequent suit on *A*, *B* and *C* who are members of an undivided family. To such a case the provisions of S. 11, Expl. 6, C. P. Code, apply and the decision in prior suit becomes *res judicata* as against *A*, *B* and *C*: A.I.R. 1927 P. C. 56; 30 Mad. 324 and 22 Mad. 461, *Rel on.* (*Ananthakrishna Ayyar, J.*). SETHURATNAM IYER *v.* CHINNA SOLAN. **122 I.C. 164= A.I.R. 1930 Mad. 206.**

———*Decrees.*

A decree against father in respect of joint family properties binds sons, father being deemed to be their representative. (*Spencer and Devadoss, JJ.*). MEYYAPPAN SERVAI *v.* MEYYAPPAN AMBALAM. **83 I.C. 985=19 M.L.W. 484= 34 M.L.T. 209=A.I.R. 1924 Mad. 571= 46 M.L.J. 471.**

———*Foreclosure decree against father—Binds sons though not parties to foreclosure suit, unless the debt is illegal or immoral.*

A foreclosure decree against their father could not be considered a nullity simply because the plaintiffs were no parties to the suit in which the decree was passed. If the debt is such as the manager of the joint Hindu family had authority to contract and for which he could bind the joint family property, the decree cannot be disturbed merely on the ground that the plaintiffs, minor members of the family at the time of the suit, were not impleaded in the suit.

According to the principles of Hindu Law a Hindu son cannot escape liability under a decree obtained against his father and *karta* of the family unless he proved that the debts were contracted for immoral or illegal purposes.

The burden lies on the sons to prove the illusory character or immorality of the debt. (*Case-law reviewed.*) 7 O.L.J. 164, *Diss.* (*Dalal, J. C. and Simpson, A.J.C.*). MAHADEO BAKHSH SINGH *v.* SURAJ BAKHSH SINGH. **80 I. C. 447= 10 O. L. J. 252=A.I.R. 1924 Oudh 34.**

—Joint family—Father—Decree againt—Subsequent partition.

——— *Liability of the estate is not affected.*

Where a Hindu joint family consists, of a father and sons and the father has incurred debts and a decree has been passed on the basis of those debts, the estate can be taken in execution proceedings unless the debts had been incurred for immoral purposes: A. I. R. 1924 P. C. 50, *Foll.*

And in no circumstances can that liability of the estate to be taken in execution proceedings be removed by the subsequent filing of a suit for partition. (*Stuart, C. J. and Raza, J.*). JAGESHWAR PANDEY *v.* MANIAM. **101 I.C. 907= 2 Luck. 561=4 O.W.N. 408= A.I.R. 1927 Oudh 180.**

HINDU LAW—Joint family—Father—Insolvency of.

—Joint family—Father—Duties of.

———*Father is bound to maintain a joint son, independent of any right to maintenance of the son.*

Where there is joint family property in which the son has a share, though the father is not under an absolute obligation to maintain his adult son, he is bound as the manager of the family to maintain him as a member of the undivided family: 2 Bom. 573, *Foll.*

This obligation is independent of the consideration whether, on account of the lunacy of the son, the father as the manager of the family would be bound to maintain him on the ground that he would be disqualified from inheriting or enforcing partition of his share from the joint family property during the period of lunacy. (*Shah and Fawcett, JJ.*). CHANVIRGAUDA SHIVANGAUDA *v.* DIST. MAGISTRATE, DHARWAR. **100 I.C. 575= 51 Bom. 120=29 Bom. L R. 52= A.I.R. 1927 Bom. 91.**

—Joint family—Father—Insolvency of.

———*After partition—Official Receiver cannot proceed against sons' shares.*

Where a Hindu co-parcener becomes insolvent and the Official Assignee of his estate subsequently brings a suit for partition and separate shares are allotted also to the sons of the co parcener without making a provision for the satisfaction of the insolvent co-parcener's debts, the share of the sons of the insolvent co-parcener do not vest in the assignee. The Receiver cannot take any proceeding against the sons' separate shares where he fails before the partition to obtain an order declaring the sons' shares to be liable for the father's debts: A. I. R. 1925 P. C. 18, *Rel. on*; A.I.R. 1926 All. 447, *Not foll.* (*Stuart, C. J. and Raza, J.*). TRAYAMKESHAR PRASADH *v.* BASANT KUMAR MUKERJI. **123 I.C. 61=6 O.W.N. 977= A I.R. 1930 Oudh 36.**

———*Power of Hindu father over son's property is "property."*

The power of a Hindu father over the family property including son's interest therein must be deemed to be 'property' within S 28 and, as such, to vest in the Court or the Receiver: A.I.R. 1925 P.C. 1, *Expl.*; *Gilchrist, In re. Armstrong*, 17 Q.B.D. 521, *Dist.*; A. I. R. 1925 Bom. 416, *Diss. from*; A.I.R. 1923 Mad. 55 and A.I.R. 1924 Mad. 550, *held not overruled by* A.I.R. 1925 P.C. 18 (P.C.). (*Phillips and Madhavan Nair, JJ.*). SUBRAMANIA AIYAR *v.* T. V. KRISHNA AIYAR. **102 I.C. 266= A.I.R. 1927 Mad. 701.**

———*Son's share does not vest in Official Receiver—Only father's power to sell vests—Power continues even after father's death.*

Official Receiver in whom the property of an insolvent Hindu governed by the Mitakshara is vested under the Provincial Insolvency Act (5 of 1920) is entitled to sell the joint family property of the insolvent and his sons for his debts where they are neither illegal nor immoral, *i.e.*, such debts as the sons would, on account of their pious obligation, be bound to pay from their joint property. It is the power of sale that vests in him and not the share of the son itself: A.I.R. 1925 P.C. 18, *Expl.*; A.I.R. 1925 Mad. 52, *Overruled.* This power continues even after the father's death by virtue of S.17. Section 28 by itself is enough to vest the power of disposing whole family property in the Receiver in insolvency of a Mitakshara Hindu father. It is not necessary to pray in aid the definition of "property" in S. 2 (d) for this purpose.

HINDU LAW—Joint family—Father—Insolvency of.

Per *Venkatasubba Rao, J.*—The expression 'property' in S. 2 (d) of the Provincial Insolvency Act includes the qualified and restricted power of a Hindu father. (*Krishnan, Ramesam and Venkatasubba Rao, JJ.*). BALAVENKATASEETHARAMA CHETTIAR *v.* OFFICIAL RECEIVER, TANJORE.

97 I.C. 825=49 Mad. 849=24 M.L.W. 345=1926 M.W.N. 743=A.I.R. 1926 Mad. 994=51 M.L.J. 269 (F.B.).

———*Son's shares vest in Official Receiver—They can be sold for just debts of father.*

Where in the case of a Hindu joint family the father is adjudged an insolvent, even the sons' shares vest in the Official Receiver and he can dispose of the same to pay the debts of the father unless they are incurred for immoral purpose; and the pious obligation of the sons will prevent them from contending that their shares are not liable to be sold: A.I.R. 1925 Pat. 127; A.I.R 1924 P.C. 50 (P.C.); A I.R. 1923 Lah. 1 (F.B.), *Foll.* (*Ross and Kulwant Sahay, JJ*). CHAIRMAN, DIST. BOARD, MONGHYR *v.* SHEODUTT SINGH. **98 I.C. 364=5 Pat. 476=1926 P.H.C.C. 321=8 P.L.T. 278=A.I.R. 1926 Pat. 438.**

———Father's power to alienate family property for just purposes does not vest in Official Assignee: A.I.R. 1925 P. C. 18, *Foll.* (*Macleod, C. J. and Coyajee, J.*). SHRIPAD GOPALKRISHNA *v.* BASAPPA RUDRAPPA. **89 I. C. 996=49 Bom. 785=27 Bom. L. R. 934=A.I.R. 1925 Bom. 416.**

———Shares of the undivided sons also vest in the Official Receiver but they can bring a suit for partition on the ground of father's debts being illegal or immoral. (*Devadoss, J.*). G. NARASIMHULU *v.* P. BASAVA SANKARAM. **85 I.C. 439=20 M.L.W. 946=A.I.R. 1925 Mad. 249=47 M L.J. 749.**

———*Official Assignee is placed in father's position as regards his powers in respect of the joint family property.*

When the estate of the insolvent vests in the Official Assignee, the right of the father to dispose of the son's interest in ancestral immovable estate for the payment of his debts vests in the Official Assignee. Upon general principles of the Hindu Law governing the rights of the father and his son in the co parcenary property an order of adjudication against the father has only the effect of replacing the father by the Official Receiver and the order does not by itself vest in the latter the interests of the son in the property. As the son's share is in certain cases liable for the debts of the father, the Official Receiver may be able to enforce that liability, provided that he takes appropriate proceedings for the purpose and satisfies the conditions which alone render the son's interest liable for the father's debts. The joint family property can be attached and sold in execution of a decree for money passed against the father, and the sale affects the interest of the son as well as that of the father, and in principle there is no real difference between an individual creditor realizing his debt from the co-parcenary property and an Official Assignee who represents the general body of the creditors seizing it for the satisfaction of their debts. Section 60, C.P.C., mentions *inter alia* the property over which or the profits of which the judgment-debtor "has a disposing power which he may exercise for his own benefit". And this is exactly the phraseology which has been used in the Insolvency Act, and it would be most undesirable that the same expression used in two enactments dealing with the rights of the creditors should receive two different interpretations. The son has his remedy, but the proper mode of asserting such equities is by suit or other proceeding against the Official Assignee. For instance, if the sons of an insolvent alleged that certain of his debts had been incurred for immoral purposes and were not binding upon their interests in ancestral immovable estate, they might maintain these allegations in a suit against the Official Assignee: and, in effect, seek to have the property marshalled so as to apply the property other than such interests of theirs to the payment of such debts: 7 Bom. 438; 21 Bom. 205; 19 Mad. 74; 158 P.R. 1919; A.I.R. 1922 All. 79, *Foll.*; 49 I.C. 848; 5 O.L.J. 665, *Dist.*; 42 Cal. 225, *Dist.* (*Shadi Lal, C.J., Chevis and Abdul Raoof, JJ.*). BIHARI LAL *v.* SAT NARAYAN. **69 I.C. 486=3 Lah. 329=A.I.R. 1923 Lah. 1 (F.B.).**

HINDU LAW—Joint family—Father—Representation.

—Joint family—Father—Manager.

———Where the father is alive he is the *de jure* manager and in the absence of evidence that he was incapacitated from being guardian of his minor son, he must be deemed to be the guardian. (*Ashworth, J.C.*). JAMNA PRASAD *v.* BALBHADDAR. **74 I.C. 353=25 O C. 388=9 O.L.J. 601=A.I.R. 1923 Oudh 147.**

—Joint family—Father—New business.

———Father starting new business—Money cannot be raised on family estate though the business may be a profitable one, to himself and his sons: (*Case-law discussed.*) (*Mears, C.J. and Mukerji, J.*). INSPECTOR SINGH *v.* KHARAK SINGH. **112 I.C. 881=50 All. 776=26 A.L.J. 577=A.I.R. 1928 All. 403.**

—Joint family—Father—Powers of.

———*Acknowledgment of pre-partition debt.*

Where a Hindu Father executes a promissory note after partition partly in lieu of debts contracted before partition and partly in respect of fresh advances the old liability is replaced by the promissory note and the creditor can only proceed under the latter instrument. (*Kumaraswmai Sastri and Reilly, JJ.*). SUBRAMANIA MOOPANAR *v.* SUBBIAH AYYAR. **1930 M.W.N. 658.**

———There is no statutory power given to a Hindu father to tie up his property for what he conceives to be the benefit of his children. (*Marten, C. J. and Crump, J.*). VENKATARAMAN *v.* JANARDHAN. **106 I.C. 79=52 Bom. 16=29 Bom. L.R. 1522=A.I.R. 1928 Bom. 8.**

———In the case of a Mitakshara father who is the karta, an implied authority to make an admission for the benefit of his minor sons may well be presumed. (*Mukerji and Mitter, JJ.*). SURENDRA NATH *v.* SAMBHU NATH. **104 I.C 219=55 Cal. 210=A.I.R. 1927 Cal. 870.**

—Joint family—Father—Representation.

———*Suit on mortgage by father—Son when bound by the decree.*

Where certain minor sons in a joint Mitakshara family are completely represented in a suit on the mortgage of the joint family property by the father and have raised every possible defence available to the minor members of a joint Mitakshara family, the mere fact that one such son was not joined as party to the mortgage action cannot entitle him for a declaration that the decree in the mortgage suit was not binding as against him and his interest in the joint family property after the judicial sale of the property mortgaged: 17 A. 537 (F.B.) treated as *overruled* by A.I.R. 1924 P.C. 50 (*Case-*

HINDU LAW—Joint family—Father—Representation

law considered.) (*Adami and Wort, JJ.*). RAGHUNANDAN PRASAD SINGH *v.* GHANANAND SINGH.
A.I.R. 1930 Pat. 521.

———Where the effect of a revenue partition is to bind the father of a Hindu joint family conclusively, his son will be equally bonud although his name may not have been entered in the revenue papers. (*Sulaiman and Ryves, JJ.*). GAJADHAR SINGH *v.* HARI SINGH. **87 I.C. 647=47 All. 416=23 A.L.J. 291=6 L.R.A. Civ. 237=A. I. R. 1925 All. 421.**

———The presumption that when a Hindu father, a member of a joint family, sues or is sued, it is to be presumed that he sues or is sued in a representative capacity does not apply where several of the co-parceners have affixed their signatures to the bond in suit as executants and are made defendants in suit. (*Baker, J.C.*). NARAYAN *v.* DHUDABAI. **92 I.C. 663=21 N.L.R. 38=A.I.R. 1925 Nag. 299.**

———There is a great distinction between cases in which a Hindu father sues in respect of a contract which he is empowered under the Mitakshara Law as manager to make on behalf of the family and cases in which a father sues in respect of rights in immovable property, rights which he can only hold in an equal measure with other co-parceners.

The question as to whether a Hindu father sufficiently represents all the co-parceners in a given litigation is a question which has to be decided with reference to the circumstances of the case. (*Foster, J.*). HUKUM MAHTO *v.* SANT SAHO. **78 I.C. 19=A.I.R. 1925 Pat. 308.**

—Joint family—Father—Right to sue.

———*Father can sue without impleading his minor sons.*

There is no valid reason for drawing a distinction between the powers of a manager to sue on behalf of the joint Hindu family for a debt due to the family in his own name alone without impleading the other members and to sue for possession of immovable property belonging to the joint Hindu family without impleading the other co-parceners. At any rate, especially in the case of a father of a joint Hindu family, the consideration is even a stronger in favour of holding that he could sue both on behalf of himself and his minor sons without impleading the minor sons. The position will be different where co-parceners other than the father or the manager are suing, and, therefore, limitation runs even against a minor member of a joint Hindu family as regards adverse possession if his father who was joint with him was a major at the time that the adverse possession began: A. I. R. 1926 P. C. 16, *Dist.* (*Harrison and Dalip Singh, JJ.*). SHARAM SINGH *v.* SADHA SINGH. **110 I.C. 293=A.I.R. 1928 Lah. 484.**

———Suit by Hindu father for recovery of joint family land binds all co-parceners—Such suit must be deemed to be a representative suit on behalf of all the co-parceners. (*Foster, J.*). HUKUM MAHTO *v.* SANT SAHO. **78 I.C. 19=A.I.R. 1925 Pat. 308.**

—Joint family—Father—Self-acquisitions.

———Son cannot object to attachment of father's self-acquired property in execution of decree against father: 4 P. R. 1913, *Dist.* (*Bhide, J.*). RAGHBIR SINGH *v.* PAT-RAM GANGA-RAM.
115 I.C. 478=30 P.L.R. 29=10 L.L.J. 543=A.I.R. 1929 Lah. 181.

———Amongst Hindus an adult son usually lives with his father even when there is no joint family property and it cannot be said that a father whose property is self-acquired intends to make it joint family property simply because he does not turn out his son as he is of age and can earn his living. (*Kumaraswami Sastri and Reilly, JJ.*). PERIAKARUPPAN CHETTI *v.* ARUNACHALAM CHETTI.
102 I.C. 290=50 Mad. 532=25 M.L.W. 688=1927 M.W.N. 287=A.I.R. 1927 Mad. 676=52 M.L.J. 571.

HINDU LAW—Joint family—Law as to.

———The sons do not take a right by birth in his self-acquisitions of their father: 13 C.P.L.R. 137; 3 N. L. R. 182; 4 N.L.R. 9; 5 N. L. R. 103, *Foll.* (*Mittra, A. J. C.*). MAROTI *v.* TUKARAM.
76 I.C. 934=19 N.L.R. 99=A.I.R 1921 Nag. 138.

—Joint family—Father—Suit for accounts.

———In a suit for accounts against a joint family the son is not liable for the period of management by his father. (*Chaudhuri and Newbould, JJ.*). BISWAMBHAR HALDAR *v.* GIRIBALA DASI.
25 C.W.N. 356=A.I.R. 1921 Cal. 571.

—Joint family—Father—Will.

———A Hindu father has no interest in co-parcenary property after his death which he can vest in the trustees of any settlement, whether that settlement is made by deed or by will. (*Marten, C.J. and Crump, J.*). VENKATARAMAN *v.* JANARDHAN.
106 I.C. 79=52 Bom. 16=29 Bom. L.R. 1522=A.I.R. 1928 Bom. 8.

———Father cannot bequeath by Will joint family property: 43 Mad. 824, *Foll.* (*Spencer and Odgers, JJ.*). DEIVACHILA AIYANGAR *v.* VENKATACHARIAR. **88 I.C. 967=22 M.L.W. 188=1925 M.W.N. 556=A.I.R. 1926 Mad. 46=49 M.L.J. 317.**

———Father and son being co-parceners, former cannot appoint testamentary guardian for son for the co-parcenary property: 41 Mad. 561 (F. B.), *Foll.* (*Spencer and Odgers, JJ.*). DEIVACHILA AIYANGAR *v.* VENKATACHARIAR. **88 I.C. 967=22 M.L.W. 188=1925 M.W.N. 556=A.I.R. 1926 Mad. 46=49 M.L.J. 317.**

—Joint family—Law as to.

———The law governing the descent of the zamindari of Sadak Arjuni, Bhandara District, is that which governs the estate held by a joint Hindu family. (*Mohiuddin and Macnair, A. J. Cs.*). MT. SARJABAI *v.* GANGARAM. **118 I.C. 871=A.I.R. 1930 Nag. 35.**

———*Law of joint family and that of survivorship are closely connected.*

So closely is the law of joint family and survivorship connected with the law of succession and inheritance that it is often very difficult to say precisely where the Hindu Law of succession and inheritance can be separated from the rest of the Hindu Law of the joint family. (*Kumaraswami Sastri, J.*). HAJEE ABOO BUCKER *v.* EBRAHIM HAJEE. **70 I.C. 715=31 M.L.T. 183=A.I.R. 1921 Mad. 571.**

—Joint family—Manager.
Acknowledgment.
Arbitration.
Bond in favour of.
Compromise.
Contract.
Decree against.
De facto.
Discharge.
Exclusive possession.
Insolvency of.
Liability of members.

HINDU LAW—Joint family—Manager—Acknowledgment.

Liability to account.
Loan.
Powers of.
Presumption.
Representation.
Right to sue.
Who can be.

—Joint family—Manager—Acknowledgment.

———The *karta* has the same authority to acknowledge a debt as he has to incur it, and the acknowledgment need not be expressed as having been made in his capacity of *karta*. (*Buckland, J.*). HARI MOHAN GHOSE *v.* SOURENDRA NATH MITTER. **88 I.C. 1025=41 C.L.J. 535= A.I.R. 1925 Cal. 1153.**

———A Hindu Manager can bind himself in an acknowledgment of a time-barred debt but he cannot bind his co-parceners. (*Broadway and Campbell, JJ.*). THAKAR DAS *v.* MT. PUTLI. **82 I.C. 96=5 Lah. 317=A.I.R. 1924 Lah. 611.**

———*Acknowledgment by one member—When binds others.*

If one of the members of a joint Hindu family makes an acknowledgment in a statement before a Court and there are circumstances which indicate that that member was making that statement on behalf of the family, other members of the family are bound by the acknowledgment. (*Kanhaiya Lal, J.C.*). RAM AUTAR *v.* BENI SINGH. **68 I.C. 196=25 O.C. 89=10 O.L.J. 7= A.I.R. 1922 Oudh 135.**

—Joint family—Manager—Arbitration.

———*Reference to arbitration—When manager can make.*

A manager of a joint Hindu family, even when he is not the father, has the power to bind the family by a reference of a dispute with any outsider regarding family property, to arbitration, provided such reference be for the benefit of the family; and minors in the family are bound by the reference, and consequently by the award made upon it: 14 C.L.J. 188, *Rel. on*; 27 Bom. 287, *Foll.* (*Jai Lal and Bhide, JJ.*). NANAK CHAND *v.* BANARSI DAS. **A.I.R. 1930 Lah. 425.**

———*Manager can refer to arbitration disputes on behalf of co-parcenary firm.*

The Manager of a joint Hindu family is entitled to refer to arbitration disputes on behalf of the co-parcenary business or firm. It makes no difference if the family is constituted not of father and son but of brothers: A. I. R. 1927 Lah. 362, *Rel. on*; A. I. R. 1926 All. 238, *Dist.* (*Jai Lal, J.*). SHIV DAYAL MAL SHANKAR DAS *v.* MOHAN LAL CHUNI LAL. **122 I.C. 231=A.I.R. 1930 Lah. 388.**

———*Bona fide* reference to arbitration of dispute as to succession to family property is binding on others in the absence of fraud or good reasons to the contrary. (*Chevis and Scott-Smith, JJ.*). DWARKA DAS *v.* KISHAN KISHORE. **61 I.C. 628= 2 Lah. 114=3 L.L.J. 349=73 P.L.R. 1921= A. I. R. 1921 Lah. 34.**

—Joint family—Manager—Bond in favour of.

———Promissory note in favour of manager for money advanced out of joint funds—Surviving member can sue on it without succession certificate under Succession Certificate Act, S. 4: A.I.R. 1921 Mad. 68 (F.B.), *Foll.* (*Beasley, J.*). ARUNACHALLAM CHETTY *v.* JAGANNATHA PILLAI. **98 I. C. 872=24 M. L. W. 659= 1926 M.W.N 804= A.I.R. 1926 Mad. 1188.**

———Bond held in the name of manager is presumed to be joint property—Separate private transactions by individual members do not disprove it—Evidence meagre on both sides—Presumption is not displaced. (*Viscount Cave.*) BANDHU RAM *v.* CHINTAMAN SINGH. **66 I.C. 402= 26 C. W.N. 406=3 P. L. T. 295= 20 A.L. J. 493=A.I.R. 1922 P.C. 215 (P.C.).**

HINDU LAW — Joint family — Manager—Contract.

—Joint family—Manager—Compromise.

———*Compromise by manager is binding.*

In a Hindu family consisting of two brothers the elder brother of the two brothers should be presumed to be the head or the manager of the family in the absence of any evidence to the contrary and a compromise entered into by him is binding upon the younger brother. (*Shadi Lal, C.J. and Agha Haidar, J.*). SANT RAM *v.* HIRA NAND. **A.I.R. 1930 Lah. 719.**

———Compromise by, if reasonable, binds minor members. (*Mears, C.J. and Banerjee, J.*). TULSHI *v.* BISHNATH RAI. **71 I. C. 623=21 A.L.J. 175= 4 L.R.A. Civ. 134=A.I.R. 1923 All. 284.**

—Joint family—Manager—Contract.

———*Specific performance of—When can be enforced against minor.*

A contract entered into by a manager on behalf of the joint family at a time when one of the members was a minor cannot be enforced as against the minor. There is no reason to limit this rule to cases where the contract on behalf of the minor is a contract for the purchase of immovable property. Nor can it be said that the principle has no application to a case where there is a contract to sell for the purpose of necessity,

Held, however that a contract by the manager can be enforced except with reference to the share of the infant in the property contracted to be sold, unless the contract is of such an indivisible character that no specific performance can be ordered. (*Jack and Mitter, JJ.*). NRIPENDRA CHANDRA SARKAR *v.* EKHERALI JOARDAR. **57 Cal. 263= 34 C.W.N. 272=A.I.R. 1930 Cal. 457.**

———Transactions entered into by manager—Word 'heir' used in such transaction does not mean heirs of manager only. (*Das and Ross, JJ.*). HASAN IMAM *v.* BRAHMDEO SINGH. **A.I.R. 1930 Pat. 301.**

———Contract entered by family through manager—Through manager it can sue for matters arising out of that contract.

The managing member of a joint family business can sue in matters affecting the business, without joining in the suit the other members of the family. (*Macleod, C.J and Coyajee, J.*). MADIVELLAPPA *v.* MALLAPPA. **96 I.C. 281= 28 Bom. L.R. 711=A.I.R. 1926 Bom. 414.**

———*Contract to sell property—Sale not for necessity—Specific performance of only vendor's share can be had.*

The managing member of a joint Hindu family, who, for purposes not binding upon the other co-parceners and without their concurrence, agrees to convey a specific item of joint family property, cannot 'perform' his contract in its entirety and the case falls within the provisions of S. 15. The purchaser in such a case cannot enforce specific performance of the entire contract. But Courts will grant specific performance by a conveyance of the share which the vendor had in the property at the date of the contract, if the purchaser elects to pay the entire consideration, and the share should be specified in the decree. (*Mitchell, A.J.C.*). SINGHAI RAM LAL *v.* KANHAYA LAL. **96 I.C. 949= A I.R. 1926 Nag. 493.**

HINDU LAW — Joint family — Manager—Contract.

———A contract of partnership entered into by the Manager of a joint Hindu family with strangers does not *ipso facto* make the other members of the family partners: 41 M. 454, *Ref.* (*Baker, J.C.*). SHEO NARAIN *v.* BABULAL. **85 I.C. 775= A.I.R. 1925 Nag. 268.**

———Contract by the Manager of a Hindu joint family in his individual capacity does not bind other co-parceners but the manager is not deprived on this account, of his right to enforce the contract. (*Kennedy, J.C. and Lobo, A.J.C.*). TANUMAL *v.* GANGARAM. **94 I.C. 547=A.I.R. 1925 Sind 103.**

———Where a contract is by manager on behalf of a family, and for the benefit of the family and the manager dies, it can be enforced against the survivors even when some of the survivors are minors: 22 Bom. L.R. 997, *Foll.* (*Ramesam and Jackson, JJ.*). NARAYANA CHETTY *v.* MUTHIA CHETTY. **80 I.C. 658=20 M.L.W. 103= 34 M.L.T. 350=1924 M.W.N 482= 47 Mad. 692=A.I.R. 1924 Mad. 680= 46 M.L.J. 575.**

———Manager contracting to sell family property —Sale not binding on other members—Other members not consenting—Sale of vendor's share only can be enforced on payment of contracted consideration: 37 Mad. 387, *Appr.*; 26 Mad. 74 and 32 Mad. 320, *Overruled.* (*Wallis, C.J., Oldfield and Kumaraswami Sastri, JJ.*). BALUSWAMI AIYAR *v.* LAKSHMANA AIYAR. **63 I.C. 374=44 Mad 605= 13 M.L.W. 562=1921 M.W.N. 316= A.I.R. 1921 Mad. 172=41 M.L.J. 129 (F.B.).**

—Joint family—Manager—Decree against.

———*Manager entering into partnership with strangers—Adult co-parceners not liable for partnership—Liability if their consent was not taken.*

A preliminary decree was passed against *A* personally declaring him to be a partner with *P* and for rendition of partnership accounts. During continuance of further proceedings *A* died and *P* prayed to substitute the son and the brother of *A* as legal representatives on the ground that *A* entered into the partnership as manager of the joint Hindu family consisting of himself, his brother and son. There was no allegation that the brother had given his consent to *A* for carrying on the new business with *P*. The Court holding that *A* could not even if he entered the business as manager make other members partners with *P*, substituted only the son of *A* on the ground that trade debts of the father are binding on son,

Held further, that the Court was correct in refusing to substitute the brother as legal representative: 15 N. L. R. 21, *Rel. on*; 46 Cal. 962, *Ref.* (*Subhedar, A.J.C.*). KASHIBAI *v.* SHRIKUMAR. **A. I. R. 1930 Nag. 10.**

——— *Suit for trespass—Manager, resisting suit on the ground that property belongs to family—Decree binds members.*

Where in a suit the plaintiff contends that the defendant has wrongfully encroached on his land and the defendant who is the manager of a joint Hindu family contends that the land is his family property the suit cannot be said to be brought on a trespass pure and simple. If the defendant as manager of the joint family puts forward a title to the plaint property and if it is found against him, the other members of the joint family are also bound. (*Devadoss, J.*). (MADA PEDDA) SUBBANNA *v.* KURNAM DHANDRA BAYAMMA *alias* RAMA BAYAMMA. **86 I.C. 498=21 M.L.W. 300= A.I.R. 1925 Mad. 640.**

HINDU LAW — Joint family—Manager—Exclusive possession.

———*Execution of decree against manager—Interest of all members passes unless contrary is shown.*

In the absence of any objection by any member of the family, when joint family property is put up for sale in execution of a decree against a manager, it may be inferred that the intention was to pass the interest of all the members of the family in the property, though it may be open to the other members of the family to dispute that intention, and to satisfy the Court either that the alienation, was not binding on them or that the debt incurred by their father was not binding on them, or on any other ground that their interests in the family property had not passed to the auction-purchaser: 44 Cal. 524, *Foll.* (*Macleod, C. J. and Crump, J.*). DADA JIVAPPA *v.* YESU. **73 I.C. 402= 25 Bom. L.R. 494=A.I.R. 1923 Bom 450.**

———*Suit by or against manager—No presumption that suit is representative.*

If it is shown that the debt is incurred by the Karta of a family for the purposes of the family trade or for its benefit otherwise and he is sued as manager and a decree is substantially against the family in the name of its manager, all the members of the family will be liable for the decretal amount. These facts, however, must be proved by evidence. There is no presumption of law that a suit by or against a manager of a joint family is in his representative capacity as manager; and where the question itself is not raised as to his having represented the family, a Court will be acting rightly in holding that he sues or is sued in his own personal capacity. (*Abdul Raoof and Harrison, JJ.*). MELA MAL *v.* GOURI RAJMAL. **66 I.C. 485=3 Lah. 288=A.I.R. 1922 Lah. 200.**

———*Decree against manager binds minor members.*

Decree passed against the managing members a joint family as the legal representatives of their deceased father against whom the suit had been originally filed in order to make him reimburse mesne profits which he had realised out of the joint family property to the plaintiff—another member of the family with whom he had been joint—is binding on minor members of the family though they were not made parties to the suit or the execution proceedings that followed: 36 All. 383 (P.C.), *Foll.* (*Kanhaiya Lal, A. J. C.*). RAM NIDH *v.* ISHURDIN. **63 I C. 288=24 O.C. 161= A.I.R. 1921 Oudh 117.**

—Joint family—Manager—De facto.

———A *de facto* manager can deal with the family property for proper family purposes, and a mortgage by him of such property for such a purpose is binding on the family. (*Abdur Rahim, Offg. C. J. and Odgers, J.*). SADAYAPPA ASARI *v.* RAGHAVA ASARI. **62 I.C. 220=27 M.L.T. 325.**

—Joint family—Manager—Discharge.

———Where there is a division of status, the person who was the managing member before there was such a division, ceases to represent the family afterwards and debts renewed by him subsequently would not bind the persons who were already divided in status. (*Kumaraswami Sastri and Reilly, JJ.*). VENKATA KRISHNAYYA *v.* RANGAYYA. **117 I. C. 720=A.I.R. 1928 Mad. 865.**

—Joint family—Manager—Exclusive possession.

———*Manager cannot claim exclusive possession against other members.*

Manager of a joint Hindu family is no more entitled to exclusive possession of any part of the joint family property than any other member is.

HINDU LAW—Joint family — Manager—Insolvency of.

If another member takes exclusive possession of a part or of the whole of the property and thereby ousts the Manager from joint possession, the latter can be restored to that joint possession, but he cannot be put in exclusive possession, as admittedly he has no right to it: 7 N.L.R. 82 ; 1 All. 77, *Dist.* (*Hallifax, A.J.C.*). KHEDU SINGH *v.* BHAGWAN SINGH. **79 I.C. 400=A. I. R. 1924 Nag. 163.**

—Joint family—Manager—Insolvency of.

———On the insolvency of the Manager of a Hindu joint family business, the Official Receiver can attack colourable transfers of the family property made shortly before the adjudication though such transfers were made by the senior members of the family and the manager was only a junior member. (*Walsh, Ag. C.J. and Ryves, J.*). NARAIN DAS *v.* BANKIM CHANDRA. **85 I.C. 396=49 All. 912= A.I.R. 1925 All. 194.**

———*Shares of other members do not vest in Official Assignee.*

On the insolvency of the managing member of a joint Hindu family the Official Assignee succeeds to the undivided interest of the insolvent in the joint property and his rights as managing member so far as they can be exercised for his own benefit; but he is not entitled to have vested in him the shares of the other members though he is entitled to deal with them as the insolvent would lawfully have done if there be no insolvency: A. I. R. 1923 Mad. 55, *Foll.*; A.I.R. 1923 Lah. 1 (F. B.), *Not foll.* (*Schwabe, C. J. and Coleridge, J.*). VARADARAJAN *v.* SRINIVASA RAO. **75 I.C. 471= A.I.R. 1924 Mad. 792.**

———*Minor co-parcener's share does not vest in Receiver.*

Although the manager and the other adult members of the family are adjudicated insolvents, the property of the minor co-parceners does not vest in the Receiver: 42 Cal. 225 and 19 Mad. 74, *Foll.* The Full Bench Ruling, 3 Lah. 329, has distinguished the case in 42 Cal. 225. (*Abdul Raoof, J.* BASHESHER NATH *v.* GANGA RAM. **73 I.C. 281=A.I.R. 1923 Lah. 572.**

—Joint family—Manager—Liability of members.

———Lease of fields taken by person as manager of joint Hindu family of himself and his brother—Fields cultivated by brother for certain years—Rent for those years can be recovered from him by lessor, though he be not actual party to lease: 1 N. L. R. 178, *Rel. on.* (*Subhedar, A. J. C.*). NARAIN *v.* NILKANTH. **A.I.R. 1930 Nag. 54.**

———Where the managing member of a joint family misappropriated, in the interests of joint family business, the money of a public trust,

Held, the other members of the joint family were jointly with the managing member and severally, liable to re-pay the amount with the interest which the trust would have reasonably acquired. (*Sir John Edge.*) JAI NARAIN *v.* PRAG NARAIN. **85 I.C. 2=1925 M.W.N. 13= 21 M.L.W. 162=2 O.W.N. 157= 6 L.R.P.C 73=27 Bom. L.R. 713= 29 O.W.N. 775=3 Pat. L.R. 255= A.I.R. 1925 P. C. 11=48 M.L.J. 236 (P.C.).**

—Joint family—Manager—Liability to account.

———The manager of a joint Hindu family after the date of division in status, is under an obligation to account for his management of the whole of the family property, he being co-owner in possession of the property of the separated member of the family : 18 Cal. 10 (P.C.) and A.I.R. 1927 Mad. 801, *Foll.* (*Phillips and Thiruvenkatachariar, JJ.*).

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RAMAKRISHNA AYYAR *v.* MUTHUSWAMI AYYAR. **121 I. C. 609=52 Mad. 672=29 M.L.W. 560= A.I.R. 1929 Mad. 456=56 M. L. J. 657.**

———Manager is not bound to render accounts to the co-parceners of the profits of the joint-family during continuance of jointness. (*Simpson, A.J.C.*). LACHMI NARAIN *v.* SALIG RAM. **83 I.C. 833= 11 O L.J. 154=A.I.R. 1924 Oudh 428.**

———Manager cannot be freed from the liability of rendering accounts simply because he has said that he possesses no account books and the plaintiff has been unable to prove the existence of such. (*Broadway and Zafar Ali, JJ.*). RAM KISHAN *v.* RANSHAU. **77 I.C. 532=A.I.R. 1923 Lah. 551.**

———*He is liable to account only for what he actually receives.*

In the absence of proof of direct mis-appropriation or fraudulent and improper conversion of the moneys to the personal use of the manager (Karta) he is liable to account for what he received and not for what he ought or might have received if the moneys had been profitably dealt with. (*Sir John Edge.*) A. PERRAZU *v.* A. SUBBARAYADU. **61 I.C. 690=3 Pat. L.T. 1=26 C W.N. 1= 30 M.L.T. 1=43 I.A. 280=44 Mad. 636= 19 A. L. J. 621=23 Bom. L. R 920= 34 C. L. J. 56=14 M. L. W. 270= 1921 M. W. N. 540=A.I.R. 1922 P. C. 71= 41 M.L.J. 33 (P.C.).**

———*Manager to maintain accounts to show savings effected—Suppression of account-books—Manager will be charged with value of net income.*

The Karta of a joint Mitakshara Hindu family is not accountable for the rents, issues and profits which came into his hands during his management of the properties as Karta. But he is still bound to keep true and correct accounts and to show the savings effected from the income of the joint family properties.

Where the Karta of the joint family properties has suppressed his books of account with the result that it is impossible to discover what are the savings effected from the income of the joint family properties, the only possible way, to discover those savings is to see what was the income of the joint family properties and what expenses were incurred by the joint family year by year. The Karta must be charged with the utmost value of the whole net produce deducting therefrom what is proved by him to have been spent for the joint family. Such an enquiry is always directed against trustees and agents who do not keep true and faithful accounts. *Lipton* v. *White*, (1808) 15 Ves. 432 and *Gray* v. *Haig*, (1854) 20 Beav. 219, *Ref.*

The rule is founded on the principle that every presumption consistent with established facts ought to be made against a trustee or an agent who, by his tortious acts has made it impossible for the plaintiff to discover his property. Although a Karta of a joint Mitakshara Hindu family is neither a trustee nor an agent in the strict sense of those terms; but as it is his duty to conserve the joint family properties and to disclose those properties to the members of the joint family at the time of partition the rule stated above is applicable in his case. This method of investigation is hardly a satisfactory one, and may even lead to injustice so far as the Karta is concerned; but the Court deals severely with any irregularities on the part of the agent and it strictly requires that he, who is the person trusted, shall

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act in all matters, relating to such agency for the benefit of his principal, and it is imperative upon him to preserve correct accounts of all his dealings and transactions in that respect and the loss and still more the destruction of such evidence by the agent, falls most heavily on himself.

Where the joint family has a money lending business, but where having regard to the attitude taken up by the Karta it is impossible to determine what the value of that business is, the only reasonable way of dealing with this matter would be to assume that the Karta of the joint family must have invested the net income derivable from the properties less the expenditure in each year, in the money lending business and to charge him with interest at such a rate as in the opinion of the Court fairly represents the profits usually made by the employment of money in such a business. *Burdick* v. *Garrick*, (1870) 5 Ch. 233, *Ref. (Das and Ross, JJ.)*. GOBIND DUBE *v.* PARAMESHWAR DUBE. **62 I.C. 83=2 P.L.T. 365= A.I.R. 1921 Pat. 487.**

—Joint family—Manager—Loan.

——When the manager of a joint Hindu family incurs a debt and gives a promissory note therefor the creditor may sue him upon the note and make him personally liable but he cannot make the other members of the family liable by suing on the note. (*Shingne, J.*). MANCHERSHA *v.* GOVIND. **32 Bom. L.R. 1035=A. I. R. 1930 Bom. 424.**

——Where the manager of a joint family borrows money on a promissory note for a joint family business, the other members of the joint family are liable on the note, though the note was executed by the manager in his sole name : Authorities on P. 249, Mulla's Hindu Law, *Foll.* (*Broadway and Skemp, JJ.*) MEHLU MAL *v.* BHOLU. **102 I.C. 295=9 L. L. J. 186=28 P.L.R. 277. A. I. R. 1928 Lah. 81.**

——When the whole of the money borrowed by manager for the family is spent on it or by it, whether on necessities or luxuries the question of the actual existence of the necessity does not arise. (*Hallifax, A.J.C.*). RAMBHAU *v.* WAMAN RAO. **107 I. C. 657=A.I.R. 1928 Nag. 251.**

——*Debt by the manager for the construction of new house on old site is a legal necessity though new house is more spacious.*

Where a manager borrows money to construct a new house on old site the mere fact that it was on a larger and more extensive scale, does not make the loan any the less for necessity where there has been no proof that the construction was not a reasonable and natural one in the circumstances and the work had already been commenced and it would have been uneconomic and indeed a disastrous step to have left matters as they were and the net result had been that the family property had been improved and increased in value and was capable of producing a larger income. (*Findlay, C.J.*). JAGO KALAR *v.* NILKANTH. **105 I.C. 471=A.I.R. 1928 Nag. 78.**

——*Promissory note by karta in his own name—Other members not liable on the note—Creditor can sue on the original debt, all the members—Members can plead debt was not justified.*

The karta of a joint Hindu family, by executing a promissory note unconditionally in his own name for family purposes cannot thereby bind the other members of the family or the interest of any other member of the joint family property. The other members of the joint family would only be bound

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by a promissory note or bill of exchange signed by the Karta for family purposes if the name of each member of the joint family to be charged appears on the instrument itself and is disclosed in such a way that on any fair interpretation of the document his name is the real name of the person liable upon the bill : 46 Cal. 663; A.I.R. 1925 Cal. 1062 and 30 Mad. 88, *Foll.*; 23 Mad. 597 and A.I.R. 1922 All. 116, *Diss. from*; 11 C.W.N. 139, *Dist.*

A debt contracted under a promissory note signed by a karta for family purposes does not attract the Hindu doctrine of family responsibility for family debts, and such a doctrine is incompatible with the object and effect of the law relating to negotiable instruments.

If a person has lent money to the karta of a joint family for family purposes upon the security of a promissory note, he is entitled to recover the full amount due under the promissory note, irrespective of whether the money was or was not borrowed or applied for family purposes but if he elects to pursue this course, he is restricted to the remedy that he possesses against the party to the promissory note, and must follow the special procedure provided in respect of negotiable instruments. On the other hand in a suit aptly framed he may claim in the alternative the amount of the original debt for which the promissory note was given as security, and may proceed under the Hindu Law against the property of the joint family as a whole; but if he chooses to adopt the alternative the coparceners will be entitled to raise the defence that the debt was not contracted or the proceeds of the loan applied for family purposes. In short the plaintiff in such a case may enforce the rights that he possesses either under the law relating to negotiable instruments or under the Hindu Law: but whichever remedy he pursues he is bound by the rules of the Code that he invokes. (*Page, J.*). RAM GOPAL *v.* DHIRENDRA NATH. **101 I.C. 573= 54 Cal. 380=31 C. W. N. 397= A.I.R. 1927 Cal. 376.**

——Where the elder brother releases his interest in the family, the next brother becomes the manager and loans contracted by him for benefit of the family are binding on the family including the sons of elder brother, the sons remaining joint in spite of the release by the father. (*Venkatasubba Rao, J.*). BALASUNDARACHARI *v.* KANNIAPPA. **107 I.C. 132=39 M.L.T. 443= A.I.R. 1927 Mad. 1165.**

——The karta of a Hindu joint family cannot bind the members of the family by his signature alone on a promissory note, no other names appearing upon the document as those of persons to be charged: A.I.R. 1923 Bom. 244 and A.I.R. 1922 All. 116, *Foll.*; 46 Cal. 663 (P.C.), *Dist.* (*Buckland, J.*). HARI MOHAN GHOSE *v.* SOURENDRA NATH MITTER. **88 I.C. 1025=41 C.L.J. 535= A.I.R. 1925 Cal. 1153.**

——*Promissory note by karta—Other members not liable on the note.*

Where a promissory note is signed by the karta alone of a joint Hindu family he cannot be said to have signed on behalf of the other members of the family if their names do not appear in the pro-note. Such promissory note gives no cause of action against other members of the joint family than the karta himself, and hence no question under S. 91, Evidence Act, arises. Such a case is different from one where the pro-note is merely inadmissible for non-compliance with the provisions of the

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Stamp Act. (*Buckland, J.*). HARI MOHAN GHOSE *v.* SOURENDRA NATH MITTER. **88 I.C. 1025= 41 C.L.J. 535=A. I. R. 1925 Cal. 1153.**

——Manager alone is liable for the debt incurred by him where it is not incurred for family purposes. (*Shadi Lal, C.J. and Le Rossignol, J.*). BARU *v.* BALLA. **105 I.C. 770=6 L.L.J. 441= A.I.R. 1925 Lah. 141.**

——There is no presumption that a debt contracted by the manager of a Hindu family is contracted for the benefit of the family: 34 A. 135, *Ref.* (*Martineau and Zafar Ali, JJ.*). KHAZAN 'MAL *v.* JAGAN NATH. **74 I.C. 484=4 Lah. 200= 5 L.L.J. 236=A.I.R. 1924 Lah. 44.**

——*Promissory note by karta—Suit against other members for the debt—When lies.*

A suit upon a promissory note executed by the manager of a joint family and brought against the other members (undivided younger brothers of the executant) after his death is maintainable where the plaint mentions the fact of the loan and alleges that it was incurred for family purposes. (*Wallace, J.*). SUPPAI GOUNDAN *v.* MURUGAPPA CHETTIAR. **19 M.L.W. 605=A.I.R. 1924 Mad. 710.**

——There is no presumption in law that a document signed in his personal capacity by one who is the manager of a joint Hindu family is signed by him as such manager. It is essential for the plaintiff to prove that there was necessity for these loans sought to be repaid under the suit promissory notes. (*Wallace, J.*). SUPPAI GOUNDAN *v.* MURUGAPPA CHETTIAR. **19 M.L.W. 605= A.I.R. 1924 Mad. 710.**

——*Suit on pro-note by manager cannot be treated as one for original debt.*

A suit which is primarily a suit on a promissory note by manager cannot be treated as a suit for the debt for which the promissory note was passed. If that were permissible difficulties would arise because the issues in a suit on a promissory note would be entirely different from the issues which would be raised in a suit against the whole family to recover debt. Defences which would be open to members of the family when sued for a debt would not be open to the person who passed the note. (*Macleod, C. J. and Crump, J.*). VITHAL RAO SHESHGIRI RAO *v.* VITHAL RAO SOUDEKAR. **72 I. C. 242=25 Bom. L. R. 151= A.I.R. 1923 Bom. 244.**

—Joint family—Manager — Powers of — Acts binding.

——*Averting loss in family business—Mortgage therefor is binding—Test of justification.*

The criterion to be applied to a transaction such as a mortgage by a manager is not whether it ultimately turned out to be for the benefit of the family, but whether it was a transaction which at the time it was entered into was such that a prudent man would have entered into it in the expectation that it would be for the benefit of the joint Hindu family.

Where a mortgage deed was proved to have been executed by adult members of a joint Hindu family on their own behalf and as guardians of minor members, and where the minors challenged the mortgage on the ground that it was not for legal necessity or for the benefit of the family estate and where it was proved that the consideration of the mortgage was borrowed for purchasing a house in which the joint family had been carrying on jajmani business and it was established by evidence that if the adult members had failed to purchase the house which was offered to them at a

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concession, there would have been a loss to the family in the jajmani business,

Held, that as the danger to be averted was the loss of the possession of the house which had been in the possession of the family for 40 years, and which had been of material assistance to the family in conducting its business of jajmani, the adult members were justified in executing the mortgage in question and that the transaction was a transaction for the benefit of the family: 6 M.I.A. 393, *Foll.* and A.I.R. 1924 P.C. 50, *Ref.* (*Mukerji and Bennet, JJ.*). GOBINDJI *v.* LALLAMUL HARDEO DAS. **1930 A.L.J. 1170=A. I. R. 1930 All. 767.**

——Manager for securing economical management of family property taking up management of neighbouring property and creating charge on family property to secure honest management—Manager does not exceed his powers nor does he burden family property without legal necessity. (*Ashworth, J.*). MT. ASHRAFUNNISSA BEGAM *v.* SAHDEO PANDEY. **117 I.C. 609= A.I.R. 1929 All. 479.**

——*Transaction by manager can be maintained either on the ground of necessity or of benefit.*

A transaction by a manager of a joint Hindu family can be maintained on two grounds, either: (1) that of necessity or (2) that of benefit. If the transaction is beneficial to the family, to establish that there existed a pressure on the family estate and that there was need for the transaction is unnecessary.

Where the family is in danger of losing the entire property and the manager pays off the mortgage by executing another mortgage, his action is justifiable on the ground of legal necessity: 6 M. I. A. 393 and A. I. R. 1925 Oudh 459, *Foll.* (*Wazir Hasan and Gokaran Nath Misra, JJ.*). GAJRAJ SINGH *v.* MT. MULAN KAUR. **105 I.C. 593=4 O.W.N. 981= A.I.R. 1927 Oudh 521.**

——*Karta—Position of, in the joint family*—Bona fide *partition by manager is binding unless other members are prejudiced.*

In a Hindu family the *karta* occupies a position superior to that of the other members in so far as he manages the family property or business or looks after the family interests on behalf of the other members. In fact he exercises a complete authority over the family affairs, as the common interests requiring protection, so long as full and absolute confidence is reposed in him by the other members and no separation is effected, but that authority does not include authority to transfer or alienate the family property except for family purposes. A partition of the family property between his branch and the other branches of the family is not an alienation and if he acts in good faith and in the interest of the family to which he belongs or of which he is the manager that partition is binding on the adult members of the family, and particularly on those who are absent on employment elsewhere or are minors unless there is anything to show that they were prejudiced by it. (*Kanhaiya Lal and Ashworth, JJ.*). JAGMOHANDAS *v.* KUNWAR SINGH. **95 I.C. 135=A.I.R. 1926 All. 532.**

——*Acts of manager are binding if they are for family benefit or interest.*

The mere fact that a certain person is the manager of a joint family is not enough to make his acts binding upon the other members of the family and it must be shown by the party relying

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upon the acts of the manager and seeking to bind the other members of the family, that the acts were done by the manager either for the benefit or for some interest of the family. (*Greaves and Mukerji, JJ.*). SUBASHINI DASI *v.* HABU GHOSE. **89 I.C. 100=A.I.R. 1926 Cal. 247.**

———Where the manager of a joint Hindu family purchased a share in a village, part of which was already owned by the family, and in order to pay off the mortgage decree which was binding on the purchased share, executed mortgage of the joint family property.

Held, that though the purchased property yielded a small profit, the purchase was not speculative but was prudent and was binding on the family. (*Das and Ross, JJ.*). BENI MADHO SINGH *v.* CHANDER PRASAD. **83 I.C. 603=3 Pat. 451=6 P.L.T. 233=A.I.R. 1925 Pat. 189.**

———Manager's acts bind all unless they are prejudicial to them or are not for their benefit. (*Jwala Prasad and Ross, JJ.*). NANA OJHA *v.* PRABHUDAT OJHA. **75 I.C. 508=5 P. L.T. 284=A.I.R. 1924 Pat. 647.**

———New business started by Karta for benefit of family—Karta can raise money on joint property. (*Broadway and Zafar Ali, JJ.*). CHALA RAM *v.* KISHEN CHAND. **88 I.C. 762=A.I.R. 1923 Lah. 462.**

———To save other properties from sale at execution, manager sold the mortgaged property. But full purchase money could not be paid by the purchaser and the manager became a surety to the mortgage executed by the purchaser in order to be able to find money to set aside the execution sale before confirmation.

Held, there was legal necessity for the last transaction and the manager was justified in becoming a surety to the mortgage. (*Das and Adami, JJ.*). KANHAILAL KHENKA *v.* THAKUR PRASAD SINGH. **79 I.C. 9=2 Pat. L.R. Civ. 285=5 P.L.T. 594=A.I.R. 1923 Pat. 268.**

———*Purchase of property if a prudent act is binding.*

The *karta* of a joint family is entitled to borrow money in order to purchase property under certain circumstances. Provided that the transaction is one into which a prudent owner would enter, the manager of a joint family is entitled to bind the joint family properties by a mortgage executed by him. It is wholly immaterial whether the minors join in the mortgage or not. As a matter of law, they cannot join in the transaction; the transaction binds the joint family properties, although there be no registration, and consequently no execution on behalf on the minors. (*Das and Bucknill, JJ.*). KUMAR KALIKNAND SINGH *v.* SHIVA NANDAN PRASAD SINGH. **63 I.C. 625=3 P.L.T. 149=A.I.R. 1922 Pat. 122.**

—Joint family—Manager—Powers of— Acts not binding.

———The manager of a joint family cannot validly give up a valuable claim of the family and extinguish it without any return or consideration. No such waiver or giving up by the manager can be regarded as binding on the minor members of a family and therefore on the family as a whole. (*Srinivasa Ayyangar and Jackson, JJ.*). DASARATHARAM *v.* NARASA REDDI. **109 I.C. 329=51 Mad. 484=28 M.L.W. 77=A.I.R. 1928 Mad. 601=55 M.L.J. 109.**

———The manager of a joint Hindu family property is, in the absence of evidence of necessity

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for the same, not justified in accepting the contract postponing the redemption of a mortgage for forty years. (*Wazir Hasan, A.J.C.*). MT. KANIA FIZZA BIBI *v.* DATADIN. **90 I.C. 184=2 O.W.N. 650=A.I.R. 1925 Oudh 678.**

—Joint family—Manager—Powers of—Borrowing for business.

———The manager of a joint family business has an implied authority to contract debts for the ordinary purposes of the family business. (*Addison, J.*). MAULUK CHAND KISHANJI *v.* DAYA KISHAN. **106 I.C. 183 (Lah.).**

———The manager of a trading family has wider powers than those of the manager of a non-trading family. There is no deviation from the fundamental principle that what is done must be for the benefit or necessities of the family, but acts as the incurring of debts and drawing of negotiable instruments are necessities to a trading family while they would not be to a non-trading family. Even where the debts in fact are incurred merely for personal purposes of the manager they will bind the family if they are within the ostensible authority of the manager as conducting the family business. So it is, that those who deal with him and to whom he incurs debts are not put upon enquiry as to whether the debts where incurred for the benefit or necessities of the family so long as they are incidental to the family business: *Mayne, 9th Edition*, pp. 398-399. *Rel. on*: 34 Bom. 72; 35 Mad. 692 and 42 Mad. 629, *Foll.* (*Wallace and Thiruvenkatachariar, JJ.*). RAJAGOPALA AIYAR *v.* RAMANCHETTIYAR. **1927 M.W.N. 879=A.I.R. 1927 Mad. 1190.**

———*When co-parceners are personally liable.*

The Manager of a joint family business has an implied authority to contract debts for the ordinary purposes of the family business. Where such debts have been incurred, the other co-parceners, whether they be adults or minors, are liable, but to the extent only of their interest in the joint family property. They are not liable personally, unless, in the case of adult co-parceners, the contract sued upon, though purporting to have been entered into by the Manager alone, is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct, or one which they have subsequently ratified; and in the case of minor co-parceners, unless the contract has been ratified by them on attaining majority: 29 All. 166, *Foll.* Mulla's Hindu Law, 3rd Edn., pp. 219 and 211, *Ref.* (*Broadway and Abdul Raoof, JJ.*). BISHEN SINGH *v.* KIDAR NATH. **62 I.C. 800=2 Lah. 159=76 P.L.R. 1921=A.I.R. 1921 Lah. 61.**

—Joint family—Manager—Powers of—Contribution.

———Where debts binding on the joint family were renewed in favour of another by the manager subsequent to the filing of a suit for partition.

Held, that though the renewal by the managing member, subsequently to a division may not bind other members they were in equity bound to contribute towards the debts which were discharged by the renewal: 39 M. 288; 44 B. 179, *Foll.* (*Phillips, J.*). VISVASANKARA NARAYANA AIYAR *v.* KASI AIYAR. **86 I.C. 225=21 M.L.W. 25=A.I.R. 1925 Mad. 453.**

—Joint family—Manager—Powers of—General.

———The manager can represent the co-parcenary in all suits affecting its interest, can make

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contracts, refer to arbitration and compromise, any claim and can do all acts which he thinks necessary or beneficial to the estate. (*Scott-Smith, J.*). MITHAND *v.* SHIVRAM. **60 I.C. 484 (Lah).**

—Joint family—Manager—Powers of—Giving discharge.

———Money lent by manager—Death of lender—If money be private property of lender only person holding heir certificate alone can give discharge—If money was joint manager can give discharge. (*Kennedy, J.C. and Rupchand Bilaram, A.J.C.*). SHAKAR KHAN *v.* LAKHIMAL. **94 I.C. 664= A. I. R. 1926 Sind 56.**

———The managing member of a joint Hindu family can give good receipts on behalf of the family which will bind the family: 34 All. 549; 38 Mad. 118; 45 Bom. 446, *Foll.* (*Daniels and Dalal, JJ.*). BAIJNATH *v.* RAM BILAS. **80 I.C. 12=3 L. R. A. Civ. 386= A.I.R. 1924 All. 738.**

———*Manager can give discharge in respect of debts due to family business.*

Though ordinarily one out of several joint creditors cannot give a valid discharge for the amount of a joint debt, the managing member may do so where the payment is made to him in discharge of a debt due on account of a joint business carried on in the interests of a joint Hindu family and such payment is made to him as representing all its members: 14 O. C. 45 and 18 O. C. 154, *Dist.*; 33 All. 272, *Foll.* (*Kanhaiya Lal, J.C.*). SHEO CHARAN DAS *v.* BRIJ BAHADUR SINGH. **81 I.C. 303=26 O.C. 286=A.I.R. 1924 Oudh 161.**

———*Mortgage in favour of minor—Tender of mortgage money to Manager, if good tender.*

If, in executing a mortgage in favour of a minor, the transaction is really entered into by the joint family consisting of the father and the son, and if at the time of deposit the mortgagee is still a minor, then it might well be held that an offer to pay the mortgage money to the managing member of the joint family is a good and valid tender in the eye of the law. (*Lindsay and Stuart, JJ.*). SHEO SARAN CHAUDHRI *v.* RAM LAGAN DAS. **64 I.C. 413= 44 All. 64= 19 A.L.J. 852=A. I. R. 1922 All. 355.**

—Joint family—Manager—Powers of—Guardianship.

———Where a managing member is the next friend or guardian of his minor brothers, his powers are controlled by the provisions of the law and he cannot do any act in his capacity of managing member which he is debarred from doing as next friend or guardian without leave of the Court: 36 Mad. 295 (P. C.), *Foll.* (*Rupchand Bilaram and Lobo, A.J.Cs.*). CHAGANMAL AILDAS *v.* TEJOOMAI. **103 I.C. 460=A.I.R. 1927 Sind 268.**

———*Manager cannot apply for appointment of guardian under Guardians and Wards Act.*

It is not open to the manager of a co-parcenary to apply under the Guardians and Wards Act (8 of 1890) to be appointed guardian of the property of minor co-parceners. Though it may perhaps be open to the managers in a Presidency town to apply to a Chartered High Court under its extraordinary jurisdiction to sanction an intended sale and to sell the property under the authority of such sanction, it would not be possible for them to sell or otherwise alienate any single item of the co-parcenary property in the mofussil unless they come to a partition with the minor co-parceners and have such item allotted to their share at such partition: 16 Bom. 634; 19 Bom. 96; 25 Bom. 353; 25 All. 407 and 43 Bom. 519, *Foll.* (*Rupchand Bilaram, A.J.C.*). LAKHMICHAND ISARDAS *v.* FIRM OF KHUSHALDAS MANGATRAM. **88 I. C. 116=18 S.L.R. 230=A.I R. 1925 Sind 330**

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—Joint family—Manager—Powers of—Minor.

———Transaction entered into by manager on behalf of minors need not be of a defensive nature—If the transaction be shown to be for the benefit of the estate and such as a prudent owner would have carried out with knowledge that was available to him at the time, it cannot be set aside by anybody.

The degree of prudence which might be required from a person who was not the sole owner would be somewhat greater than that which might be expected in the case of a sole owner, and might well be held to be what would be demanded in ordinary cases from a trustee: A.I.R. 1928 All. 454 (F. B.), *Foll.*; 6 M. I. A. 393 (P.C.), *Expl.* (*Kendall and Niamatullah, JJ.*). BASDEO NARAIN *v.* MUHAMMED YUSUF. **116 I.C. 491= 51 All. 285=26 A.L.J. 1313=9 L.R.A. Rev. 321= A.I.R. 1928 All. 617.**

—Joint family—Manager—Powers of—Prudent Acts.

———Acts of manager cannot be called avyavaharik merely because they involve risk to family property: A. I. R. 1926 Pat. 17 and A. I. R. 1926 Lah. 41, *Rel. on.* (*Macnair and Subhedar, A.J.Cs.*). NARAYANARAO *v.* SETH HANUMATRAM. **A.I.R. 1930 Nag. 273.**

—Joint family—Manager—Presumption.

———If a Hindu family is presumed, a manager also must be presumed and the senior member of the family would have a legal right to physical possession of the family property until the family is dissolved. (*Campbell, J.*). THE FIRM RAGHBIR SINGH *v.* NARIJAN SINGH. **72 I.C. 569= A.I.R. 1923 Lah. 48.**

—Joint family—Manager—Representation.

———Contract on behalf of the joint family—Manager effectively represents all members in suit on it—On death of manager it is only necessary to substitute his successor—Other co-parceners need not be joined: 33 All. 272 (P.C.); A.I.R. 1914 P.C. 136 and A. I. R. 1922 Bom. 281, *Rel. on*; A. I. R. 1928 Pat. 250, *Dist.* (*Tek Chand and Agha Haidar, JJ.*). ATMA RAM *v.* BANKU MAL. **A. I. R. 1930 Lah. 561.**

———Omission to describe karta of family as such in plaint—Plaintiff is not barred from claiming that managing member represents family (*obiter*). (*Courtney-Terrell, C.J. and James, J.*). GOBIND GORHI *v.* BALDEO RAM. **A.I.R. 1930 Pat. 293.**

———In a suit against a joint Hindu family the karta can effectively represent all other members of the family although he may not be described as a party in that capacity in the records of the case: A. I. R. 1914 P.C. 136; 1 Pat. L.W. 197 and 34 All. 549, *Foll.*; 1 Pat. L. J. 468, *Diss. from.* (*Adami and Chatterji, JJ.*). LALCHAND *v.* SHEOGOBIND. **121 I.C. 330=8 Pat. 788= A.I.R. 1929 Pat. 741.**

———The fact that the karta did not contest the suit does not necessarily mean that he was careless of the interest of the family: A.I.R. 1924 Mad. 571, *Foll.* (*Adami and Chatterjee, JJ.*). LALCHAND THAKUR *v.* SHEOGOBIND THAKUR. **121 I.C. 330= 8 Pat. 788=A.I.R. 1929 Pat. 741.**

———*Manager sued with other members—He enjoys double capacity, one as karta and the other as member* (*Walsh, J.*)—*He is not presumed to represent the family* (*Iqbal Ahmad, J.*).

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Walsh, J.—When the karta together with the other members of the joint family is sued, it must be taken that he enjoys the dual capacity which he enjoys in the family, that is to say, he is sued both as the karta representing the family and managing the family, and as a member of it, having an undivided interest.

Iqbal Ahmad, J.—When the manager of a joint Hindu family is impleaded as a defendant to the suit, the presumption is that he is sued in that capacity. But if along with the manager certain other members of the family are joined as defendants to the suit, the presumption must be the other way, because if the manager was being sued as representing the family, there could be absolutely no reason for joining some other members of the family as defendants in the suit. (*Walsh and Iqbal Ahmad, JJ.*). THAKUR LAL SINGH *v.* JAGRAJ SINGH. **107 I. C. 693=50 All. 546=26 A.L.J. 229=A.I.R 1928 All. 86.**

———*Senior member representing family—Decree binding as* res judicata.

In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again and each infant to wait till he comes of age, and then bring an action, or bring an action by his guardian before; and in each of these cases, therefore, the Court looks to Explanation 6 of S. 11 of the C. P. Code, to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors: A.I.R. 1925 P.C. 272, *Ref.* (*Lord Phillimore.*) LINGANGOWDA DOD BASANGOWDA PATIL *v.* BASANGOWDA BISTANGOWDA PATIL. **101 I. C. 44=25 M. L. W. 789=25 A. L. J. 319=31 C. W. N. 570=1927 M. W. N. 352=4 O. W. N. 424=29 Bom. L. R. 848=45 C.L.J. 504= 8 P.L.T. 462=51 Bom. 450=54 I. A. 122=A. I. R. 1927 P. C. 56=52 M. L. J. 472 (P.C.).**

———Entry in revenue papers of a person as representing the family—Suit questioning the entry—Person can be sued as representative of the family—Such representative's confessing judgment that the family had no right in the land, is binding on the family in absence of fraud or collusion, etc.: 16 All. 231, *Foll.* (*Ashworth, J.*). RAM LAL KOERI *v.* PANCHU AHIR. **100 I. C. 316=8 L.R.A. Rev. 69=A. I. R. 1927 All. 813.**

———*Mortgage by manager for necessity—Decree against manager is binding on all members.*

A decree for foreclosure obtained against the manager of a joint family alone on the basis of a mortgage executed by him for legal necessity is binding upon other members of the family who have not been impleaded in the suit. If a Hindu father can effectively represent his sons there is no reason why a brother or an uncle who happens to be the manager of the family should not similarly be able to effectively represent his younger brothers and nephews in the suit brought against him to enforce a mortgage executed for family necessity. The real point which has to be borne in mind in such cases is whether the deed was not executed for legal necessity. If such be the case it affects the entire family property and if a suit is brought on the basis of that deed against the manager alone the decree passed in such a suit is binding on all the members of the family. (*Gokaran Nath Misra and Raza, JJ.*). PIRTHIPAL SINGH

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v. RAMESHWAR. **99 I. C. 154=2 Luck. 288=3 O.W.N. 954=A.I.R. 1927 Oudh 27.**

———The karta of a joint family has full authority to act for the family and the leave of the Court need not be obtained before a payment is made to him under a decree in favour of the joint family merely because a minor member of the family is concerned. (*Ross and Kulwant Sahai, JJ.*). JHAKHRI GOPE *v.* PHAGU MEHLO. **103 I. C. 75=8 P. L. T. 708=A.I.R. 1927 Pat. 329.**

———*Decree in a representative suit by manager is binding on the minors as well as those who are not then born unless fraud or collusion is proved—Carelessness on manager's part, does not make decree the less binding on the other members.*

A manager of a joint Hindu family represents the family and, therefore, all its members, as against a third party. When he institutes a suit as manager in the interests of the family against a stranger all the members must be deemed to be represented in it through him. The result of the suit binds not only the manager but all the members of the family unless, of course, any fraud or collusion were established which would vitiate the decree. The mere ground that in the opinion of the minor sons their fathers did not look after the case sufficiently well, or that they were careless or negligent in the conduct of their case, would not be a good ground for ignoring the effect of the decree. The question of carelessness or negligence may arise in cases where a suit is instituted by a guardian on behalf of his ward and the question of a case being properly and fairly fought out may also arise when a limited owner, like a Hindu widow, is representing the estate for the time being. But these considerations cannot arise when the manager of a family, not as a mere reversioner, but as proprietor in whom the interest actually vests, institutes a suit and instead of impleading all the members of the family sues on their behalf as manager. A decree obtained under such circumstances is binding not only on all the members of the family who are then alive but also on those who are born subsequently: 34 All. 572 (F.B.), *Foll.*; A.I.R. 1922 All. 342, *Dist.* (*Sulaiman, J.*). RAM RATAN *v.* DURGA KOERI. **89 I.C. 120=6 L.R.A. Civ. 545=A.I.R. 1926 All. 201.**

———*Until partition joint property is one unit—Manager represents the family in suits.*

There is not only unity of title but unity of possession and enjoymeut with all the incidents of the right of survivorship attached to it; therefore in suits the manager is deemed to represent a joint family. In the same way, when all members join in suing. each member is deemed to sue not in his individual right but by way of enforcing a joint right. (*Kinkhede, A.J.C.*). KISAN *v.* SITARAM. **81 I.C. 1009=A.I.R. 1925 Nag. 160.**

———*Manager's name alone recorded in revenue papers—Manager represents junior members also.*

It is a common, though not an invariable, practice, in the case of a *zemindari* owned by a joint family for the name of manager alone to be recorded in the revenue papers. In such cases the manager is recorded in a representative capacity, and it is really the joint family which is the recorded co-sharer. Therefore an order passed under S. 111 (1) (b) of the U.P. Land Revenue Act will be binding on the junior members whose names are not recorded in the revenue papers wherein the name of the manager alone is recorded: 26 All. 383 and 24 O.C. 143, *Foll.*; 20 O.C. 241, *Dist.*

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(*Daniels, J.C.*). SHEO BAKSH SINGH *v.* INDRA BAHADUR SINGH. **87 I.C. 185=12 O.L.J. 239 2 O.W.N. 209=28 O.C. 194= A.I.R. 1925 Oudh 392.**

———Where the bond was executed by the *kartas* of the family and the suit was for enforcement of the mortgage against the joint family impleading the *kartas* of the family and other members whose existence was known to the plaintiffs,

Held, the non-joinder of two members of family could not defeat the suit against all. (*Jwala Prasad and Kulwant Sahay, JJ.*). PARMESHWAR PANDEY *v.* RAJ KISHORE PRASAD NARAYAN SINGH. **80 I.C. 34=3 Pat. 829=5 P.L.T. 646= A. I. R. 1925 Pat. 59.**

———*Suit against adult members is deemed as one against whole family.*

Where all the adult members of a joint Hindu family appear on the record as defendants it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members, though it is not formally stated in the plaint that the defendants were being sued as managers and therefore the addition of minor members defendants, after limitation does not justify dismissal of suit: 34 All. 549 (F.B.), *Foll.* (*Daniels and Neave, JJ.*). CHETAN SINGH *v.* SARTAJ SINGH. **79 I.C. 1001=46 All. 709= 22 A.L.J. 702=5 L.R.A. Civ. 480= A.I.R. 1924 All. 908.**

———The manager is the accredited agent of the family and where he acts as a prudent owner for the purpose of benefiting the estate or averting any danger to it, his action binds the family though he be not the father of the members of the joint family. On occasions including foreclosure suits the manager so effectively represents the joint family that the whole family is bound. (*Kennedy, J.C. and Raymond, A.J.C.*). NARUMAL MULCHAND *v.* NICHUMAL. **76 I.C. 778=18 S.L.R. 1= A.I.R. 1924 Sind 124.**

———*Suit against manager and adult members—Minor members are also bound by decree if the whole family is represented.*

Where a suit was brought against the manager and the adult members were also joined party defendants,

Held, that the minor members must be taken to have been duly represented. It is not necessary that he should have been described as manager or that in the plaint it should have been stated specifically that the defendants to the suit represented not only themselves but also the minor members. It is sufficient if in reality the whole of the family is represented by the persons who are named as defendants to the suit. It is true that it is unnecessary to make every adult member a defendant if they are represented by the managing member, but if for the sake of precaution the adult members are made parties, that does not affect the real nature of the suit. (*Mears, C.J. and Banerjee, J.*). TULSHI *v.* BISHNATH RAI. **71 I.C. 623= 21 A.L.J. 175=4 L.R.A. Civ. 134= A.I.R. 1923 All. 284.**

———*Karta can represent whole family—Karta need not say he sues as such if it is obvious on the pleadings.*

A suit by a karta of a Hindu family on behalf of all the members is deemed to be a valid suit and will within O. 34, R. 1, Civil P.C. It is not necessary that the karta should mention expressly that the suit is instituted by him in his capacity as karta, provided the fact that the suit is brought by him in his representative capacity is obvious from the pleadings in the case: 5 C. 148 (P.C.); 11 B. 37, *Ref.* (*Jwala Prasad, A.C.J. and Das, J.*). JAG SHAH *v.* RAMCHANDRA PRASAD. **63 I. C. 564=2 P.L.T. 553=6 P.L.J. 640= 1921 P.H.C.C. 289=A. I. R. 1921 Pat. 377.**

—Joint family—Manager—Right to sue.

———It is open to the karta to bring a suit in his own name or to join the other members of the family; but the fact that he has joined the other members does not necessarily derogate from his power as karta. (*Ross and Kulwant Sahay, JJ.*). JHAWKHRI GOPE *v.* PHAGU MAHTO. **103 I.C. 75=8 P.L.T. 708=A.I.R. 1927 Pat. 329.**

———*Suit by manager on promissory note—Other members not necessary parties.*

Where plaintiff was the manager of the undivided family and sued on a promissory note passed in his name by the defendant and the adult coparceners were not made parties to the suit,

Held, that the other members were not necessary parties and that the suit was not bad for non-joinder : 33 All. 272 and A.I.R. 1914 P.C. 136, *Foll.*

The Privy Council decisions do affect the various rulings of Bombay High Court which go to the extent of saying that in every case where a contract is entered into on behalf of a joint family by a co-parcener, he cannot sue alone, but must join the other co-parceners as parties to the suit. (*Fawcett, J.*). RAMNATH DWARKANATH WAIWOODE *v.* RAMRAO BALKRISHNA DHOTRE. **64 I.C. 966= 46 Bom. 358=23 Bom. L.R. 1135= A.I.R. 1922 Bom. 281.**

———Manager can sue for debts due to the family: 35 Mad. 685; A.I.R. 1914 P.C. 136, *Rel. on.* (*Krishnan, J.*). SUBRAMANIA GURUKAL *v.* RAMAKRISHNA AIYAR. **70 I.C. 160=15 M.L.W. 31= A.I.R. 1922 Mad. 407.**

—Joint family—Manager—Who can be.

———Son may become karta of the joint family during the lifetime of his father : 49 I.C. 907, *Ref.* (*Kinkhede, Offg. A. J. C.*). KALOO SINGH *v.* MT. SUNDERABAI. **95 I. C. 707= A. I. R. 1926 Nag. 449.**

—Joint family—Partnership.

———There is no material difference between an ordinary partnership firm and a Hindu joint family consisting of adult co-parceners who actively conduct the business of the firm.

Where a partnership composed of the members of a joint Hindu family is dissolved but no general notice of the dissolution is given, and the firm is continued by one of the partners, an acknowledgment of a debt due to a creditor signed by a partner who serves in the firm on salary, in the name of the original firm, is binding upon all the members of the firm as the original firm must be deemed to have continued and the member signing to have authority as partner to bind his late partners along with himself by the acknowledgment : 10 Bom. 358, *Dist.* (*Mirza, J.*). KRISHNABAI *v.* VARJIVANDAS JAGJIVANDAS. **32 Bom. L.R. 201= A.I.R. 1930 Bom. 236.**

———*Co-parcener entering into partnership with strangers—Other members of family are not partners.*

Partnership is a particular relationship and *prima facie* a partnership suit should be kept to accounts between the partners that are concerned. One individual *A* is entitled to enter into a partnership with another individual *B*, although *B* may happen to be a member of a joint Hindu

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family; but it does not necessarily follow that because he enters into a partnership with one co-parcener *B*, he thereby becomes a partner with the other members of *B*'s joint family of whose existence he may not even be aware; and in the suit primarily based on an ordinary partnership the dissolution and the accounts should be confined to the relations between the parties, without prejudice to any claim that *A* may subsequently have against the other co-parceners of *B*: 41 Mad. 454: A. I. R. 1921 All. 306; 27 Bom. 157 and A.I.R. 1922 P. C. 237, *Rel. on.* (*Marten, C. J. and Patkar, J.*). LAXAMAN KUSHABA *v.* BHIKCHAND RAICHAND.
122 I.C. 843=31 Bom. L.R. 1179=
A.I.R. 1930 Bom. 1.

———*Junior co-parceners may also contract debts for family firm if authorised.*

It is wrong to say that in a joint Hindu family trading partnership only the manager of the family has authority to contract debts and that no other co-parcener has that authority. Ordinarily the manager of a joint Hindu family alone is entitled to contract debts on behalf of the family trading firm so as to bind the other co-parceners personally, but, it may be that a co-parcener other than the manager of the family is authorised expressly or by implication to contract debts on behalf of the firm and if he is so authorised debts contracted by him on behalf of the firm are binding on other co-parceners personally: 23 Mad. 597, *Rel. on.* (*Jai Lal, J.*). LAL CHAND *v.* GHANAYA LAL.
120 I. C. 611=A I.R. 1930 Lah. 243.

———*Presumption is of continuity of partnership.*

Where brothers of a Hindu joint family carry on business of partnership, the presumption is that a partnership continues so long as the business continues; it is possible for a partner to separate himself from his co-partner by an unequivocal expression of intention to dissolve at once just as a co-parcener can separate from his family. (*Percival, J. C. and Barlee, A. J. C.*). DWARKADAS JAVERMAL *v.* DAVID SASSON. **121 I.C. 865=**
A.I.R. 1930 Sind 83.

———Where one member enters into partnership with strangers, there is no presumption that he does so in representative character so as to make other members liable as partners—If they are sought to be made liable, it can be done by evidence of consensus or by evidence to prove agency through which contract of partnership was brought into existence: 12 A.L.J. 79; A.I.R. 1922 P.C. 215; 39 I.C. 498; 40 I.C. 463; A.I.R. 1929 P.C. 1, *Dist.*; 6 M.L.W. 417; 20 M.L.T. 565; A.I.R. 1924 All. 414; A.I.R. 1926 All. 337; A. I. R. 1929 All. 148; 25 All. 378; A.I.R. 1921 All. 306; 41 Mad. 454; 27 Bom. 157; 3 Bom. L.R. 144; 40 Cal. 523, *Rel. on.* (*Sulaiman and Sen, JJ.*). MIRZA MAL BHAGWAN DAS *v.* RAMESHAR. **118 I. C. 145=**
1929 A. L. J. 641=51 All. 827=
A. I. R. 1929 All. 536.

———Manager by reason of having minor son is not bound to continue partnership with a stranger. (*Sulaiman and Ashworth, JJ.*). BANKEY LAL *v.* NATHA RAM. **107 I.C. 576=A.I.R. 1929 All. 199.**

———Per *Sulaiman, J.*—Relations of strangers with joint Hindu families, when they enter into transactions of partnership, are not governed strictly by the Hindu Law but by the Contract Act. (*Sulaiman and Ashworth, JJ.*). BANKEY LAL *v.* NATHA RAM. **107 I. C. 576=A.I.R. 1929 All. 199.**

———Where a joint family is a partner, the partnership is not dissolved on the death of the managing member of the family inasmuch as a joint family does not die on the death of the manager. (*Sulaiman and Kendall, JJ.*). GAURI SHANKAR *v.* KESHAB DEO. **114 I.C. 881=1929 A.L.J. 204=**
A.I.R. 1929 All. 148.

———A joint family can become a partner in partnership business: A. I. R. 1926 All. 337, *Foll.* (*Sulaiman and Kendall, JJ.*). GAURI SHANKAR *v.* KESHAB DEO. **114 I.C. 881=1929 A.L.J. 204=**
A.I.R. 1929 All. 148.

———When members of a family trade together and are partners in a joint firm they are all personally liable for the debts of that firm: 41 Mad. 824, *Dist.* (*Phillips and Reilly, JJ.*). SOMASUNDARAM CHETTIAR *v.* KANOO CHETTIAR.
118 I.C. 494=1929 M.W.N. 262=
A.I.R. 1929 Mad. 573.

———*Younger brother is as much entitled to manage business as elder brother.*

If two partners of a firm are brothers, they are equally entitled to participate in the management of the business of that firm and it is in the fitness of things that either of them may at all opportune times attend to the business and do all that is needful. Even according to Hindu Law a younger brother is as much entitled to take part in the management of the business as his elder brother. (*Zafar Ali, J.*). GHULAM MAHOMED *v.* SOHNAMAL.
101 I.C. 742=9 L.L.J. 233=28 P L.R. 307=
A.I.R. 1927 Lah. 385.

———*One co-parcener is the agent of every other as in ordinary firm.*

As between the partners and the outside world, whatever may be their private arrangements between themselves each partner is the unlimited agent of every other in every matter which is partnership business or which he represents as partnership business and not being in its nature beyond the scope of the partnership. This rule applies equally to joint Hindu family firms and ordinary partnership concerns: 34 P. R. 1906; 31 M.L.J. 93; 60 P.L.R. 1915, *Dist.* (*Zafar Ali, J.*). GULAM MUHAMMED *v.* SOHNAMAL.
101 I.C. 742=9 L.L.J. 233=28 P.L.R. 307=
A.I.R. 1927 Lah. 385.

———One partner in Hindu family business cannot refer a matter in litigation to arbitration and so bind the other partners. A reference to arbitration is not an ordinary incident of the family business. (*Le Rossignol, J.*). GAINDA MALL *v.* FIRM NIHAL CHAND CHHAJU MALL.
84 I.C. 726=6 L.L.J. 502=
A. I. R. 1925 Lah. 261.

———*Manager entering into partnership with strangers—Other members of family are not necessarily partners.*

Where the managing member of a joint family enters into a partnership with strangers he does not thereby make other members of the family partners in the business so as to clothe them with all the rights and obligations of a partner as defined by the Contract Act. In such a case the family as a unit does not become a partner, and only such of its members as in fact enter into a contractual relation with the strangers will be governed by the Act. (*Rupchand Bilaram, A. J. Cs.*). HARNAMDAS *v.* FIRM OF MAYADAS LAKMICHAND. **87 I. C. 905=**
A. I. R. 1925 Sind 310.

———*Manager entering into partnership—Other members are not necessarily partners—Son working for the father is not necessarily a partner.*

Though a person carrying on business is a co-parcener or even a manager in a joint family, it

HINDU LAW—Joint family—Partnership.

does not necessarily follow that all his co-parceners are his partners in that business, entitled with him to his rights and liable like him for its liabilities: 27 Bom. 157, *Foll.*

A contract of partnership entered into by the manager of a joint Hindu family with the strangers does not *ipso facto* make the other members of the family, partners, and not being partners the other members whether divided or undivided cannot institute any suit in respect of the partnership: 41 Mad. 454; 43 All. 116, *Foll.*

The mere fact of a son helping his father in the business and the business being carried on in their joint names is not sufficient to establish a partnership between them. (*Raymond, A.J.C.*). HEMRAJ KANJI *v.* TOPAN VISHINJI. **86 I.C. 950= A.I.R. 1925 Sind 300.**

———*Manager entering into partnership—Other members are not necessarily partners.*

Other members of a joint family must not be treated as necessarily or *ipso facto* partners in any partnership into which a member of the joint family, or even the manager of the joint family, may see first to enter: 41 Mad. 454 and 30 M.L.J. 241, *Appr.*; 61 P.R. 1915, *Dist.* (*Piggott and Ryves, JJ.*). KHARIDHAR KAPRA & CO. *v.* DAYA KISHAN. **43 All. 116=A.I.R. 1921 All. 306.**

—Joint family—Plea of.

———A decision whether persons form members of the joint Hindu family or not is ordinarily a question of fact when the correct legal principles on which the point should be decided have been appreciated. (*Wilberforce and Abdul Qadir, JJ.*). MST. MAYA WANTI *v.* ISHAR SINGH. **67 I. C. 789=3 L. L. J. 552= A. I. R. 1921 Lah. 267.**

—Joint family—Presumption—Absence of.

———*Presumption of jointness ceases when one branch has separated—Entries in revenue papers are not much helpful in determining status—In large family the presumption grows weaker as the relationship becomes more distant.*

A family is presumed to be joint until the contrary is established, but no such presumption arises where it is established that before the suit one or more members of the family had separated. A member of a joint family can separate himself from the other members of the joint family, and would on such separation be entitled to have a share in the property of the joint family ascertained and partitioned off for him, but the remaining co-parcener, without any special agreement between themselves may continue to be co-parceners and to enjoy as members of a joint family what may remain after such a partition of the joint family property is made or live separately from each other. But where one branch of the family was separate, the ordinary presumption that the remaining branches of the family had continued joint ceases to apply. The definition of shares in revenue papers by itself affords very slight indication of a separation in a Hindu family. Such entries are usually made in the Revenue records by those responsible for their preparation to make the record definite and precise. The acquisition of some property in the name of one member of the family and of another property in the name of another member, would similarly be inconclusive, but where there is a long series of dealings by different members of the family independently of each other, the same consideration would not be applicable.

HINDU LAW — Joint family — Presumption — Burden of proof.

Where a Hindu family is a fairly large family comprising several members, the ordinary presumption that a family is joint grows weaker as the relationship becomes more distant, or the branches multiply. (*Walsh and Kanhaiya Lal, JJ.*). DARBARI LAL *v.* MT. PARBATI. **91 I.C. 841= A.I.R. 1926 All. 256.**

———Presumption is not that every Hindu is member of joint family, nor that joint family owns joint property. The property standing in each man's name is *prima facie* his own. (*Kinkhede, A.J.C.*). TANIABAI *v.* RANGNATH. **96 I.C. 963=9 N.L.J. 183=A.I.R. 1926 Nag. 476.**

—Joint family—Presumption—Basis of.

———Presumptions in the case of a joint Hindu family owning property are to be drawn from the facts of each particular case. (*Krishnan and Venkatasubba Rao, JJ.*). KANNAMMAL *v.* RAMATHILAKAMMAL. **97 I. C. 632= A. I. R. 1927 Mad. 38.**

—Joint family—Presumption—Brothers.

———*Brothers and their sons messing and living together—Presumptions and rules of burden of proof discussed.*

Where Hindu brothers and their sons live and mess together there is a presumption that they are members of a joint family. But there is no presumption that that family owns a joint family property in the absence of any proof of a nucleus; at the same time it would seem that there can be no presumption that any property which is in existence and is in possession of one member of the joint family is necessarily his separate property, or is his self-acquisition. The party who wishes to make out that it is his separate property over which he had absolute power of disposal should establish that case. No presumption can be made in his favour: 33 All. 677 and 35 All. 564, *Foll.* (*Sulaiman and Kendall, JJ.*). GAYA PRASAD *v.* JASWANT RAI. **A.I.R. 1930 All. 550.**

———There is no presumption that if there are two brothers they should be considered as members of a joint Hindu family. Where two brothers constitute a joint Hindu family there is no presumption, that one brother must necessarily buy property for the benefit of the other brother. (*Devadoss, J.*). VENKATARAMA CHETTIYAR *v.* MARUTHAPPA PILLAI. **86 I.C. 886=21 M L.W. 226= A.I.R. 1925 Mad. 448.**

—Joint family—Presumption—Brothers and uncles.

———The ordinary presumption of Hindu law is that brothers and uncles are joint. (*Sulaiman, Ag. C.J. and Kendall, J.*). DEO NARAIN *v.* PHAGU. **121 I.C. 817=A.I.R. 1930 All. 541.**

—Joint family—Presumption—Burden of proof.

———*Property in one line for generations—That line need not prove that it was dissociated from the other line generations ago.*

When it appears from facts that through generations a property has been possessed in a certain single line, it can never be said that it lies upon that line to establish that it was dissociated generations ago, from another line which appears on the scene as a claimant and proposes no facts of jointness, such as living in the same home, sharing in food or worship, or quoad estate participating in the enjoyment or fruits thereof. To put, in consequence of a stretch of the doctrine of onus, an unnatural and forced construction upon the actual facts of family life and development is not warrant-

HINDU LAW — Joint family — Presumption—Business.

ed by the law of India. (*Lord Shaw.*) YELLAPPA RAMAPPA *v.* TIPPANNA. **114 I.C. 13=31 Bom. L.R. 249=53 Bom. 213=56 I.A. 13=1929 A.L.J. 4=49 C.L.J. 104=29 M.L.W. 231=33 C.W.N. 238=A.I.R. 1929 P.C. 8=56 M.L.J. 287 (P.C.).**

—Joint family—Presumption—Business.

———*Business carried on by a co-parcener is not presumed to be a joint family one.*

A presumption that business carried on by one member of a Hindu joint family is a joint family business does not obtain. It must be shown in each case that the business was established with the help of family funds. Therefore, simply because a person carrying on business is a co-parcener in a Hindu joint family, it does not follow as a necessary corollary that all his co-parceners are his partners in the business: 27 Bom. 157 and 2 S.L.R. 13, *Foll.* (*Rupchand Bilaram, A. J. C.*). MOTHARAM DOULATRAM *v.* PAHLAJRAI GOPALDAS.

80 I.C. 141=19 S.L.R. 286=A.I.R. 1925 Sind 159.

—Joint family—Presumption—Father and son.

———*Father and sons must be held joint unless proved to the contrary.*

The presumption under Hindu Law is that a father and son are joint and unless it is proved that they are separated it must be held that they are still joint.

Plaintiff's father *B*, a Hindu, came to Burma and resided there for some 32 years before his death and acquired some property. Defendant, *B*'s son by the second wife, lived with his father in Burma. Plaintiff sued defendant for partition of his father's estate. Plaintiff's case was that he, his father and defendant formed a joint family and on his father's death he was entitled to one-half share of the estate. Defendant denied that plaintiff was a member of the joint family and contended that the fact that the deceased lived in Burma with defendant, whilst plaintiff lived in India and had apparently nothing to do with the deceased and defendant, except for a single meeting with his father, for 15 years, was incompatible with their being members of a joint family,

Held, (*Das and Carr, JJ.*), that the plaintiff was entitled to partition as it was not proved that the father and son ever separated or that there was partition between the father and son. The mere fact that the son lived in India and that the father came away to, and stayed in Burma, did not prove the partition or separation between the father and son: 32 Mad. 377, *Rel. on.*

Pratt, J.—The fact that the deceased brought his sons by one wife to Burma, and he did not bring plaintiff the son by his other wife, and plaintiff did not at majority or at any time join his father in Burma, justifies the presumption that plaintiff was separate and was not a member of a joint family with his father after the latter came to Burma. (*Das, J. on difference between Pratt and Carr, JJ.*). RAGHUBAR DAYAL *v.* RAMDULARE.

111 I.C. 839=6 Rang. 367=A.I.R. 1928 Rang. 206.

———Joint family is presumed till disproved where father and sons do joint business. (*Raymond and Madgavkar, A. J. Cs.*). CHETANAND MOHANDAS *v.* MESSRS. RALLI BROTHERS.

83 I.C. 135=A.I.R. 1925 Sind 153.

———There is an initial presumption in favour of jointness in a Hindu family and this presumption is particularly strong in the case of a father and his only son. (*Daniels and Lyle, A.J.Cs.*). MT,

HINDU LAW — Joint family — Presumption—Jointness.

PARBATI *v.* SAIYED MUHAMMAD HADI.

68 I.C. 534=9 O.L.J. 304=A.I.R. 1928 Oudh 31.

—Joint family—Presumption—Jointness.

———Every Hindu family is presumed to be joint unless division is proved and burden of proving it is on party alleging it. (*Sulaiman and Kendall, JJ.*). BHAGWAN DEI *v.* SHIB SINGH.

A.I.R. 1930 All. 341.

———The presumption of jointness in a normal Mitakshara family is so strong that in the absence of contrary evidence the entire property which a person seeks to dispose of may be taken to partake the character of joint family property: 29 All. 244 (P.C.), *Foll.* (*Tek Chand and Agha Haidar, JJ.*). BELI RAM *v.* SARDARI LAL.

A.I.R. 1930 Lah. 613,

———The presumption of jointness between parties one of whom was five degrees removed from the common ancestor whereas the other was removed by four degrees would be very weak indeed: 10 B.H.C.R. 444 and A.I.R. 1929 P.C. 8, *Rel. on.* (*Misra and Raza, JJ.*). KHUSHWAKT RAI *v.* JAGANNATH PRASAD TANDAN. **119 I.C. 872=A.I.R. 1930 Oudh 184.**

———Presumption is that every Hindu family is joint—Onus is on the person alleging to prove that it is otherwise—Purchase of property in the name of one or other member of family is immaterial: 22 Cal. 85 (P.C.), *Foll.* (*Fforde and Haidar, JJ.*). SANWAL DAS *v.* KUREMAL. **109 I.C. 779=9 Lah. 470=10 L.L.J. 27=29 P.L.R. 635=A.I.R. 1928 Lah. 224.**

———The legal presumption is that a Hindu family is joint and undivided in business as well as in other respects: 33 P.R. 1870, *Foll.* If any member sets up that a particular portion of the property formed his separate property the onus of proving that, lay on the member who so claimed: 40 Cal. 523, *Foll.* (*Addison, J.*) MAULUK CHAND KISHANJI *v.* DAYA KISHAN. **106 I.C. 183 (Lah.).**

———Where jointness up to a certain date is proved, the onus of proving a separation subsequent to that date is on the party alleging such separation. (*Lord Sinha.*) DEO NARAIN PANDE *v.* AGYAN RAM PANDE. **101 I.C. 249=1927 M.W.N. 96=31 C.W.N. 533=A.I.R. 1927 P.C. 52=53 M.L.J. 658 (P.C.).**

———Where it is proved or admitted as to a Hindu family that it lives in commensality and possesses joint property, the presumption of law is that all the property they are possessed of is joint. (*Zafar Ali, J.*). BALBADHAR SINGH *v.* SHANKAR DAS. **101 I.C. 652=A.I.R. 1927 Lah. 825.**

———*Presumption is that family continues joint until contrary is proved—Definition of shares in revenue papers is not sufficient indication of separation.*

In a joint Hindu family, the presumption is until the contrary is proved, that the family continues joint. That presumption is peculiarly strong in the case of the sons of one father and gets weaker as the branches multiply.

A definition of shares in revenue and village papers affords, by itself, but a very slight indication of an actual separation in a Hindu family, and certainly in no case it can be regarded, standing alone, as sufficient evidence upon which to find, contrary to the presumption in law as to jointness, that the family to which such a definition referred had separated: A.I.R. 1925 P.C. 132, *Foll.* (*Kanhaiya Lal and Ashworth, JJ.*). TULA RAM *v.* BHOLA SINGH. **96 I.C. 176 (All.).**

HINDU LAW — Joint family — Presumption — Jointness.

———The legal presumption is that a Hindu family is joint and hence it is for the party alleging separation to prove it. (*Misra and Raza, JJ.*). MT. JAGWANTI *v.* BACHAND SINGH. **95 I.C. 774= 13 O.L.J. 744=A.I.R. 1926 Oudh 511.**

———If nucleus for a joint family is proved to exist, the burden of proving separation is on the person alleging separation: 29 All. 244 (P.C.), *Ref.* (*Hasan and Misra, JJ.*). ABHAIDAT SINGH *v.* RAGHO INDAR PARTAB SAHAI. **91 I.C. 976= 1 Luck. 1=3 O.W.N. 40=13 O.L.J. 37= A.I.R. 1926 Oudh 77.**

———All property belonging to family is presumed to be joint. (*Sulaiman, J.*). MUNESHAR TEWARI *v.* RAM NARAIN. **86 I.C. 852= A.I.R. 1925 All. 820.**

———*Suit for partition dismissed as being for partial partition—Presumption of jointness attaches.*

A suit instituted by a member of a joint Hindu family for partition of the family property was dismissed by the Court on the ground that all the family properties had not been brought into the hotchpot. There was no subsequent division of the property by metes and bounds,

Held, that the presumption of jointness attached to all the properties, and unless it was established that any particular item was acquired with separate funds by any individual member, all the properties in the hands of the members were liable to be divided. (*Mears, C.J. and Mukerjee, JJ.*). HAZARI LAL *v.* RAM LAL. **88 I.C. 422= 47 All. 746=23 A.L.J. 621= 6 L.R.A. Civ. 379=A.I.R. 1925 All. 813.**

———*Every Hindu family is presumed to be joint unless division is proved.*

In the case of Hindu joint family the presumption is, in the absence of the proof of division, that the family was joint in food, worship and estate, but the presumption is not applicable after there has been a separation in the sense of disruption such as would put an end to a joint family.

In the absence of evidence as to nucleus, the property may readily be presumed as joint from the subsequent conduct of the parties.

Court has to be exceedingly careful to arrive at a conclusion one way or the other where the question of inclusion of Hindu ladies is concerned, as long as it does not appear that they ceased to get maintenance from the family. (*Rankin and Mukerji, JJ.*). KUMUDINI DASSYA *v.* MUKTA SUNDRI DASSYA. **80 I.C. 432= A.I.R. 1925 Cal. 257.**

———*Presumption is that family is joint but to establish partition, no formal separation on any specified date need be proved—Purchase by members specifying shares does not prove partition.*

The defendants in a suit by the widow to recover possession of specified share of her husband on the ground of separateness, start with a certain presumption in their favour; but the presumption is not a very strong one where the relationship is not a very near one. The widow is not bound to prove that a formal separation, accompanied by an apportionment of such goods or properties as it was desired to divide immediately and an ascertainment of shares in respect of other landed properties, took place in any formal manner or at any specified date. The plaintiff can succeed if she can produce evidence to satisfy the Court that the position of her husband and the defendants up to the time of the death of her husband was such that they could not have been living as members

HINDU LAW — Joint family — Presumption — Possession of property.

of a joint undivided family. It is by no means an unusual thing for members of a joint family, when acquiring landed property by purchase, to cause to be specified in their document of title the shares which they would respectively take upon a partition. Where this is not done the ordinary inference from the document, on the face of it, would be that the vendees are taking in equal shares, and the members of the family may well think it convenient that such a presumption, where it is not in accordance with the facts, should be rebutted by specification of shares; no clear inferences in favour of separation or the break up of the joint family can be drawn from a transaction of this sort. (*Piggott and Walsh, JJ.*). MT. JAI RAJI *v.* BHAGWAT PRASAD PANDE. **65 I.C. 844= A.I.R. 1923 All. 225.**

———*Presumption of jointness—Rebuttal.*

The presumption in the case of Hindu families is in favour of jointness. Where a guardian was appointed for three minors who constituted a joint family, and after each one attained majority his share was given to him and during their minority as well as afterwards the accounts of the income were kept separate in the name of each minor and after all the brothers attained majority the income was divided among them and one of them admitted that he had no concern in the property of another brother,

Held, that the presumption of jointness was rebutted. (*Broadway and Abdul Raoof, JJ.*). GOBIND SAHAY *v.* BAL KAUR. **63 I.C. 559 (Lah.)= 4 U.P.L.R. 1.**

—Joint family—Presumption—Joint tenancy.

———*Trust by father of his self acquired property—Sons appointed trustees—Sons become joint trustees as they would become joint tenants in case of gift.*

When a father makes a gift of or bequeaths self-acquired property of his to his children who are members of a joint family, the ordinary presumption is that they take that property as joint tenants and not as tenants-in-common. [A. I. R. 1923 P.C. 160, *Rel.*] There is very little difference between the conferring of the office of trustee as regards a trust founded by the father by dedication of properties and the gift of properties to the sons. In the case of properties given to them absolutely, of course, they will have full powers of alienation; in the case of a trust they would have such powers as the law gives the trustee. The nature of the estate taken either in property or in the trust must be the same, *viz.*, joint estate. (*Kumaraswami Sastri and Krishnan, JJ.*). SALAKSHI AMMAL *v.* DORAIMANIKKA NADAN. **90 I.C. 829=48 Mad. 827=1925 M.W.N. 582= A.I.R. 1926 Mad. 51=49 M.L.J. 341.**

—Joint family — Presumption — Possession of property.

———There is no presumption that a Hindu family has any joint property, and it is necessary to establish the existence of a nucleus of joint family property before the property in the possession of any one member can be presumed to be joint family property: 33 All. 677, *Foll.* (*Marten, C.J. and Patkar, J.*). DAJI RAMJI *v.* LAXMAN RAOJI. **100 I.C. 937=29 Bom. L. R. 122= A.I.R. 1927 Bom. 110.**

———*No presumption exists as to joint family possessing property.*

There is no presumption that a family, because it is joint, possesses joint property or any property. But where it is proved or admitted as to a Hindu

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family that it lived in commensality and possessed joint property, the presumption of law is that all the property they are possessed of is joint. It is necessary to establish the existence of a nucleus of joint family property before the property in the possession of any one member can be presumed to be joint family property: 33 All. 677 and 13 Bom. 61, *Foll.* (*Zafar Ali and Jai Lal, JJ.*). ANANT RAM *v.* ABDUL HAR. **103 I. C. 479= 28 P. L. R. 610=9 L.L.J. 223= A.I.R. 1927 Lah. 793.**

———Possession of joint property is not presumed. (*Addison, J.*). BHAGWAN DAS *v.* MT. CHETON BOI. **96 I.C. 247=A.I.R. 1926 Lah. 566.**

———There is a presumption that a Hindu son and his father are joint in estate, but there is no presumption that the joint family which they constitute possessed any property at all. (*Dalal and Simpson, A.J.Cs.*). RAM RAJ SINGH *v.* AVADHA BEHARI LAL. **80 I.C. 480=10 O.L.J. 235= A.I.R. 1924 Oudh 28.**

—Joint family—Presumption—Rebuttal of.

———Presumption is in favour of jointness—But presumption is weakened by parties living and holding properties separately for several years. (*Dhobley, A.J.C.*) LAXMAN BHAT *v.* MST BONABAI. **64 I.C. 906=A.I.R. 1921 Nag. 144.**

———Presumption is of jointness—Presumption is displaced by proof that some members are separate: 30 Cal. 725 (P.C.), *Foll.*

Where the cultivation is joint and the brothers divide the produce only so far as is necessary for household expenses and keep the rest joint for the purposes of *len den*, the mere fact that the brothers were living and messing separately does not necessarily indicate separation in estate. (*Kotval, A.J.C.*). MT. SUWA *v.* DUKALU. **59 I.C. 499= A.I.R. 1921 Nag. 109.**

—Joint family—Presumption—Transaction by member.

———*Transaction entered into even by a junior member relating to family is presumed to be a family transaction.*

In the case of every transaction relating to a joint family the presumption is that although the transaction may be carried on in the name of one or another member of the family it is a family transaction and the member in whose name the transaction is carried on represents the joint family.

One of the members of a joint Hindu family was implicated in a criminal case and a compromise was effected whereby it was agreed that a portion of joint family property was to be sold, in consideration of all the disputes between the family and the opposite party, including the criminal case, being settled. The transaction was entered into by a junior member of the family. The other members disputed that the sale deed was illegal,

Held, that the ordinary presumption was that the joint family was bound by such a compromise even though entered into by a junior member and the plaintiffs must prove that it was not a family transaction. (*Kulwant Sahay and Macpherson, JJ.*). RAM DAS SINGH *v.* KANAK SINGH. **111 I.C. 51= 9 P.L.T. 758=A.I.R. 1928 Pat. 557.**

—Joint family — Presumption — Uncle and nephew.

———*Presumption of jointness applies.*

Where the members of a Hindu family are related to each other as uncle and nephew, and there is no clear and cogent proof of partition the presumption of Hindu Law that the family is joint

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will prevail, and the property purchased in the name of one of them will be considered joint family property. (*Tek Chand and Agha Haidar, JJ.*). PHULLO *v.* INDAR. **121 I. C. 431=11 L.L. J. 226.**

—Joint family—Proof.

———*Migration of a branch of family does not imply separation.*

The migration of a branch of the family in itself establishes nothing regarding the question of jointness or separation. Members of a joint Hindu family migrating to another district might or might not separate from their family. (*Stuart, C.J. and Nanavutty, J.*). NANAK PRASAD *v.* GAYA PRASAD. **118 I.C. 803=A.I.R. 1929 Oudh 289.**

———The support on a liberal scale of poor relations and even the payment of the expenses of their marriage ceremonies are not in themselves without other evidence, proof of a joint family: 8 Bom. 154 and 10 C. W. N. 338 (P.C.), *Appl.* (*N. R. Chatterjee and Panton, JJ.*). PRAYAG KUMARI DEBI *v.* SIVA PRASAD SINGH. **93 I.C. 385= 42 C L.J. 280=A.I.R. 1926 Cal. 1.**

———An agreement was followed by an arbitration award and the award was duly registered. Under the award the house in dispute was assigned to the widows of one of the brothers. The widow alienated the house,

Held, that the onus was shifted on to the persons challenging the alienation to prove that the property was joint Hindu family property at the time of alienation by widow. A decree for maintenance against the male members of the family on the ground that the widow was entitled to be maintained out of her husband's share of the joint property does not help the plaintiffs to prove that there was any joint Hindu family. (*Scott-Smith and Moti Sagar, JJ*). KARAM SINGH *v.* MT. HAR KAUR. **76 I C. 747=A I.R. 1923 Lah. 371.**

—Joint family—Rights of co-parceners.

———*While family is joint no suit for possession of a co-parcener's share lies.*

In a joint family no co-parcener can say that he has a specific share in the property. His share is liable to fluctuate and consequently if one of the co-parceners brings a suit against others for declaration of his share and possession of the same in the alternative on the allegation that the co-parceners in possession treated the property as their separate property and if the Court finds that the property is joint family property, and there is no indication in the plaint that the plaintiff wanted to come out of the family and to separate his status the declaration should be confined to the jointness of the property without specifying shares. (*Mukerji and Bennet, JJ.*). KAULESHAR RAI *v.* BANWARI RAI. **123 I.C. 375= A. I. R. 1930 All. 362.**

———Property vested in co-parcener—Subsequent insanity does not divest: 22 Cal. 864, *Foll.*; A. I. R. 1922 Nag. 161, *Expl.* (*Findlay, J.C. and Staples, A.J.C.*). DADA *v.* CHANDRABHAGA BAN. **116 I.C. 663=25 N.L.R. 61=12 N.L.J. 44= A. I. R. 1929 Nag. 93.**

———*Hindu co-parcener becoming lunatic — If manager can be appointed to his share.*

If a member of a joint Hindu family under the Mitakshara Law be a lunatic, where it is shown that his property is being wasted, the Civil Courts have power to appoint a manager of the lunatic's share under the Lunacy Act, although no doubt a strong case must be made out for the appointment of a manager: 6 Cal. 539 and 12 C. C. 209, *Foll.*

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(*Case-law discussed*). (*Findlay, J. C. and Staples, A. J. C.*). DADA *v.* CHANDRA BHAGA BAI.
116 I.C. 663=25 N.L.R. 61=12 N.L.J. 44=A.I.R. 1929 Nag. 93.

———An agreement which absolutely takes away from members of the family their inherent right to have a partition effected as owners of the joint family property and consequently deprives them of one of the incidents of ownership is void and legally unenforceable. (*Raza and Nanavutty, JJ.*). BRIJLESHARI PRASAD *v.* KASHI PRASAD.
110 I. C. 886=5 O.W.N. 589=A.I.R. 1928 Oudh 365.

———*Co-parcener has indefeasible right of partition.*

In the absence of a separation or division of the joint family property, a member of the joint family has an indefeasible right to demand partition and his right is not affected by a deed executed by his father on the basis that there was no joint family or joint family property. (*Sir Lancelot Sanderson.*) MUKUND *v.* BALKRISHNA. **105 I.C. 703=52 Bom. 8=54 I. A. 413=29 Bom. L.R. 1496=46 C L.J. 413=32 C.W.N. 203=39 M.L.T. 521=27 M L.W. 198=1927 M.W.N. 732=4 O.W.N. 845=A.I.R. 1927 P. C. 224=53 M.L.J. 468 (P.C.).**

———Undivided co-parcener remaining absent for a long time—No adverse possession can arise as against him unless abandonment or exclusion is proved—Alienation of his share is inoperative. (*Odgers, J.*). GOVINDASWAMI CHETTIAR *v.* KOTHANDAPANI CHETTIAR. **99 I.C. 158=24 M.L.W. 766=A.I.R. 1927 Mad. 111=52 M.L.J. 203.**

———Adverse possession cannot arise against a co-parcener without his knowledge. (*Obiter*). (*Odgers, J.*). GOVINDASWAMI CHETTIAR *v.* KOTHANDAPANI CHETTIAR. **99 I.C. 158=24 M. L.W. 766=A.I.R. 1927 Mad. 111=52 M.L.J. 203.**

———Permanent lease of joint property granted by all members except one—Partition by Civil Court—The member not concurring in the lease takes his share free from the lease: 26 Cal. 434; 1 I. A. 106, *Foll.*; 1 C. W. N. 62, *Diss.* (*Chatterjea, Ag. C. J., Walmsley, Cuming, Page and Chakravarti, JJ.*). NIRANJAN MUKHERJI *v.* SOUDAMINI DASI.
95 I.C. 516=53 Cal. 694=43 C.L.J. 333=30 C.W.N. 511=A.I.R. 1926 Cal. 714 (F.B.).

———Manager expending income on mistress, in making improvement on her property—Survivors cannot realize moneys from the property nor sue for possession thereof. (*Lord Phillimore.*) DEBI RAI *v.* PAHLAD DAS. **86 I. C. 251=6 L. R. P. C. 92=21 M. L. W. 183=A. I. R. 1925 P. C. 38 (P.C.).**

———*Suit by member for declaration of title to specific share does not lie in absence of partition being claimed.*

The exact extent of the share owned by a member of a joint Hindu family in the joint family properties can only be determined at the time when separation between the members actually takes place. Therefore, so long as the family remains joint and in the absence of any suggestion that a separation is desired, no member of a joint Hindu family can sue for a declaration that he necessarily has a certain specified share in the joint family property. (*Walsh, Ag. C. J. and Sulaiman, J.*). RAM SARUP *v.* MT. KATAULA.
83 I.C. 227=5 L. R. A. Civ. 723=A. I. R. 1925 All. 211.

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———Alienation by manager without necessity can be wholly set aside and not only to the extent of the challenging co-parcener's share: 6 P.R. 1893 and 20 W.R. 192, *Not foll.*; 39 All. 500 (P.C.), *Foll.* (*Campbell, J.*). CHORANJI LAL *v.* KARTAR SINGH.
79 I.C. 171=A.I.R. 1925 Lah. 130.

———A member of a joint Hindu family cannot dispose of by will any portion of joint family property. (*Devadoss, J.*). CHITTAMBALA MUDALIAR *v.* PARTHASARATHI MUDALIAR. **84 I.C. 905=20 M.L.W. 659=1925 M.W.N. 90=A.I.R. 1925 Mad. 194=47 M.L.J. 801.**

———*Purchaser—Co-parcener acquiescing in possession of—Not entitled to mesne profits.*

A co-parcener can recover possession of the joint family property from an outsider but if he stands by it and allows the outsider to remain in possession he cannot demand account for the past profits though his interest in the property remains unaffected by the acquiescence. The possession of a purchaser of a particular portion of a joint family property or the purchaser of interest of one of the members of the joint family in any particular item of joint family is not wrongful possession against the other members, though the purchaser is not entitled to possession, he is not liable to account for the mesne profits. (*Macleod, C.J. and Shah, J.*). GANGABESAN JEEWANRAM *v.* VALLABHDAS SHANKARLAL. **87 I.C. 703=48 Bom. 428=26 Bom. L. R. 464=A.I.R. 1924 Bom. 433.**

———A decree against a co-parcener without specific mention of his representative capacity does not entitle the decree-holder to attach the interests of other co-parceners not parties to the decree by name or by implication. (*Macleod, C. J. and Shah, J.*). NAMDEO TUKARAM *v.* VISHNU CHINTAMAN. **80 I.C. 425=26 Bom. L.R. 497=A.I.R. 1924 Bom. 395.**

———*Impartible estate—Rights of co-parceners in.*

Where the estate is impartible, the members of the joint family have none of the rights of coparcenership except a right of succession by survivorship, limited by the rule of impartibility which allows only one member at a time to hold. They cannot demand partition or assert any right to any individual share in the estate nor can they restrain alienation. (*Dawson-Miller, C.J. and Foster, J.*). RAJA SHIV PRASAD SINGH *v.* EMPEROR.
82 I. C. 653=5 P.L.T. 497=1924 P.H.C.C. 234=2 Pat.L.R. Cr. 233=4 Pat. 73=A.I.R. 1924 Pat. 679.

———*Will made by all co-parceners is valid.*

If a Hindu is the absolute owner of the property, whether ancestral or self-acquired, he can bequeath it by will, and in principle there is no objection to the same power being accorded to two or more Hindus, provided they together have the entire ownership of the whole of the co-parcenary property. (*Mears, C. J. and Banerji, J.*). LAXMI CHAND *v.* MUSSAMMAT ANANDI. **71 I.C. 574=21 A.L.J. 73=45 All. 245=4 L.R.A. Civ. 306=A.I.R. 1923 All. 109.**

———A gift even of his own share by an undivided co-parcener is invalid. (*Baker, Offg. J. C.*). MULLA FAIZ ALI *v.* MT. HARKUAR.
77 I.C. 50=A.I.R. 1923 Nag. 334.

———*Arrangement between co-parceners—Validity of.*

A co parcener made an arrangement with others by a deed of settlement signed by the former and presented for registration by the latter, by which, if the village profits to be shared, were not suffi-

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cient to meet the expenses, the latter were to lose their shares in the villages. Subsequently it was found that the profits were insufficient to meet the expenses and the other co-parceners accordingly passed a letter to the effect that they will not take a share.

Held, the arrangement is perfectly a good one and is sufficient to convey their shares according to Hindu Law, if accepted by one party and acted upon by another even though the document is not in fact signed by the person to whom it is addressed. The letter is only a piece of evidence not constituting an acceptance of the earlier proposal but showing that it had been accepted and that it is admitted that the happening of the conditions upon which the first agreement was to operate had in fact occurred. (*Lord Buckmaster.*) PANDURANG KRISHNAJI *v.* M. TUKARAM. **65 I.C. 954= 24 Bom.L.R. 557=35 C.L.J. 409=15 M.L W. 486= 20 A.L.J. 305=18 N.L.R. 1=26 C.W.N. 201= 30 M.L.T. 249=49 Cal. 334=49 I.A. 16= 5 N.L.J. 6=A.I.R. 1922 P.C. 20= 42 M.L.J. 436 (P.C.).**

———While the manager of a Hindu joint family can sue to recover the entire alienated family property on behalf of the family, individual members cannot claim to do so but can only maintain the suit in respect of their own shares. (*Daniels, A.J.C.*). MAHESH DAT *v.* RAM ASRE.

67 I.C. 814=9 O.L.J. 138=A.I.R. 1922 Oudh 114

—Joint family—Rights of Members.

———Where some of the members of a joint Hindu family sued on a mortgage impleading the other members also as defendants and the mortgaged property was purchased in execution by the plaintiff,

Held, that the other members of the family who were impleaded as defendants were also entitled to the property along with the plaintiff. (*Sulaiman, A.C.J. and Kendall, J.*). MAN SINGH *v.* RAMLAL. **121 I.C. 819=1930 A.L.J. 671.**

———*Mortgage—Suit on—Minor member not impleaded as a party—Decree—Junior member, if bound.*

Where a suit was instituted on a mortgage executed by the members of a joint Hindu family, and in that suit a junior member of the family was not impleaded as a party and a decree was obtained in the suit and the property was sold in execution of the decree, the decree and the sale are binding on the entire family inclusive of the member was not impleaded as a party. (*Sulaiman, A.C.J. and Kendall, J.*). DEO NARAIN SINGH *v.* PHAGU SINGH. **121 I.C. 817 (All.).**

———Where a promissory note executed by one of three brothers was in revival of a note executed by their father and one of the brothers got subsequently divided from the family,

Held, that all the brothers were liable for the debt due under the promissory note. (*Madhavan Nair, J.*). KRISHNAMURTHI AYYANGAR *v.* LAKSHMANASWAMI CHETTI. **1929 M. W. N. 603.**

———*If a member has properly litigated a family right it cannot be litigated again.*

In the case of a joint Hindu family, where all have rights, it is impossible to allow each member to litigate the same point over and over again and the Court has in each case to look to Expl. (6) to S. 11, to see whether or not the member, who though not its karta, represented the family, in compromising a previous suit, has been acting either on behalf of minors, or in their interest, or

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if there are majors, with the assent of the majors : A.I.R. 1927 P.C. 56, *Rel. on.* (*Kulwant Sahay and Macpherson, JJ.*). RAM DAS SINGH *v.* TANAK SINGH. **111 I.C. 51=9 P.L.T. 758= A.I.R. 1928 Pat. 557.**

———*Bond in favour of one member—He can sue alone.*

If a bond is in favour of one member alone of a joint Hindu family, he is competent to sue alone on the bond.

Assuming that all the members of a joint Hindu family are necessary parties to such a suit, the provision of law is complied with, even by making them as defendants in the case. (*Jai Lal, J.*). BIRU RAM *v.* MIRAN. **99 I.C. 565= A.I.R. 1927 Lah. 129.**

———Relinquishment by a member of his interest found to be invalid—The member continues to be joint owner.

He cannot be treated as dead in the eye of the law: 6 Bom. L.R. 925 and 14 N.L.R. 56, *Ref. to.* (*Kinkhede, A. J. C.*). JANARDHAN KASHINATH KASAR *v* JANARDHAN VISHWANATH SASTRI. **101 I.C. 839=A.I.R. 1927 Nag. 214.**

———A member of a joint Hindu family cannot dispose of by will any portion of joint family property. (*Devadoss, J.*). CHITTAMBALA MUDALIAR *v.* PARTHASARATHY MUDALIAR. **84 I.C. 905= 20 M.L.W. 659=1925 M.W.N. 90= A.I.R. 1925 Mad. 194=47 M.L.J. 801.**

———Even where a person is not a karta of a Hindu joint family there may be circumstances which would entitle a Court to hold that the person sued was sued as representing the entire family. (*Dalal, J.C.*). THAKURAIN ANPURNA KUAR *v.* JAGESHAR MISRA. **87 I.C. 208= A.I.R. 1925 Oudh 658.**

———No member of a joint family has a right to incur debts for buying property. (*Spencer and Devadoss, JJ.*). SUBBARAYA MUDALI *v.* THANGAVELU MUDALI. **72 I.C. 815=A. I. R 1924 Mad. 33= 45 M.L.J. 44.**

———Single member may have entire alienation set aside if his rights are infringed: A.I.R. 1924 Oudh 120 ; 39 All. 500; 56 I.C. 766, *Foll.* (*Wazir Hasan, J.C.*). MAMU LAL *v.* BISHAMBAR NATH. **79 I.C. 35=11 O.L.J. 415=A.I.R. 1924 Oudh 378.**

———*Mortgage taken by some members of joint Mitakshara family can be enforced by them without other members.*

Where only some of the members of a joint Hindu family got a mortgage bond which contained no indication as to whether it was made out of their separate funds or joint family funds and a suit was brought on it.

Held, (1) that there was no ground on principle why any distinction should be drawn between the plaintiff who had a beneficial interest in the mortgage and who represented both themselves and other members of the family, and a *benamidar* who has no beneficial interest at all.

(2) That the question was one of authority and if they were authorised to enter into the transaction on behalf of the family it must be taken that they were equally authorised to institute a suit to enforce it : 42 Mad. 348; 24 Cal. 644, *Foll.* (*Miller, C.J. and Kulwant Sahay, J.*). HIT LAL MAHTON *v.* JIBOO MAHTON. **75 I. C. 378=3 Pat. 81= 5 P. L.T. 142=A.I.R. 1924 Pat. 458.**

———*Debt by one member—All members are liable if creditor proves necessity or* bona fide *inquiry.*

A creditor is entitled to a decree as against the entire joint family, if he can establish that there

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was legal necessity for the loan taken by one of the members of the joint family. If he is unable to establish legal necessity, he is still entitled to succeed, if he shows that there was representation made to him as to existence of a legal necessity and that he made an honest enquiry and that he was satisfied that there was such a necessity. (*Das and Adami, JJ.*). CHINTAMANI MAHAPATRA *v.* SATYABADI KAR. **70 I.C. 226=1 Pat. 715=A.I.R. 1923 Pat. 71.**

———*Some members entering into contracts not for family purposes—They are liable but minor members are not.*

Members of a joint family cannot escape from liability to perform contracts entered into by them on the ground that their contracts were not such as would bind the joint family and that they had no property other than that which is the property of the joint family. If they could escape from any liability it would be necessary for every person with whom they sought to make a contract to assure himself that the business to which the proposed contract would relate was business of the joint family, and that no member of the joint family was a minor. Under such circumstances, it would be difficult to carry on business with persons who happened to be members of a joint family of the Province of Madras.

But the minor's interest in the joint property of the family will not be affected by any decree against the other members in transactions which are in the course of any family business. (*Sir John Edge.*) P.M. SADASHIO MUDALIAR *v.* A.R. HAJEE FAKIR MAHOMED SAIT. **72 I.C. 48=32 M.L.T. 99=27 C.W.N. 677=37 C.L.J. 569=17 M.L.W. 288=A.I.R. 1922 P.C. 397=44 M.L.J. 396 (P.C.).**

———*Junior member has no authority to bind the family by acknowledgment—Text Harita.*

Per *Krishnan and Odgers, JJ.*—The words "remotely absent" in the text of Harita, cannot be constructed so as to bring within their scope the case of a manager, who though absent from his home is in correspondence with the junior members and is the controlling manager. Therefore apart from the authority given, a junior member is not entitled under Hindu Law to act as the manager so as to bind the family by his acknowledgment. (*Kumaraswami Sastri, Krishnan and Odgers, JJ.*). P. RAMA PATTER *v.* A. VISWANATH PATTER. **66 I.C. 155=45 Mad. 345=15 M. L. W. 130=1922 M.W.N. 27=30 M.L.T. 209=A.I.R. 1922 Mad. 23=41 M.L.J. 567.**

———Where the plaintiff sues as a member of a joint family to recover joint family property from the defendant, another member of the joint family, who claims to hold it adversely, no decree for mesne profits should be passed but a decree for joint possession of an undivided share in the property, should be passed. (*Daniels, J.C.*). GOKUL PRASAD *v.* KAILAS NATH. **65 I.C. 345=8 O.L.J. 596=A.I.R. 1922 Oudh 55.**

———*Contract by co-parcener—When binding.*

Where a contract is made by a member of a joint Hindu family, unless it is shown that that member was the manager of the family or that the contract was entered into in the course of the family business or that the other members derived a benefit from it the other members are not liable on the contract. (*Lyle, A.J.C.*). RAMDHIR SINGH *v.* MATA PRASAD. **69 I. C. 846=9 O.L.J. 617.**

HINDU LAW—Joint family—Self-acquisition—Blending of.

———*Debt for defending members in a criminal charge is a necessity and does not depend upon the result of the trial.*

The rule of Hindu Law upon which the act of the *karta* and his dealing with the family property are binding upon the other members of the family does not restrict it to the *karta* alone. It is wide enough to authorise any member of the family to deal with the family property, such as to incur debts, provided the act is done in times of distress and for family necessity. The defence of a member of a joint family in a criminal charge is regarded among the Hindus as a pious and necessary act in order to remove the stigma of disgrace upon the whole family consequent upon the conviction of one member. The question whether there existed legal necessity for raising the loan cannot be made to depend upon the result of the trial. (*Jwala Prasad and Ross, JJ.*). DHANUKTHARI SINGH *v.* RAMBIRICH SINGH. **70 I. C. 391=1 Pat. 171=A.I.R. 1922 Pat. 553.**

———Partition in status but not by metes and bounds—One member can sue others for joint possession of defined share. (*Banerji, Piggott and Walsh, JJ.*). SHEODAN KURMI *v.* BALKARAN KURMI. **59 I. C. 116=43 All. 193=A.I.R. 1921 All. 337.**

———Transaction by all adult members—Minors impeaching transaction—Onus of proof is on them. (*Ayling and Seshagiri Aiyar, JJ.*). KRISHNA AIYAR *v.* MADHAVA PANIKKAR. **63 I. C. 258=30 M.L.T. 26=A.I.R. 1921 Mad. 381.**

———*Reference to arbitration by some members only—Award is not binding.*

Only some members of a Hindu family cannot bind the family property by submitting to an arbitration of a claim made by a third person or by entering into an arrangement with him. Such an arbitration will not affect the family property or even the shares of the members submitting to the arbitration. (*Abdur Rahim and Oldfield, JJ.*). BHUMI REDDI SURANNA *v.* BHUMI REDDI APPADU. **60 I.C. 615=1921 M. W. N. 28=A.I.R. 1921 Mad. 232.**

———Decree on the basis of contract by one member is not binding on others unless he entered into the contract, as the head or others derived benefit thereunder. (*Lyle, A.J.C.*). T. RANDHIR SINGH *v.* MATA PRASAD. **8 O.L.J. 617=A.I.R. 1921 Oudh 258.**

—Joint family—Self-acquisition—Blending of.

———*Unless kept strictly separate self-acquisition goes to common income of family.*

In the absence of any evidence that a Hindu is keeping his self-acquisitions strictly separate, the presumption is that the whole income of the family from whatever source derived, goes into the common chest of the family. The manager of such property is, therefore, incompetent to make a will of the property in favour of his wife in presence of sons : 29 All. 244 (P.C.) and A.I.R. 1917 P. C. 128, *Ref.* (*Tek Chand and Agha Haidar, JJ.*). BELI RAM *v.* SARDARI LAL. **A.I.R. 1930 Lah. 613.**

———Joint family of manager and his younger brothers and their sons—No separate accounts kept of property acquired under gift—Income and expenditure of both lumped up together—Property acquired under gift is sufficiently blended with ancestral property : 29 All. 244 (P. C.) and A.I.R. 1923 P.C. 57, *Ref.* (*Fawcett and Madgavkar, JJ.*). BABANA SANGAPPA *v.* PARAVA NINGBASAPPA. **100 I.C. 147=50 Bom. 815=28 Bom. L.R. 1446=A.I.R. 1927 Bom. 68.**

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——Where a separated Hindu who has no son mixes his self-acquisitions with the ancestral property and keeps one account no intention on his part to throw self-acquisitions into common stock can be inferred. (*Kumaraswami Sastri, Offg. C. J. and Curgenven, J.*). ALAVANDAR GRAMMANI *v.* DANAKOTI AMMAL. **99 I.C. 775=A.I.R. 1927 Mad 383.**

——*Superstructures built by co-parcener on joint family land at his expense are presumed to be his.*

Very strong evidence is required to show that property originally self-acquired was afterwards voluntarily thrown by the owner into the joint stock with the intention of abandoning all separate claims upon it: 2 O. L. J. 237, *Foll.*

Where a member of a joint family built superstructures on joint property with his own money,

Held, that in the absence of any evidence that the joint family fund contributed to the money with which the superstructures were raised or that there was any nucleus possessed by the family productive of any income whatsoever which might be presumed to have been utilized for the purpose of building structures and lastly in the absence of a case or evidence to the effect that the member deliberately made a gift of his self-acquisitions in favour of the joint family as a whole, the principle of self-acquisition becoming joint family property when the member who made the acquisitions has thrown into the common stock is not applicable: A.I.R. 1921 P.C. 35, *Expl.* (*Wazir Hasan, J.*). KALI PRASAD *v.* CHANDRIKA PRASAD. **103 I.C. 746=4 O.W.N. 667=A.I.R. 1927 Oudh 335.**

——A separate or self-acquired property of a member of a joint family may become joint family property if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. (*Ross and Kulwant Sahay, JJ.*). GAJADHER PRASAD *v.* LACHANWAN LAH SAHU. **103 I.C. 354=8 P.L.T. 759=A.I.R. 1927 Pat. 339.**

——Where the member of a joint Hindu family does not intend to blend his self-acquisitions with the ancestral property but he always treats them as his own over which he has full disposing power the self-acquired property is not to be considered as joint family property. (*Scott-Smith and Le Rossignol, JJ.*). IQBAL SINGH *v.* JANG BAHADUR. **93 I.C. 634=A.I.R. 1926 Lah. 333.**

——*No registered deed is necessary for blending.*

There is no authority for the proposition that when a co-parcener throws self-acquired property into the common stock of the co-parcenary consisting of himself and others, a registered deed is necessary to effect the transaction: A.I.R. 1925 Mad. 1174 and 8 L. W. 400, *Expl.*; Per *Srinivasa Iyengar, J.*, in 32 I.C. 955, *Doubted.* (*Odgers, J.*). RAMASWAMI *v.* RAJU. **96 I.C. 1051=1926 M.W.N. 635=A.I.R. 1926 Mad. 963=51 M.L.J. 167.**

——Self-acquired property may be impressed with the character of joint property by its being dealt with as joint family property: A.I.R. 1923 P.C. 57, *Foll.* (*Kumaraswami Sastri, J.*). SHYAMA BHAI *v.* PURUSHOTHAMA DOSS. **90 I.C. 124=21 M.L.W. 551=A.I.R. 1925 Mad. 645.**

——When a person made deposits out of his separate acquisition in the Bank in the joint names of himself and of his wife and made them payable to either or to the survivor he intended that there should be a provision for his widow in case he died before her and cannot be claimed by his co-partners as being part of joint family property. (*Scott-Smith and Moti Sagar, JJ.*). MT. UTTAM DEVI *v.* DIN NATH. **75 I.C. 774=A.I.R. 1923 Lah. 359.**

HINDU LAW—Joint family—Self-acquisition—Gains of science.

——*Gains of science—When are self-acquisition.*

All acquisitions by members of a joint Hindu family are *prima facie* partible and the burden of proof lies on those who assert to the contrary. The gains of science are exempted from this rule only when the education which made such gains possible is affirmatively shown to have been acquired without detriment to the family estate: A.I.R. 1917 P.C. 105 and A.I.R. 1921 P.C. 35, *Foll.* (*Harrison and Coldstream, JJ.*). KANSHI RAM *v.* SHANKARDAS. **111 I.C. 596=10 L.L.J. 93=A.I.R. 1928 Lah. 397.**

——*Gains made by a member without the aid of joint family funds are self-acquired property.*

The acquisition of distinct property by a member of an undivided Hindu family without the aid of joint funds is his self-acquired property, and is not subject to partition. 6 B. 225; 45 C. 666, *Ref.* Hindu law texts regarding gains of science establish it as a rule of Hindu Law that the ordinary gains of science are divisible, when such science has been imparted at the family expense, and acquired while receiving a family maintenance; but that it is otherwise when the science has been imparted at the expense of persons who are not members of the acquirer's family. Acquisition, made as a Government servant, which is kept quite separate from the joint family funds, is impartible and the acquirer could deal with it as he chose. (*Scott-Smith and Moti Sagar, JJ.*). MT. UTTAM DEVI *v.* DIN NATH. **75 I.C. 774=A.I.R. 1923 Lah. 359.**

——*Earnings without the help of joint family funds are self acquisitions.*

No doubt when it is proved and admitted that a Hindu has lived in commensality and possessed joint property, if any member of the family claims any property as his separate, the burden lies upon him to prove that it was acquired in circumstances which would constitute it his separate property. But where the deceased was a member of a joint family and it was not shown that he acquired any education at the expense of the joint family or that any money was contributed out of the joint family funds to help him in any of his undertakings.

Held, that the property left by him was his separate property: 16 Bom. L. R. 101 (P. C.) and 12 S.L.R. 116 (P.C.), *Ref.*

Every member of a joint family who is found to be in possession of a property at his death cannot necessarily be said to have acquired the property as a member of the joint family. (*Kennedy, J. C. and Raymond, A. J. C.*). SANT SINGH *v.* RARI BAI. **76 I.C. 408=17 S.L.R. 206=A.I.R. 1924 Sind 17.**

——*Gains of science—When not self-acquisition.*

In a joint Hindu family the rule is that the acquisitions of the members are joint property and partible and impartibility is the exception. One of the recognised exceptions is property acquired by the possession of special "science" or "learning". Where this is acquired outside the family and has to be paid for in one form or another at the expense of the family it is acquired "to the detriment of the family property". In that case it is a family investment, and the emoluments which its possessor is thus enabled to obtain, are joint property of the family as fruits of the investment thus made in the person of one of its more

HINDU LAW—Joint family—Self-acquisition—Nucleus.

gifted members. But the individual can sever from the family at will on the footing of bringing his accumulations into hotchpot as part of the family property and without capitalising future earnings or being under future liability as to what he may make thereafter. So personal earnings and acquisitions may remain partible throughout the unseparated member's life, if he was originally equipped for the calling or career, in which the gains were made by a special training at the expense of the patrimony. (*Case-law referred to*).

A post in the Covenanted Civil Service of India is a post to which the rule would apply.

An Indian Civil Servant is not always what is commonly called a scientific man, but his is certainly a special and in many cases an eminently learned profession. The presumption, even in the case of such special gains, is that the acquisitions of all members are partible, until the contrary is proved. The personal and the family elements in the ultimate gains cannot be distinguished. There is equally little ground for contending that partibility depends on *causa proxima* or is negatived by the intervention of the personal element of the individual co-parcener's character. Changes with regard to gains of science have been in the direction of narrowing the category of partible gains. From maintenance out of the family funds during the period of education, the basis of partibility changed to the receipt of the education itself as the family expense, and then education generally was narrowed to specialised education, which is now the basis. No corresponding change, however, is to be traced upon the question, what is science, in the sense in which the text of the Mitakshara uses the term. On the contrary, while the principle has remained the same, the application of it has tended to widen, as changing times have brought up fresh instances of callings, to which special science and not the native wit of man is the means of entrance. (*Lord Sumner*). AMARNATH *v.* HUKAM CHAND NATHU MAL. **60 I.C. 379= 2 Lah. 40=48 I.A. 162=19 A.L.J. 249= 23 Bom.L.R. 671= 25 C.W.N. 534= 33 C.L.J. 355=14 M.L.W. 435= 1921 M.W.N. 175=2 P.L.T. 201= A.I.R. 1921 P.C. 35=40 M.L.J. 327 (P.C.).**

—Joint family—Self-acquisition—Nucleus.

———Throwing into the common stock depends on the *animus*. Where in the case of a Sourashtra trading family there was some nucleus and the father and sons jointly worked and property was purchased out of the family funds,

Held, that under those circumstances the property became the property of the joint family and that the onus of proving self-acquisition was on the party alleging it. (*Kumaraswami Sastri and Reilly, JJ.*). RENGANATHA AYYAR *v.* VENKATATHRI AYYAR. **1930 M.W.N. 793.**

———Where there is admittedly a nucleus which is by no means negligible and properties are purchased while the parties continue joint, the burden of proving self-acquisition is on the party pleading it. (*Kumaraswami Sastri and Reilly, JJ.*). RENGANATHA AYYAR *v.* VENKATATHRI AYYAR. **1930 M.W.N. 793.**

———Property acquired by member of joint family not shown to have nucleus is not always joint family property. (*Sen and Niamatullah, JJ.*). DURGA *v.* CHANHARJA. **122 I.C. 413= 1930 A.L.J. 775= A.I.R. 1930 All. 536.**

HINDU LAW—Joint family—Self-acquisition—Nucleus.

———No nucleus proved—Burden of proving that property is not self-acquired is on the propounder. 9 Mad. 477, *Dist.* (*Ramesam and Reilly, JJ.*). RAMASWAMY PILLAI *v.* MARIMUTHU GOUNDAN. **113 I.C. 865=A. I. R. 1928 Mad. 764.**

———*One member holding property cannot be presumed to be joint family property unless nucleus is proved* (per *Venkatasubba Rao, J.*).

It is not correct to say that, to start with, a presumption should be made that the family is possessed of joint property and therefore it cannot be presumed from the mere fact that a member of the family holds property that it is joint family property. Something more must be shown. The party alleging that the property held by an individual member is joint family property must show that the family was possessed of some property with the aid of which the property in question could have been acquired. If this is shown and only then, the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. (*Krishnan and Venkatasubba Rao JJ.*)., KANNAMMAL *v.* RAMATHILAKMMAL. **97 I.C. 632=A.I.R. 1927 Mad. 38.**

———*Acquisition of property while family was joint —Person alleging that it was separate property must prove it.*

Where it is proved that there is a joint family and where it is also proved that that joint family has some joint property, the presumption will arise that all property acquired while the family still remains joint is joint family property and that the onus of proving that any particular item of property alleged to be joint, is in fact separate property, will lie upon the person who asserts it to be so: 33 All. 677, *Foll.* (*Lindsay and Kanhaiya Lal, JJ.*). MAHADEO KASANDHAN *v.* GAYA DIN KASANDHAN. **96 I.C. 184 (All.).**

———*Party alleging nucleus of joint property must prove it—Nucleus too small as compared with acquisitions—Property cannot be held to be joint.*

There can be no presumption that a joint family had a nucleus, nor that it had joint property. Those who allege existence of such a nucleus must prove it and once they so prove, the onus is shifted to the other side to show that the acquisition by one member was not a joint acquisition : 33 All. 677 and 8 N.L.R. 82, *Ref.* If there is a large family nucleus and if the property in the possession of a member of the joint family can be ordinarily traceable to the income of the family nucleus, such property would be considered joint family property till it is affirmatively shown that that property was acquired without the help of and without detriment to the family nucleus ; but where the family nucleus is so small that it could not by any stretch of imagination have been the means of acquiring any portion of the property standing in the name of a member, such property cannot be held to be joint-family property : A.I.R. 1923 Mad. 262 and 2 Lah. 40 (P. C.), *Rel. on.* (*Kinkhede, A.J.C.*). BIRDICHAND LALCHAND *v.* POPAT LAL. **95 I.C. 183=A. I. R. 1926 Nag. 389.**

———Joint family proved to have some joint property—Onus of proving any property to be self-acquired by any particular member is on the party setting up the plea. (*Baker, J.C.*). MOTILAL *v.* HARJIMAL. **87 I. C. 809= A. I. R. 1926 Nag. 146.**

HINDU LAW—Joint family—Self-acquisition—Nucleus.

———*Person claiming self-acquisition must prove there was no help from nucleus.*

Property which is incapable of yielding any income might not be treated as a nucleus for the purpose of affecting the presumption as to subsequent acquisitions. But this proposition might apply for instance, to an ancestral house and not to a business, when the management of an ancestral business is taken over by a member of the family. The state of that business, when such member took over the management, is a fact peculiarly within his knowledge and if he wishes to show that the business was ended or yielded no income it is for him to prove it and not call the other side to prove the contrary. (*Lindsay and Daniels, JJ.*). SUKHNANDAN *v.* BRIJNANDAN. **73 I. C. 1052= 5 L.R.A. Civ. 39=A.I.R. 1923 All. 574.**

———Where the family is joint and there is a nucleus of joint property, properties acquired are *prima facie* joint properties and the burden of proof is on the party setting up a case of separate estate. (*Mookerjee and Panton, JJ.*). NIBARAN CHANDRA *v.* NIRUPAMA DEBI. **69 I.C. 476= 34 C. L. J. 563=26 C. W. N. 517= A.I.R. 1921 Cal. 131.**

———*Onus is on person setting it up.*

Where nucleus is admitted or proved, the burden of proving that particular property is the self-acquisition rests on party alleging it. (*Mr. Ameer Ali.*) RAJANGAM AYYAR *v.* RAJANGAM AYYAR. **69 I. C. 123=37 C.L.J. 435=21 A.L.J. 460= 27 C.W.N. 561=46 Mad. 373=50 I.A. 134= 31 M.L.T. 136=16 M.L.W. 615= A.I.R. 1922 P.C. 266=44 M.L.J. 745 (P.C.).**

—Joint family—Self-acquisition—Plea of.

———It is only when self acquisition is claimed that it is necessary for the other members of the joint family to prove that they had also contributed to the acquisition of the property. (*B.B. Ghose and Panton, JJ.*). GOURANGH SUNDAR *v.* MOHENDRA NARAYAN. **104 I.C. 694= 46 C.L.J. 175=A.I.R. 1927 Cal. 776.**

—Joint family—Self-acquisition—Presumption.

———*Dayabhaga law—Property acquired in name of manager will be presumed to be family property.*

In the case of a family governed by the Dayabhaga Law, the father is the owner of the entire property and on his death his sons take the property as co-owners and not as joint owners. But where the property is held jointly and where there is a nucleus of family property and where one of the members of the family has been left in the management of the property, properties acquired in the name of the manager will be presumed to be the property of the family, unless the manager shows that he had a separate income apart from the yields of the joint family property out of which he may have acquired the property: 31 Cal. 448, *Dist.*; 31 All. 477, *Expl.* (*Mukerji and Bennet, JJ.*). GOSWAMI SADANAND *v.* GOSWAMI INDRA NAND. **123 I.C. 763=A.I.R. 1930 All. 383.**

———*Property acquired by a member—Presumption.*

There is no presumption that any property acquired by an individual member of a joint Hindu family, which is not shown to have possessed any nucleus, is joint family property. (*Sen and Niamatullah, JJ.*). DURGA PRASAD *v.* CHAUHARJA PRASAD. **122 I C. 413=1930 A.L.J. 775= A.I.R. 1930 All. 536.**

———Property acquired by members of joint family without aid of joint family property will be joint family property unless acquirers intend to hold it as co-owners: 32 Bom. 479; 10 Bom. L.R. 175; A.I.R. 1926 Bom. 408 and 25 Mad. 149, *Rel. on*; 9 Bom. 438, *held not good law.* (*Shingne, J.*). RANGU NYAHALCHAND SHET VANI *v.* LAKSHMAN MARTAND KULKARNI. **A.I.R. 1930 Bom. 438.**

HINDU LAW—Joint family—Self-acquisition—Presumption.

———*If nucleus could not have helped acquisition it is not joint property.*

The proposition that mere possession of joint family property by a joint Hindu family would raise a presumption of law that all the property in the possession of a co parcener is joint family property would be strictly correct only if the joint family property possessed by the joint Hindu family was such as would have enabled and led to the acquisition of the other property. If having regard to the nature of the income from the admitted joint family property or otherwise, the same could not have possibly helped in or led to the acquisition of the subsequent property, then there is no presumption that the subsequent property is joint family property. (*Ananthakrishna Ayyar, J.*). C. SANKARANARAYANA MUDALIAR *v.* TANGARATNA MUDALIAR. **A.I.R. 1930 Mad. 662.**

———No doubt various presumptions arise from the relations *inter se* of the members of a joint Hindu family. But where there is evidence of circumstances which point to an acquisition by one member either for himself personally or for the benefit of the family, the presumptions are superseded by the circumstances which have been found obtaining in the particular case, and the Court considering all the circumstances has to draw an inference therefrom one way or another. (*Page and Mallick, JJ.*). SITA NATH CHAKRAVARTI *v.* BIBIN BEHARI CHOWDHURY. **117 I. C. 529= 32 C.W.N. 644.**

———There is no presumption that the members of a joint Hindu family possess their self-acquisitions as joint co-parcenary property. (*Addison and Coldstream, JJ.*). KANSHI RAM *v.* SHANKAR DAS. **111 I.C. 596=10 L.L.J. 93=A.I.R. 1928 Lah. 397.**

———In the case of a joint Hindu family even if there is no nucleus of ancestral property but if two members of the family are joint in worship and live in commensality and carry on a business jointly and are treating that business as that and acquiring property with the proceeds of that business, that property would be deemed to be the joint family property: 32 Bom. 479; 10 Bom. L. R. 175, *Foll.*; A.I.R. 1926 Bom. 408, *Ref*; 33 All. 677; 27 M.L.J. 677; A.I.R. 1926 Nag. 389 and A.I.R. 1927 Mad. 38, *Dist.* (*Fforde and Agha Haidar, JJ.*). SANWAL DAS *v.* KUREMAL. **109 I.C. 779= 9 Lah. 470= 10 L.L.J. 27=29 P.L.R. 635= A.I.R. 1928 Lah. 224.**

———Where a conveyance is taken in the name of one of two undivided brothers forming a joint Hindu family, in the absence of evidence as to utilisation of family funds for the purchase, no inference can be drawn of its being a joint purchase, from the bare facts of the undivided status of the vendees. (*Waller and Madhavan Nair, JJ.*). SUBBALAKSHMI AMMAL *v.* NARSIMIAH. **102 I.C. 360= 38 M.L.T. 226=25 M.L.W. 563= A.I.R. 1927 Mad. 586=52 M.L.J. 482.**

———The ordinary presumption is that as long as family continues to be joint, properties acquired by a member of joint family are all joint properties and were acquired for the benefit of the family. (*Sulaiman and Lindsay, JJ.*). HARKESH SINGH *v.* MT. HARDEVI. **102 I.C. 66=49 All. 763= 25 A.L.J. 413=A. I. R. 1927 All. 454.**

HINDU LAW—Joint family—Self-acquisition—Presumption.

———Property purchased with the profits derived from a joint business cannot be presumed to be joint and the Hindu Law of joint property is not applicable to such property. Burden of proving that such property is joint is on the party alleging it to be so. (*Suhrawardy and Graham, JJ.*). GHOLAM SIDHIQUE KHAN *v.* JOGENDRA NATH MITRA.
96 I.C. 199=43 C.L.J. 452=31 C.W.N. 205=A.I.R. 1926 Cal. 916.

———There is a presumption in favour of jointness of subsequently acquired properties where the family is a joint one ; but according to the circumstances of each particular case the strength of the presumption varies a great deal. (*Suhrawardy and Graham, JJ.*). TRAILAKYANATHCHAR *v.* CHINTAMONY DUTT. **95 I.C. 426=30 C.W.N. 588=A. I. R. 1926 Cal. 813.**

———In the absence of evidence that the property is purchased by money of the junior member or he had separate funds the presumption is that the property is acquired by the head of the family for the family and the presumption applies also to a family consisting of father and sons, in the Dayabhaga School: 16 Bom. L. R. 101 (P.C.), *Foll.* (*Greaves and Mukerji, JJ.*). JASODA SUNDARI *v.* LAL MOHAN. **91 I.C. 681=42 C.L.J. 486=A. I. R. 1926 Cal. 361.**

———Property acquired by son during father's life-time—Son having sufficient private means—Property will be presumed to be son's self-acquired one: 16 Bom. L.R. 101 (P.C.), *Dist.* (*Suhrawardy and Cuming, JJ.*). CHOONI LAL KHEMANI *v.* NILMADHAL BARIK. **86 I. C. 734=41 C.L.J. 374=A.I.R. 1925 Cal. 1034.**

———Acquisition during joint living is presumed to be for benefit of family. (*Greaves and Cuming, JJ.*). SASHI KUMAR SARKHEL *v.* CHANDRA KUMAR SAMADDAL. **68 I. C. 322=35 C.L.J. 348= A.I.R. 1923 Cal. 204.**

—Joint family—Self-acquisitions—Rights of co-parceners.

———Co-parcener can have self-acquisitions—They are separated property, unless arising from family business or blended with family estate. (*Lord Buckmaster.*) ANNAMALAI CHETTY *v.* SUBRAMANIAN CHETTY. **113 I.C. 897=49 C.L.J. 93=1929 M.W.N. 39=29 M.L.W. 91=6 O.W.N. 104=1929 A.L.J. 9=31 Bom. L.R. 280=33 C.W.N. 435=10 P.L.T. 283=A.I.R. 1929 P.C. 1=56 M.L.J. 435 (P.C.).**

—Joint family—Self-acquisition—What is.

———Property acquired from maternal grandfather is self-acquired property and not ancestral property. (*Kulwant Sahay and Macpherson, JJ.*). CHATTRA KUMARI DEVI *v.* MOHAN BIKRAM SHAW. **121 I.C. 337 (Pat.).**

———Father bequeathing his self-acquired property to his son in lieu of certain expenses incurred by him—Property acquired is not ancestral property in son's hands, but self-acquired: A.I.R. 1923 P.C. 160, *Ref.* (*Rupchand and Wild, A.J.Cs.*). HASSANAND *v.* DEUMAL GIRDHARIMAL. **123 I. C. 703=A.I.R. 1930 Sind 174.**

———Absolute bequest to widow—Widow bequeathing the property to her son—Son gets it as personal property: 23 Cal. 262 and 6 W.R. 71, *Dist.* (*Suhrawardy and Mallick, JJ.*). GOHALI SAHA *v.* DEBENDRA NATH. **114 I. C. 404=32 C.W.N. 272= A.I.R. 1928 Cal. 285.**

———*Son first proprietor of land—Land is son's self-acquisition.*

HINDU LAW—Joint family—Self-acquisition—What is.

A land was granted in lease to the father for a period of 10 years on some conditions upon the fulfilment of which he was to get proprietary right in the land. He died without fulfilling the necessary conditions. The lease was then renewed in favour of his son with the same conditions which he fulfilled and got proprietary rights in it. He subsequently alienated it,

Held, that the son was the first proprietor of land and that it was self-acquired property in his hands and as such alienation cannot be questioned by his sons : A.I.R. 1921 Lah. 63 ; 5 P.R. 1918 and 129 P.R. 1916, *Foll.* (*Broadway and Agha Haidar, JJ.*). SARWAN SINGH *v.* LAL SINGH. **112 I. C. 168=10 L.L.J. 541.**

———Property going into the hands of sons' sons under a bequest from their grandfather after the cessation of life-estate created in their father's favour is not joint in their hands. (*Stuart, C.J. and Raza, J.*). DEBI PRASAD *v.* KRISHNA KUNWAR. **104 I. C. 847=4 O. W. N. 1041=A.I.R. 1928 Oudh 26.**

———Property got by gift or will by one member is not presumed to be attached with incidents of joint family property : A.I.R. 1926 Mad. 273 and 24 Mad. 429, *Rel. on.* (*Venkatasubba Rao, J*). RAJAGOPALA PILLAI *v.* P. VEERAPERUMAL PILLAI. **102 I. C. 680=39 M.L.T. 76=A.I.R. 1927 Mad. 792=53 M.L.J. 232.**

———*Jagir or pension is self-acquisition.*

A pension is always allowed on condition of good conduct and loyalty to Government and though it may be continued from father to son, each recipient possesses unrestricted power of expending his pension. The same may be said of jagir moneys paid by way of charity or dharamath. (*Zafar Ali and Campbell, JJ.*). WAZIR SINGH *v.* MOTI SINGH. **94 I.C. 492=7 Lah. 522=27 Punj. L.R. 846=A.I.R. 1926 Lah. 395.**

———*Property purchased by income from priestly offerings is self acquired.*

Income derived from sources as priestly offerings is the personal income of the recipient and does not form part of his family funds, and consequently the property acquired by him with that money is his own self-acquired property and he has full power of disposition over it. (*Zafar Ali and Campbell, JJ.*). WAZIR SINGH *v.* MOTI SINGH. **94 I.C. 492=7 Lah. 522=27 Punj. L.R. 846=A.I.R. 1926 Lah. 395.**

———Property purchased by father before the birth of any son to him is separate property and descends to his sons as tenants-in-common. (*Ashworth, A.J.C.*). MATHRADASS *v.* RAMJI MAL. **85 I.C. 1006=A.I.R. 1925 Oudh 619.**

———*Property got by collateral succession—When is not self-acquisition.*

Under the Hindu Law the property obtained by collateral inheritance is regarded as the separate property of the person by whom it is inherited. An exception is, however, made where joint family funds are used in the process of its acquisition or where it is voluntarily thrown into the common stock, or is otherwise impressed with the character of joint family property by subsequent treatment. (*Lindsay and Kanhaiya Lal, JJ.*). MT. PHULWANTI KUNWAR *v.* JANESHAR DAS. **83 I.C 782=46 All. 575=22 A.L.J. 521=5 L.R.A. Civ. 785=A.I.R. 1924 All. 625.**

———*Property ceasing to be joint property—Acquisition by a co-parcener afterwards—If joint property.*

HINDU LAW—Joint family—Self-acquisition—What is.

The fact that a person who subsequently acquired the house which was once joint family property but which lost that character owing to an award, was at one time a co-parcener with another cannot make the house joint family property in his hands. It is only in very special circumstances that such a result could follow. (*Shaw, Ag. C. J. and Crump, J.*). JAMNADAS KASHIDAS *v.* VALLABHDAS KASHIDAS. **84 I. C. 878=25 Bom.L.R. 1340= A.I.R. 1924 Bom. 239.**

———Where after the joint family property is disposed of by valid or voluntary alienation, the family separates and if a purchase is made of the property by one of such separated members, with his own funds, it is his self-acquired property.

The doctrine laid down in *Visalatchi Ammal* v. *Annaswamy Sastri*, 5 M. H. C. R. 150 is applicable to the case of a mortgage or to a wrongful dispossession of joint family property, but will not apply to a case where the joint family disposed of the property by valid and voluntary alienation. (*Schwabe, C.J. and Wallace, J.*). MAHOMED MARKAYAR *v.* BANSI LAL. **71 I.C. 855=1922 M.W.N. 824= A.I.R. 1923 Mad. 248.**

———*Gift or devise from father is self-acquired property in hands of donee or devisee.*

In the absence of any express limitation or condition to the contrary all property obtained by gift or devise becomes self-acquired in the hands of the donee or devisee. Consequently any property so obtained by gift from the father, grandfather or great-grandfather will become self-acquired property in the hands of the donee, if it was not ancestral property in the hands of the donor or was acquired by him without any detriment to the joint estate. (*Kanhaiya Lal, J.C.*). KANHAI LAL *v.* RAM RATAN. **68 I. C. 217= 25 O.C. 80=A.I.R. 1922 Oudh 138.**

———Purchase of joint family property at a sale by the Revenue authorities for arrears of revenue by a member of the family out of his self-acquired funds is not joint family property but is the self-acquired property of the member. (*Macleod, C.J. and Fawcett, J.*). CHOKHU *v.* TATYA. **59 I.C. 569=22 Bom. L.R. 1297.**

———Property is *prima facie* impartible where it is allotted by the State to a person in consideration of the discharge of particular duties or as payment for an office, even though the duties or office may become hereditary in a particular family.

Property purchased by a Patwari, out of the savings from his emoluments as a Patwari, is his self-acquired property. (*Mitra, A. J. C.*). SHEO RAM *v.* SHRIDHAR. **17 N.L.R. 97= A.I.R. 1921 Nag. 86.**

—Joint family—Self-acquisition—What is not.

———Joint family house repaired by self-acquisitions does not become self-acquired property of the repairing co-parcener: 45 C. 666 (P.C.), *Ref.* (*Kincaid, J.C. and Lobo, A.J.C.*). JETHANAND UDHANDAS *v.* KEWALRAM. **97 I.C. 505=20 S.L.R. 295= A. I. R. 1926 Sind 216.**

———*Money received by co-parcener by giving his son in adoption is not self-acquired property.*

Where the question was whether money received by a co-parcener in a Nattukottai family on his giving his son in adoption was his self-acquired property,

Held, in these families male member was valued for his earning capacity and the test appeared to be whether the acquisition of money was made at the expense of or to the detriment of the joint family property; if it was, it cannot be self-acquisition. The transfer of boys, by adoption was much to the detriment of their natural family, as it was to the advantage of their adoptive family (in consideration of which detriment and advantage these payments were made) and the property so acquired cannot be self-acquisition of the co-parcener in the absence of a custom to the contrary. (*Ayling and Odgers, JJ.*). RAMASWAMI CHETTY *v.* PALANIAPPA CHETTY. **76 I.C. 798= 18 M.L.W. 656=1923 M.W.N. 841= A.I.R. 1924 Mad. 354.**

HINDU LAW—Joint family—Separate property.

———Merely from a transfer of *Khata* from the name of father in joint family to that of one of the sons no presumption arises that the subject of the transfer has ceased to be joint family property and become the self-acquisition of that particular son. (*Kotval, A.J.C.*). MT. KASHI *v.* PANDURANG. **69 I.C. 612= A. I. R. 1923 Nag. 75.**

—Joint family—Self-acquisition—Will.

———In a Hindu joint family the father can dispose of his self-acquired property by will: 12 Mad. 126 and 22 Mad. 9, *Rel on.* (*Coutts Trotter, C.J. and Wallace, J.*). VENKATA SUBBA RAO *v.* LAKSHMI KANTAMMA. **A.I.R. 1929 Mad. 785.**

———Self-acquired property can be disposed of oven by will by the co-parcener who acquired it. (*Baker, Offg. J. C.*). DEBICHARAN *v.* SHANKER RAO. **80 I.C. 322=7 N.L.J. 1= A.I. R. 1924 Nag. 71.**

—Joint family—Separate property.

———*On partition share allotted to mother absolutely —On her death her share to go to her grandsons— Share in hand of grandson is his separate property.*

Under the settlement by a consent partition decree between sons and grandsons the mother was allotted an amount of money as her stridhan with full rights of ownership. In the event of her dying intestate, after setting apart a sum for her funeral ceremonies, the rest was to be divided between her grandsons. In the suit for partition between one of the grandsons and his son a question arose whether or not the sum so received was the separate property of the grandson,

Held, that the money was given to the grandson as his own separate property and that his son had no interest in it. (*Kemp, Ag. C. J. and Murphy, J.*). JAMNABAI *v.* VASUDEO SAGARMAL. **124 I.C. 793=32 Bom. L.R. 48= A.I.R. 1930 Bom. 302.**

———*If owner waives his right and voluntarily throws it into common stock it can become joint property.*

Property originally self-acquired may become joint property if it has been voluntarily thrown into the joint stock with the intention of abandoning all separate claims upon it. Question whether he has done so or not is entirely one of fact to be decided in the light of all the circumstances of the case. But a clear intention to waive his separate rights must be established and will not be inferred from acts which may have been done merely from kindness or affection. (*Rankin, C. J. and C. C. Ghose, J.*). RAJANI KANTA DEB *v.* BASHIRAM MESTARI. **121 I.C. 409=49 C.L.J. 532= A.I.R. 1929 Cal. 636.**

———Property derived from maternal grandfather mixed with ancestral properties for a long time—Presumption is that they were thrown into common stock: A. I. R. 1923 P. C. 57, *Rel. on.* (*Ramesam, J.*). AHOBILACHARIAR *v.* TULASI AMMAL. **103 I.C. 281=39 M.L.T. 276= A.I.R. 1927 Mad. 830.**

HINDU LAW—Joint family—Separate property.

———Blending of separate earnings by individual member with joint family funds—Whole becomes joint family property: 45 Cal. 733 (P.C.) and A. I. R. 1923 P. C. 57, *Foll.* (*Phillips and Odgers, JJ*). PARVATHI AMMAL *v.* M. R. SIVARAMA IYER. **97 I.C. 998= A.I.R. 1927 Mad. 90.**

———*Tenancy in the name of one member may be for family.*

It is open to the Court to find on the evidence that in spite of the fact that the name of only one member of a joint family was recorded as tenant of a holding in the village papers, the tenancy was really vested in the joint family. (*Piggott, J.*). BIJAI *v.* NARAIN. **88 I.C. 592= A. I. R. 1926 All. 45.**

———Property purchased in the name of one member—To make it joint, jointness in mess and estate and existence of sufficient estate to acquire it must be proved. (*Suhrawardy and Graham, JJ.*). TRAILAKYANATH CHAR *v.* CHINTAMONY DUTT. **95 I. C. 426=30 C.W.N. 588= A.I.R. 1926 Cal. 813.**

———Where a Christian and his Hindu relations lived as members of a joint family and it was found that there was no intention to keep the various properties separate and that all the properties were treated as the common property of the whole family,

Held, this necessarily implied an agreement between the members, that they were all to share the properties alike. (*Phillips and Madhavan Nair, JJ.*). JOGI REDDI *v.* CHINNABIREDDI. **90 I. C. 1016=22 M.L.W. 116= A.I.R. 1925 Mad. 1195.**

———*Conversion of separate property into joint property.*

A consciousness on the part of the owner of a separate property that the property is his own separate property and a clear intention to waive his rights in such separate properties is presumed where such separate property is converted into joint family property by the process of throwing it into the common stock. (*Phillips and Odgers, JJ.*). MAYANDI SERVAI *v.* SANTHANAM SERVAI. **81 I.C 1031=20 M.L.W. 812= A.I.R. 1925 Mad. 303.**

———*Blending of joint with separate property makes property joint.*

When members of joint family, who have control over the joint estate, blend that estate with property in which they have separate interests, the whole property becomes joint. Whether separate estate is brought into a joint family account or the joint family property is brought into the separate accounts, the result is the same. The real question for determination is what is the true conclusion to be drawn when people united by bonds of close relationship and living as a joint family, draw for the joint family expenses out of a fund enriched by other contributions. If the members of a joint Hindu family confuse the incomes of their joint properties with their separate properties, their intention presumably is that the properties acquired with such mixed-up funds are for the joint family. (*Lord Buckmaster.*) RAJANIKANTA *v.* JAGAMOHAN PAI. **73 I.C. 252= 50 Cal. 439=50 I. A. 173=18 M. L. W. 387= 32 M. L. T. 149=37 C. L. J. 515= 25 Bom. L.R. 683=1923 M.W.N. 438= 27 C.W.N. 997=4 L.R.P.C. 70= A.I.R. 1923 P.C. 57=44 M.L.J. 561 (P.C.).**

—Joint family—Survivorship.

———Where immediately after the son was adjudged an insolvent, his father who formed a Hindu joint family with him willed away his properties to his wife and soon after died,

Held, that the will was invalid and as the insolvent took his father's estate by survivorship the same vested in the Receiver. (*Addison, J.*). MT. PIARI BAI *v.* TULSE DAS TARLOCHANMAL. **100 I.C. 110=9 L.L.J. 30= 28 P.L.R. 134= A.I.R. 1927 Lah. 152.**

———Decree against co-parcener—Co-parcener's interest ceases after his death and there remains nothing to be sold in execution. (*Walsh, J.*). UDRAJ SINGH *v.* SHYAM LAL. **93 I.C. 385= A.I.R. 1926 All. 338.**

———*Lease which is joint family property though in name of manager passes by survivorship.*

Ordinarily in the case of a lease taken by the manager of a joint Hindu family in his own name but with family funds and really on behalf of the whole family, it is universally accepted that the lease and the benefits of it belong to the whole family and if it is heritable it will pass by survivorship and not by inheritance, whatever the mutual rights and liabilities of the lessor and the members of the family other than the manager may be. This principle applies to an occupancy holding: 13 C. P. L. R. 137; 7 N.L.R. 36 and 10 N.L.R. 64, *Foll.* (*Hallifax, A.J.C.*). BARATI *v.* SURIT. **92 I.C. 916=A.I.R. 1926 Nag. 277.**

———The Hindu Law of succession by survivorship and the vesting of a son's interest by birth is not applicable to a tenancy governed by the Central Provinces Tenancy Act. (*Baker, Offg. J.C.*). MST. GOWRA *v.* CHAITRAM. **78 I.C. 63= A.I.R. 1924 Nag. 372.**

———The status of joint ownership with rights of survivorship cannot be acquired by prescription. (*Ayling and Odgers, JJ.*). RAJAMBAL AMMAL *v.* SHANMUGA MUDALIAR. **70 I.C. 653= 1922 M.W.N. 481= A.I.R. 1923 Mad. 11.**

———*Right of survivorship is incidental to right of joint possession.*

The so-called right of survivorship of each of the daughters of a deceased male Hindu in respect of the property inherited by them from him is incidental to the right of joint possession and enjoyment of the estate with the others who are jointly entitled and cannot exist separately when the right of joint possession and enjoyment has been lost, *e.g.*, by adverse possession by one of the daughters: 9 M.I.A. 539, *Foll.* (*Wallis, C.J. and Seshagiri Aiyar, J.*). IVATURY ATCHAMMA *v.* I. BAPIAH. **60 I.C. 583=44 Mad. 131=13 M.L.W. 407= A.I.R. 1921 Mad. 24=40 M.L.J. 83.**

———*Benares School—Succession is by survivorship —Incidents of the law of survivorship.*

The system of a joint family and the rules of succession governing that family is a peculiarity of the Hindu Law of the School of Benares. The rule of succession is known as one of survivorship, where no member has any definite or defined share and, therefore, cannot transmit it to his heirs, but a member who dies or somehow or other ceases to be a member of the family causes no change in the status of the family. The properties owned by the joint family continue to be owned by the surviving members thereof after the death or extinction of one member of it. If once the members of the family in the property belonging to it are ascertained and defined, the family ceases to be a joint family under the Mitakshara, in spite of there being no division by metes and bounds and in spite of the members continuing to live in commensality. Such an intention of separation

HINDU LAW — Joint family—Trade—Carrying on.

among the members of the family and the definition of their shares in the family property may be either by deed or may be evidenced by the conduct of the parties. In either case, it will be the intention of the parties that will determine whether they really have separated themselves or not: 21 W.R. 214 (P.C.), *Ref.* (*Jwala Prasad and Ross, JJ.*) SADANANDA BARPANDA *v.* BAIKUNTHANATH BARPANDA. **63 I.C. 833=2 P.L T. 299= A.I.R. 1921 Pat. 298.**

—Joint family—Trade—Carrying on.

———Where a Hindu owner of a firm dies leaving no issue but his widow and mother, and after his death the business is continued through the same munims and gumashtas, and a son is adopted to the widow, the business descends to the adopted son and the presumption is that it was continued by the mother and widow for the benefit of the son whom they ultimately adopted to the dead owner, if the business still was carried on after adoption and during the minority of adopted son it was carried on for the benefit of the adopted son by the *de facto* guardians. (*Addison, J.*). JOTI PERSHAD *v.* HIRA LAL. **117 I.C. 911= 11 L.L.J. 233= A. I. R. 1929 Lah. 559.**

—Joint family—Trade—Enquiry into necessity.

———*Joint family business resulting in loss—Whether manager should put in more money or mortgage property rather than to sell it are questions for the manager and not for the lender or purchaser.*

Where there is joint family business, the manager has authority to raise money not only for the payment of debt, but also for the purpose of carrying on the business. Where such a business had recently resulted in loss whether the managing member was justified in putting more money into it, and whether he should have raised money by mortgage instead of by sale are questions for the manager to decide and it would be unreasonable to require a lender or purchaser to go into questions of this kind, as to which he would rarely be in a position to form a sound opinion. (*Sir John Wallis.*) NIAMAT RAI *v.* DIN DAYAL. **101 I.C. 373= 8 Lah. 597=54 I.A. 211=29 Bom.L.R. 886= 25 A.L.J. 599=45 C.L.J. 548=1927 M.W.N. 453= 4 O.W.N. 537=28 P.L.R. 463=8 P.L.T. 647= 26 M.L.W. 442=32 C.W.N. 233=9 L.L.J. 496= 39 M.L.T. 345= A. I. R. 1927 P.C. 121= 52 M. L.J. 729 (P.C.).**

———Where a family business is carried on *bona fide* for the benefit of the family and with the assent of all the adult members it is within the competence of the manager to borrow money from time to time for the purposes of the business and the lender is not bound to enquire into the necessity for each advance that may be made: A.I.R. 1924 All. 379, *Foll.* (*Kanhaiya Lal and Ashworth, JJ.*). GOPAL BHAGAT *v.* RAGHUBIR RAM. **98 I.C. 651 (All.).**

———*Creditor need not prove necessity for each advance.*

There is no difference between an ancestral and non-ancestral business. The ordinary presumption is that money required for carrying on family business is for family necessity and that the business is carried with the consent and acquiescence of all the members of the family. Creditor therefore need not prove legal necessity or family benefit for each advance. The manager has the power to contract debts for the purpose of the family business: 34 All. 135, *Dist.*; 6 C. W. N. 429, *Expl.* and *Dist.* (*Sulaiman and Ryves, JJ.*). MAHABIR PRASAD *v.* AMLA PRASAD. **79 I.C. 517= 46 All. 364=22 A.L.J. 295=5 L.R.A. Civ. 264= A.I.R. 1924 All. 379.**

HINDU LAW — Joint family — Trade — Minor members.

—Joint family—Trade—Extension of.

———*Extension of business is not new business.*

An ancestral business does not lose its character as such and become a new business by a mere extension of the same by a manager.

Where the manager of a Hindu ancestral firm, after his father's death, starts a trade in English piece-goods whereas till then the firm was trading only in country-made cloths, the character of the ancestral business is not thereby completely altered so as to make it a new business, but it amounts only to an extension of the ancestral business. (*Wallace and Thiruvenkatachariar, JJ.*). RAJAGOPALA AIYAR *v.* RAMAN CHETTIYAR. **1927 M.W.N. 879= A.I.R. 1927 Mad. 1190.**

—Joint family—Trade—Heritable asset.

———In Hindu Law a business is a distinct heritable asset. Where a Hindu dies leaving a business it descends like other heritable property to his heirs. (*Addison, J.*). JOTI PERSHAD *v.* HIRA LAL. **117 I.C. 911=11 L.L.J. 233= A.I.R. 1929 Lah. 559.**

—Joint family—Trade—Liability of members.

———*Adult member merely taking active part—Not a partner—No personal liability.*

The mere fact that an adult member of a Hindu family takes an active share in the family business without any other evidence of a consensual act on his part will not create any relationship other than that of members of a Hindu joint family trading together. Thus he cannot be said to be a partner so as to be personally liable for debts incurred in the business. The creditor's remedy is in such a case confined to the family assets invested in the business: 41 Mad. 1, *Ref.* (*Coutts-Trotter, C. J. and Ramesam, J.*). BALA VENKATA SITHARAMA CHETTIAR *v.* SIVAGURUNATHA CHETTIAR. **1930 M.W.N. 437.**

See also **1930 M.W.N. 371.**

—Joint family—Trade—Minor members.

———Whole joint family property is liable for ancestral family business—But minor member is not personally liable nor his self-acquired property: A. I. R. 1924 All. 379 and 34 Bom. 72, *Rel. on.* (*Sulaiman and Kendall, JJ.*). GAURI SHANKAR *v.* KESHAB DEO. **114 I.C. 881=1929 A.L.J. 204= A.I.R. 1929 All. 148.**

———*Acts of manager are binding on minor members, if they are incidental to the family business such as money-lending or buying or selling immovable property—What are incidental acts.*

Where a minor is a member of a joint Hindu family and as such entitled to a share in an ancestral trade, the manager of the family can, so long as it is beneficial to the minor, continue the trade on the minor's behalf. Minor members of the family are bound by the acts of the manager which are necessarily incident to and flowing out of the carrying out of such trade. An ancestral trade, like other Hindu property will descend upon the members of a Hindu undivided family and such family can by its managers enter into co-partnership with a stranger. The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Though such power of the manager for an infant heir to charge an estate not his, is under Hindu Law, a limited and qualified power; it can only be exercised rightly

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in a case of need, or for the benefit of the estate. Where a business like money-lending has to be carried on in the interests of the family as a whole, the managing members may properly be entrusted with the power of making contracts, giving receipts and compromising or discharging claims ordinarily incidental to the business. Without a general power of that sort, it would be impossible for the business to be carried on at all. Where the family trade is that of dealing in immovable properties it would undoubtedly be an act necessarily incidental to the carrying on of such trade to sell property which had been purchased for the purpose of sale. Even if the general business of a family be not that of dealing in property but lending money on mortgages and if in the course of such business the family had to purchase properties in satisfaction of their debts in order to avoid loss, it would again be an act incidental to the carrying on of such trade to sell such property and convert it into cash when a favourable opportunity offers itself to the manager: 1 B.H.C. App. 51; 34 Bom. 72; 33 All. 272 (P.C.); 6 M.I.A. 393 (P.C.); 20 C.W.N. 645; 20 W.R. 38; 3 N. W. P. H. C. 4; 32 Bom. 577; 28 C. L. J. 250; (1912) M. W. N. 167; (1918) M. W. N. 892; 12 A. L. J. 641; 42 All. 559; 39 C.L.J. 256 (P.C.) and 39 All.437 (P.C.), *Discussed*. (*Rupchand Bilaram, A. J. C.*). LAKHMICHAND ISARDAS *v.* FIRM OF KHUSHALDAS MANGATRAM.

88 I.C. 116=18 S.L.R. 230= A.I.R. 1925 Sind 330.

———*Trade debts bind Minor's share also.*

Where an accredited agent of the family, who carries on a business on behalf of the family, contracts debts for purposes of the trade, the purpose for which he contracts the debt is a family purpose because the trade is a family concern and the creditors are entitled to go against the whole of the family property and a minor member is bound inasmuch as the debt is borrowed for a family purpose. (*Spencer and Devadoss, JJ.*). SUBBARAYA MUDALI *v.* THANGAVELU MUDALI.

72 I. C. 815=A.I.R. 1924 Mad. 33=45 M.L.J. 44.

———Under Hindu Law a joint family which carries on a trade handed down from its ancestors becomes a trading family. In such a family the shares of the minor co-parceners in the family property are liable for debts contracted by the managing member for the purposes of the family trade. (*Scott-Smith and Leslie Jones, JJ.*). DAYAL SINGH *v.* DAHAL SINGH. **60 I.C. 610 (Lah.).**

—Joint family—Trade—New business.

———*New business—Acquiescence by adult co-parceners in—Mortgage therefor is binding on all.*

Where the manager of a Hindu joint family started a groundnut business with the family funds and carried it on with the assistance and concurrence of the only other adult member of the joint family who when he became the manager carried on the business and mortgaged the family properties for debts incurred in that business,

Held, that in the absence of evidence that the business was their separate business the mortgage would be binding on the interest of the other co-parceners, including minor members, in the joint family property : 51 I.C. 597 ; A.I.R. 1922 P. C. 237 and A.I.R. 1922 P.C. 397, *Dist.* (*Coutts-Trotter, C.J. and Madhavan Nair, J.*). LAKSHMIAH *v.* OFFICIAL ASSIGNEE OF MADRAS. **A.I.R. 1930 Mad. 776.**

———Debt by manager for trade started by him does not bind co-parceners unless perhaps its profits are enjoyed by co-parceners. (*Ramesam and*

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Venkatasubba Rao, JJ.). VENKATASWAMI NAICKER *v.* PALANISWAMI CHETTIAR. **117 I. C. 716= 52 Mad. 227=28 M. L. W. 762= A.I.R. 1929 Mad. 153=56 M. L. J. 380.**

———*Business started by Hindu Manager is not ancestral business—Use of minor's share in trade cannot make minor a partner.*

A business started by a Hindu manager of a coparcenary is not an ancestral business in which his minor sons are interested, even if it be started out of ancestral funds. The trade must be ancestral or at any rate it must be a trade in which all the members of a joint family have interest ; merely by using a minor's share in trade a father or other manager cannot make the minor a partner and liable for trade debts : 34 Bom. 72, *Rel. on.* (*Barlee, J.C. and Kalumal, A.J.C.*). THAKURDAS *v.* TOPANDAS. **120 I. C. 499=A.I.R. 1929 Sind 217.**

———Ancestral property cannot be transferred to raise money to start or carry on a new business even for family benefit. [But see A. I. R. 1928 All. 454 (F.B.).]

A karta is not to be allowed to involve the joint ancestral property in the risk of loss through business ventures. (*Sen and Weir, JJ.*). PARSOTAM NARAIN *v.* BENARES BANK LTD.

111 I. C. 694=A.I R. 1929 All. 59.

———*New business by father is ancestral as against sons.*

A Hindu father by starting a business with the aid of family funds can make that a family business. In such a case an alienation made by the father, for raising funds for *carrying on that business* is binding upon the son, on the ground that it was for legal necessity.

A person had an extensive ancestral money-lending business. He started a new business in cotton trading and mortgaged certain property of the family to carry on that business,

Held, that the business started by the father was an ancestral trade as against his sons in the sense that the father is an ancestor, though it was not an ancestral trade in the hands of the father himself. The mortgage debt incurred for carrying on that trade was for legal necessity and therefore binding on the sons: A.I.R. 1924 Mad. 791 ; A.I.R. 1927 Mad. 792 ; 41 Mad. 824 ; A.I.R. 1924 All. 379, *Rel. on* ; 29 C.L.J. 280 ; 6 M.L.W. 417 ; A.I.R. 1927 Mad. 53 ; A.I.R. 1922 Mad. 236 ; 42 Mad. 761 ; (1928) M. W. N. 576 ; 6 C. W. N. 429 and A.I.R. 1922 P. C. 397, *Ref.* (*Ramesam and Venkatasubba Rao, JJ.*). VENKATASAMI NAICKER *v.* PALANISWAMI CHETTIAR. **117 I. C. 716=52 Mad. 227= 28 M.L.W. 762=A.I.R. 1929 Mad. 153= 56 M.L.J. 380.**

———*New business—What is—Test is, if particular enterprise is not within* kulachara.

Too narrow a construction should not be allowed to be placed on such expressions as "family trade or business". With changes of civilizations and conditions what should be applied is not a rigid rule of law but the principle on which it is based.

If a family business should be found to have consisted in the purchase and sales of one commodity, purchase and sale of another commodity should not be held to be outside the scope of the family business. Generally speaking, each case will have to be determined only with regard to its particular facts. The question to be determined in each case should be whether having regard to the recognised business, profession, means of livelihood or what is called *kulachara* of the family, the

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particular enterprise or embarking was only within the reasonable limits of the exercise thereof or really having regard to its nature or extent, a new speculative enterprise.

Where the family business had been one of purchase and sale of piecegoods, the mere circumstance that the father ceased for some reason to carry on such business for a few years before his death is not sufficient to make a similar business started by the son sometime afterwards any the less a family business: 41 Mad. 824, *Appr.* (*Coutts-Trotter, C.J. and Srinivasa Aiyangar, J.*). DAMODHARAM CHETTY *v.* BANSILAL ABURCHAND. **111 I.C. 297=51 Mad. 711=28 M.L.W. 521=A.I.R. 1928 Mad. 566=55 M.L.J. 471.**

———The manager of a Mitakshara family has no authority to start a new business and he cannot alienate family property in order to raise money for the purposes of the business : A.I.R. 1928 All. 403, *Foll.* ; A.I.R. 1922 P. C. 237, *Expl.* (*Lindsay and Sulaiman, JJ.*). RATTAN CHAND *v.* RAM KISHAN MURARJI. **114 I. C. 743=26 A.L.J. 777=A.I.R. 1928 All. 447.**

———*Business similar in nature to family business is not a new venture.*

It has no doubt been settled that in the case of joint Hindu family it is not open to a member to carry on a new venture so as to make his other co-parceners liable for any loss in that venture. But where for example a family lives by entering into contracts and making profits therefrom, it cannot be said that because a contract entered into at one stage is a new venture in the sense that such a contract was not taken up before, it makes the contract a new venture in the sense that the other members are not liable. The question often is the difference in degree or the difference in kind, and so long as the business is a business which is similar in nature it cannot be said that the business is a new venture which could not bind the other members of the family. (*Kumaraswami Sastri, J.*). NARAYANA SAH *v.* SANKARA SAH. **99 I.C. 377=24 M.L.W. 621=A.I.R. 1927 Mad. 53=51 M.L.J. 621.**

———*Manager cannot commence new trade without consent of adult co-parceners.*

Where the manager of a Hindu family enters into illegal transactions without the consent of other co parceners, he cannot saddle the family with the losses incurred therein : and where the managing co-parcener without the concurrence of the adult co-parceners living at the time commences a new trade or business, the trade or business is not binding on the family unless it is proved that they have acquiesced in the transaction he having no power to start it. (*Spencer and Kumaraswami Sastri, JJ.*). TAMMIREDDI *v.* GANGIREDDI. **70 I.C. 337=45 Mad. 281=16 M.L.W. 55=30 M.L.T. 323=A.I.R. 1922 Mad. 236=42 M.L.J. 570.**

—Joint family—Trade—Partnership by one co-parcener.

———*Other co-parceners are not necessary parties to a suit for dissolution.*

Where a member of a joint Hindu family enters into a partnership, he might be representing the family of which he may be a member and may as such be accountable to the other members of the family ; but so far as other parties to the deed of partnership are concerned, they must confine themselves to the terms of the deed itself and cannot be permitted to travel beyond it by raising a plea that his brother, a person not party to the said deed, should have been impleaded in a suit for dissolution of partnership. (*Tek Chand and Agha Haidar, JJ.*). MANOHAR LAL *v.* RAM RICHHPAL. **A.I.R. 1930 Lah. 655.**

HINDU LAW — Joint family—Trade—Whether joint or separate.

—Joint family—Trade—Position of members.

———Members are in the position of partners in regard to other persons dealing with the business —Acknowledgment of liability by a member in usual course of business binds other members and extends period of limitation : 10 All. 418, *Foll.*; 32 All. 51, *Dist.* (*Bennet, J.*). DEBI DAYAL *v.* BALDEO PRASAD. **111 I. C. 143=50 All. 982=26 A. L. J. 1036=A. I. R. 1928 All. 491.**

—Joint family—Trade—Presumption.

———The mere fact that proprietors of several firms are members of a Hindu family does not necessarily raise a presumption that the business of those firms is a joint business : 27 Bom. 157, *Rel. on.* (*Bhide, J.*). HEM SINGH SANT SINGH *v.* NARAIN SINGH. **A.I.R. 1929 Lah. 772.**

—Joint family—Trade—Separate business.

———Where the family was not a trading family and the family funds were not contributed towards the business which was carried on in the individual *Vilasam* of one of the members,

Held, that the other members of the family cannot be held liable for the debts of the business. (*Kumaraswami Sastri and Pakenham Walsh, JJ.*). CHOKKALINGAM PILLAI *v.* PICHAPPA CHETEIAR. **1929 M.W.N. 847.**

—Joint family—Trade—Whether joint or separate.

———The question whether a particular trade carried on by a manager of joint family is joint family trade or not, is essentially one which should be decided mainly on evidence in each case : 51 I.C. 597; A.I.R. 1922 P.C. 237 and A.I.R. 1922 P. C. 397, *Dist.*; 36 I. C. 787, *Ref.* (*Coutts-Trotter, C.J. and Madhavan Nair, J.*). LAKSHMIAH *v.* OFFICIAL ASSIGNEE OF MADRAS. **A. I. R. 1930 Mad. 776.**

———*Firm is joint if members are undivided and family funds are expended for the business.*

The mere circumstances that some of the co-parceners in the family are carrying on a certain business does not make the business joint family business, but where the evidence makes it clear that the co-parceners are undivided, that the joint family assets are devoted to finance the business of the firm, and that all the co-parceners take more or less an active part in the management of that business, the conclusion that the business in question is a joint family business will be justified. (*De Sousa, A. J. C.*). DETARAM *v.* VISHINDAS. **105 I. C. 854=23 S. L. R. 54=A.I.R. 1928 Sind 57.**

———Business started by one member, but in which other members also worked without salary and maintaining themselves partly by means of funds provided by family property is a joint property and not self acquisition of the promoting member. (*Kincaid, J. C. and Lobo, A. J. C.*). JETHANAND UDHAVDAS *v.* KEWALRAM. **97 I.C. 505=20 S.L.R. 295=A.I.R. 1926 Sind 216.**

—Maintenance.

Amount of.

Arrears of.

Attachment of right.

Charge.

HINDU LAW — Maintenance — Amount of — Alteration in.

Claim for.
Decree.
Deed.
Liability.
Persons entitled to.
Suit for.
Transfer of family property.
Widow.
Will.
Miscellaneous.

—Maintenance—Amount of—Alteration in.

———*Rate incorporated in compromise decree—When Court can alter.*

Odgers, J.—Where the rate of maintenance has been made the subject of a compromise which has been incorporated in a decree, a Court in a subsequent suit to enforce the charge has no power, without consent or overriding the decree, to alter the rate of maintenance. (*Phillips, Offg. C.J., Odgers and Srinivasa Ayyangar, JJ.*). THIMMANAYANIM *v.* VENKATA NAYANIM.
109 I.C. 872=27 M.L.W. 544=A.I.R. 1928 Mad. 713 (F. B.).

———*Change of circumstances—Amount can be altered.*

The amount of maintenance, whether it is fixed by decree or by agreement, is liable to be increased or diminished, if there has been such a change of circumstances as would justify a change in the rate. Thus the rate of maintenance may be enhanced, if the income or the estate has materially increased or there has been a material increase in the cost of living. (*Jai Lal, J.*). SANSAR CHAND *v.* MT. SHANTI DEVI. **96 I.C. 255=8 L.L.J. 355=27 P.L.R. 691=A.I.R. 1926 Lah. 539.**

———A maintenance allowance is liable to be increased or decreased by change of circumstances: 27 M.L.J. 656, *Foll.* (*Spencer, J.*). NARASAMMA *v.* VENKATARAJU. **93 I.C. 686=23 M.L.W. 364=A.I.R. 1926 Mad. 534.**

———*Enhancement in suit.*

The amount of maintenance allowance to a Hindu widow whether under agreement or under a decree is liable to be enhanced in a suit brought for the purpose. (*Kincaid, J.C. and Lobo, A.J.C.*). KEWALMAL *v.* ISRIBAI. **93 I.C. 353=A.I.R. 1926 Sind. 135.**

—Maintenance—Amount of—Appellate Court.

———*When can interfere.*

When determining the amount of maintenance payable to a Hindu widow an appellate Court should be extremely reluctant to interfere with the decision of a Court below and should hesitate to do so unless there are some special circumstances which indicate that there has been a miscarriage in the way in which the amount of maintenance has been arrived at: L.R. 5 I.A. 55 (P.C.), *Foll.*

Where the lower Court took into consideration in fixing the amount of maintenance the value of the estate, the position and status of the lady's deceased husband, her position and status and the expenses which she must be expected to meet in her state of widowhood,

Held, that the question was considered in a practical and reasonable manner and there was no ground for interference. (*Stuart, C.J. and Raza, J.*). SURAT SINGH *v.* MT. BITTAN KUAR. **102 I.C. 17=4 O.W.N. 419=A.I.R. 1927 Oudh 531.**

—Maintenance—Amount of—Estimation.

———Direction in husband's will allotting a fixed sum as maintenance without bequeathing specific

HINDU LAW — Maintenance—Amount of—How determined.

property in her favour is merely indicative of husband's estimate. It is not obligatory upon Courts to award exactly that amount in a suit for maintenance by the widow. (*Spencer, J.*). NARASAMMA *v.* VENKATARAJU. **93 I.C. 686=23 M.L.W. 364=A.I.R. 1926 Mad. 534.**

—Maintenance—Amount of—How determined.

———*Private funds not to be taken into account if family income is sufficient.*

Under the Hindu Law as administered in Madras Presidency in cases where a joint Hindu family possesses properties the income from which is not only enough but more than enough for the purpose of paying maintenance to all the members depending upon the same, the fact that one is in possession of private funds which also yield an income should not be taken into account for such purposes: 38 Mad. 153, *Expl.*; 2 Bom. 573, *Not appr.*; 21 All. 232, *Doubted*; 4 Mad. 171; 5 Mad. 71; 41 Mad. 1075 and 36 Mad. 203, *Ref.* (*Ananthakrishna Ayyar, J.*). KETHIREDDI KODANDARAMI REDDI *v.* KETHIREDDI CHENCHAMMA. **A.I.R. 1930 Mad. 479.**

———*Facts to be considered enunciated.*

Maintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the condition and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being had to the scale and mode of living, and to the age, habit, wants and class of life of the parties. It is out of a great category of circumstances, small in themselves that a safe and reasonable induction is to be made by a Court of law in arriving at a fixed sum. The discretion exercised in making this induction when agreed to by two Indian Courts or even by one, should not be lightly interfered with: 5 I.A. 55, *Rel. on.* (*Lord Shaw.*) MT. EKRADESHWARI BAHUASIN *v.* HOMESHWAR SINGH. **116 I.C. 409=1929 M.W.N. 468=8 Pat. 840=56 I.A. 182=6 O.W.N. 526=30 M.L.W. 1=49 C.L.J. 579=31 Bom.L.R. 816=10 P.L.T. 345=1929 A.L.J. 695=33 C.W.N. 637=A.I. R. 1929 P.C. 128=57 M.L.J. 50 (P.C.).**

———*Scale must be suited to widow's husband's position in life.*

The test in determining maintenance allowance to a Hindu widow is whether the scale is suited to her husband's position in life. No doubt there may be circumstances in which the past mode of life of the widow may have been demonstrably on a penurious and miserly scale, or on the other hand, on a quite extravagant scale, having regard to the total income of the husband, but the general principle that can be applied is that the sum awarded must enable the lady to live as consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's life time. (*Lord Shaw.*) MT. EKRADESHWARI BAHUASIN *v.* HOMESHWAR SINGH. **116 I.C. 409=1929 M.W.N. 468=8 Pat. 840=56 I.A. 182=6 O.W.N. 526=30 M.L.W. 1=49 C.L.J. 579=31 Bom. L.R. 816=10 P.L.T. 345=1929 A.L.J. 695=33 C.W.N. 637=A. I. R. 1929 P.C. 128=57 M.L.J. 50 (P.C.).**

———*Subsistence includes residence.*

An appropriate test for what a Hindu woman should be allowed as subsistence is to be found

HINDU LAW — Maintenance—Amount of—How determined.

under the ancient Hindu texts as adapted to modern circumstances. Subsistence or maintenance must include residence and should not be confined to food and raiment: A.I.R. 1926 P.C. 73, *Ref.* (*Marten, C. J. and Patkar, J.*). CHARANDAS VASSONJI *v.* NAGUBAI MANGLOREKAR.

31 Bom. L.R. 1128=A.I.R. 1929 Bom. 452.

———*Concubine—Maintenance for.*

The amount of maintenance to be awarded to a concubine in continuous keeping covers the expenses for her establishment and clothing. The value of the property is not the sole criterion, but regard must be had to the extent of property to the manner of the woman's life and the way in which she was treated by her paramour. (*Marten, C. J. and Patkar, J.*). CHARANDAS VASSONJI *v.* NAGUBAI MANGLOREKAR. **31 Bom. L.R. 1128= A. I. R. 1929 Bom. 452.**

———*Illegitimate son of sudra—Not mere compassionate allowance to be allowed.*

The illegitimate son of a Sudra, claiming maintenance, is not only entitled to mere compassionate maintenance, and if he is accustomed to a certain mode of life, the Court should not be niggardly in determining the quantum of maintenance, provided the amonnt of maintenance awarded does not work hardship upon the family: 12 C. L. J. 173; 17 Mad. 160; 34 Mad. 68; A.I.R. 1926 Mad. 261; 12 M.I.A. 203, *Ref.*; 27 Mad. 32, *Dist.* (*Devadoss and Walsh, JJ.*). RATHINASABAPATHY ODAYAR *v.* GOPALA ODAYAR. **121 I.C. 126= 29 M.L.W. 696=A.I.R. 1929 Mad. 545= 56 M. L. J. 673.**

———Maintenance of abandoned wife—She is entitled to be kept in the manner she is accustomed to, if family can afford, without injustice to the husband and to the family. (*Phillips and Odgers, JJ.*). GOPALA PATTAR *v.* PARVATHI AMMAL. **117 I.C. 785=A. I. R. 1929 Mad. 47.**

———*Widow—Rate of maintenance should not exceed the income derivable from her husband's share—Rate should be such as to enable her to live comfortably according to her social status.*

No hard or fast rule can be laid down as to what particular fraction of income derivable from her husband's share in the family should be awarded as maintenance to the widow. All that can be stated is that in no event she can be allowed a rate of maintenance which would exceed the income from her husband's share of the family properties. Having due regard to that limit, the circumstances of each case have to be taken into consideration in fixing the rate of maintenance. The rate should be so fixed as to enable the widow to live comfortably according to the standard of living usually adopted by the members of the families occupying a social status similar to that of her husband. (*Coutts-Trotter, C. J. and Sundaram Chetty, J.*). PANCHAKSHARA *v.* PATTAMMAL. **39 M L.T. 32= A.I.R. 1927 Mad. 865.**

———*Principles—Amount sufficient for comfort enjoyed during husband's life-time consistent with the similar rights of other members of the family to maintenance should be fixed.*

The principle which should govern the Court, in fixing the maintenance of a Hindu widow is first to look to the mode of life of the family during her husband's lifetime and the amount must be fixed so as to be sufficient to allow to the widow as far as may be consistently with the position of the widow in something like

HINDU LAW — Maintenance — Amount of — Procedure.

the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime. Then to see what the husband's state is and also to see how far the estate is sufficient to supply her with the maintenance on this scale without injustice to the other members of the family who have also their rights to maintenance out of the estate, like hers. (*Kajiji, J.*). BAI PRATAPGAVARI *v.* MULSHANKAR PREMCHAND. **80 I.C. 173= 26 Bom.L.R. 269=A.I.R. 1924 Bom. 353.**

———*Circumstances to be taken into consideration—What are.*

No hard and fast rule can be laid down that a widow is entitled to a particular fraction of the income. The circumstances of each case must be considered, such as the value of the estate and its income, the position and status of the deceased husband and his widow, the expense involved by the religious and other duties which she has to discharge and so forth, and the fact that she has been given a separate property for her maintenance if such be the case. (*Woodroffe and Walmsley, JJ.*). KRISHNA BHAMINI DASI *v.* BROJA MOHINI DASI. **66 I.C. 38=25 C.W.N. 403= A.I.R. 1921 Cal. 617.**

—Maintenance—Amount of—Objections to.

———*Widow—Expenses of vritham—Question as to allotment was not allowed to be challenged in appeal for the first time.*

Where it is found that of the several vrithams and ceremonies which a widow is enjoined by the Shastras to perform, only one has to be performed by her at a comparatively late stage in her lifetime, but all the other ceremonies may be performed at any time she likes, the contention that the amount for these ceremonies should be made payable only when such vritham or ceremony is about to be performed and that the direction ordering a consolidated amount to be paid immediately for all of them is unwarranted, should not be entertained for the first time in appeal and especially when the amount which may have to be allocated for it, will, at the most, be a small amount. (*Wallace and Thiruvenkatachariar, JJ.*). SRINIVASA AYYAR *v.* LAKSHMI AMMAL. **108 I.C. 712=28 M.L.W. 328= A.I.R. 1928 Mad. 216=54 M.L.J. 530.**

—Maintenance—Amount of—Procedure.

———*Application for enhancement.*

In a suit by widow for maintenance defendants were likely to get accretion to their property. In decreeing amount of maintenance High Court allowed widow to apply for enhancement in case accretion took place. Privy Council approved of the procedure to one by separate suit. (*Lord Shaw.*) MT. EKRADESHWARI BAHUASIN *v.* HOMESHWAR SINGH. **116 I.C. 409=1929 M.W.N. 468= 8 Pat. 840=56 I.A. 182=6 O.W.N. 526= 30 M.L.W. 1=49 C.L.J. 579= 31 Bom. L.R. 816=10 P.L.T. 345= 1929 A.L.J. 695=33 C.W.N. 637= A.I.R. 1929 P.C. 128=57 M.L.J. 50 (P.C.).**

———*Reference to Commissioner not necessary.*

The question of determining the amount of bare maintenance need not be referred to the Commissioner. It can and should ordinarily be fixed by a rough and ready reference to the general condition of the family as disclosed in the evidence. (*Shah, Ag. C. J. and Kincaid, J.*). BHIKUBAI YESHWANTRAO *v.* HARIBA SWALARAM. **94 I.C. 665= 49 Bom. 459=27 Bom. L.R. 13= A.I.R. 1925 Bom. 153.**

HINDU LAW — Maintenance — Amount of — Quantum.

—Maintenance—Amount of—Quantum.

———The fact that a widow has got jewels of her own does not affect the *quantum* of maintenance, which would otherwise be fixed having regard to the extent of her husband's property. (*Kumaraswami Sastri, J.*). SHYAMA BHAI *v.* PURUSHOTHAMADOSS. **90 I.C. 124=21 M.L.W. 551=A.I.R. 1925 Mad. 645.**

———Quantum *of maintenance should be decided in suit itself.*

In all cases where a right to maintenance has been allowed, the *quantum* of maintenance should be decided in the suit itself even though the parties may not have in the first instance provided the Court with the materials. The parties entitled to maintenance who are generally females should not be left to separate proceedings. (*Macleod, C. J. and Crump, J.*). NILAWA IRAYA MATHAPATI *v.* REVANSHIDAYA SHIDLINGAYA. **79 I.C. 208= A.I.R. 1923 Bom. 419.**

—Maintenance—Amount of—Rate.

———No widow, whether single or joint with her co-widow, is entitled to claim any specific share of the income which is attributable to her husband's shares. All that she is entitled to is an allowance sufficient for her comfort.

Where out of three widows claiming maintenance two were wives of one deceased co-parcener and the third was the wife of another deceased co-parcener,

Held, that there is no reason to differentiate between the three claimants as regards the rate of maintenance. (*Wallace and Thiruvenkatachariar, JJ.*). SRINIVASA AYYAR *v.* LAKSHMI AMMAL. **108 I.C. 712=28 M.L.W. 328= A.I.R. 1928 Mad. 216=54 M.L.J. 530.**

———*Agreement fixing particular rate does not bar subsequent claim for higher rate.*

In the absence of any undertaking in an agreement by a maintenance holder under the Hindu Law to get a specific rate for all time, the Court is not prevented by such agreement from giving a higher rate of maintenance to such a holder when the circumstances warrant such a change: 14 M. L. J. 339 and A. I. R. 1924 Mad. 687, *Rel. on.* (*Devadoss, J.*). CHINNAMMAL *v.* VENKATASAMI NAICKEN. **101 I.C. 752=A.I.R. 1927 Mad. 703.**

—Maintenance—Arrears of.

———*Widow not bound to reside, with her husband's relatives—She is entitled to maintenance from time of change of residence.*

A Hindu widow is not bound to reside with the relatives of her husband; the relatives of her husband have no right to compel her to live with them; and she does not forfeit her right to property or maintenance merely on account of her going and residing with her family, or leaving her husband's residence from any other cause than unchaste or improper purposes: (1873) I.A. Supp. 203 (P.C.), *Foll.*

As a general rule, a widow cannot claim arrears of maintenance for the period she was living in her husband's family unless she was kept there under circumstances of extreme penury and oppression. She, however, is entitled to arrears from the time she changes her residence, and under no circumstances can the right be post-dated from the institution of the suit for maintenance. (*Lord Shaw.*) MT. EKRADESHWARI BAHUASIN SAHEBA *v.* HOMESHWAR SINGH. **116 I. C. 409= 33 C.W.N. 637=1929 A.L.J. 695=10 P.L.T. 345= 31 Bom. L.R. 816=49 C.L.J. 579=30 M.L.W. 1= 6 O.W.N. 526=56 I.A. 182= 1929 M.W.N. 468=8 Pat. 840= A.I.R. 1929 P.C. 128=57 M.L.J. 50 (P.C.).**

HINDU LAW—Maintenance—Arrears of.

———It is not necessary that there should be a distinct demand in cases of maintenance in order to sustain a claim for arrears: 36 Bom. 131, *Rel. on.* (*Devadoss and Walsh, JJ.*). RATHINASABAPATHY ODAYAR *v.* GOPALA ODAYAR. **121 I.C. 126= 29 M.L.W. 696=A.I.R. 1929 Mad. 545= 56 M.L.J. 673.**

———Widow residing with her brother during the period for which arrears of maintenance is claimed —Claim cannot be disallowed. (*B. B. Ghose and Roy, JJ.*). ROHINIKUMAR PAL *v.* KUSUM KAMINI PAL. **105 I. C. 725=55 Cal. 488= 32 C.W.N. 48=A.I.R. 1928 Cal. 196.**

———*Arrears even for 8 years can be claimed.*

In a joint family, a widow is entitled to claim arrears of maintenance even for 8 years and the Courts will not disallow the claim, unless abandonment or waiver is expressed or can be implied from the circumstances. (*Phillips, Offg. C.J. and Reilly, J.*). KRISHNAMACHARIAR *v.* CHELLAMMAL. **107 I. C. 641=A.I.R. 1928 Mad. 561.**

———*Widow—Husband dead 26 years before—No demand prior to 3 years of suit—Court can cut down period for which arrears are granted.*

If the defendants want to plead that the plaintiff is disentitled to recover any arrears of maintenance they must plead and prove the circumstances amounting to an abandonment. But it does not follow that because they have not pleaded such facts the plaintiff is entitled to all the arrears she claims especially in a case where her husband died 26 years before suit and when it does not appear that any demand was made prior to three years before suit. In these circumstances a discretion remains with the Courts while not disallowing totally the arrears claimed by the plaintiff, to cut down the period for which arrears may be granted. In such a case, if the plaintiff is anxious to get the whole of the amount it is for her to adduce evidence that she was in need of those arrears: 24 Mad. 147 (P.C.); 43 Bom. 66, *Ref. to.* (*Ramesam, J.*). LAKSHMAMMA *v.* VENKATASUBIAH. **87 I.C. 210= 1925 M. W. N. 213= A.I.R. 1925 Mad. 795=48 M.L.J. 266.**

———*Wife—Compelled to live separately—Husband and his heirs are liable for arrears of maintenance—Husband's obligation to maintain wife—Nature of.*

The plaintiff was the wife of a Zamindar. The Zamindar fell under the influence of a concubine and once during his absence at another place, poison was found in the food meant for the wife. Thereupon the wife left the Zamindar's house to live with her parents. The Zamindar harassed her with false criminal complaints, which ended in failure. Afterwards the wife endeavoured to persuade her husband to take her back and allow her to live with him. But he always put her off saying that he would make some arrangement for her. Then after having lived away from him for nearly 23 years, the wife sued him for arrears of maintenance for 12 years (the maximum period allowed by the Limitation Act. Art. 128.)

Held, that the plaintiff was justified in living separately from her husband and that the delay in filing the suit for maintenance was due to her having been ever hopeful of being taken back by her husband one day.

Held, further that the death of her husband pending the suit did not deprive her of her rights to maintenance and that she could enforce the right against her husband's heirs at law.

Per *Spencer, Offg. C.J.*—The obligation of a husband to maintain his wife is one arising out of the

HINDU LAW — Maintenance — Attachment of right of.

status of marriage. It is a liability created by the Hindu Law. in respect of the jural relations of a Hindu family. When there is no contract between the parties to a marriage, as among Hindus, a suit for maintenance is not a suit based upon contract, but it is a suit arising out of a civil relation resembling that of a contract, which is specially provided for in Art. 128 of the Limitation Act.

Per *Srinivasa Aiyangar, J.*—The principle of Civil Law "*actio personalis moritur cum persona*" does not apply to the right of a Hindu wife against her husband for maintenance as there is no reason for extending the rule to an action which is based on an obligation arising out of the status. The true view of the Hindu Law would seem to be that the wives of co parceners are also members of the joint family, though they may not be entitled to share in the estate of the family, or to enforce any partition and as such members the obligation of the family, and of its estate to maintain them cannot be doubted. Though the Hindu Law imposes an obligation on the Hindu husband to support his wife, without any reference to any property or share possessed by him, even as it imposes similar obligations on sons to maintain their mother and father, yet when the joint family is possessed of property, a claim by a wife against her husband need not be regarded merely as a suit for enforcement of any personal obligation, but may well be regarded as a suit against the family itself, represented by her husband, through whom alone so long as he is alive she has to obtain the relief. On his death the true legal representatives in the action would be the surviving co-parceners of the family or the personal legal representatives of the deceased husband. The arrears of maintenance due and payable to a wife by her husband can also be held to be a debt within the meaning of Hindu Law; which has regard only to undischarged obligations and to which the distinction between debts and damages is foreign. (*Spencer, Offg. C.J. and Srinivasa Aiyangar, J.*). LAKSHMI DEVI AMMA *v.* NAGANNA NAIDU.

87 I. C. 571=21 M. L. W. 461=
A.I.R. 1925 Mad. 757.

—Maintenance—Attachment of right of.

———Where husband's property is attached under Ss. 87 and 88, Cr. P. C., the wife's right of maintenance will be defeated by such attachment as such right of maintenance is only a personal obligation. (*Addison and Bhide, JJ.*). DURGI *v.* SECY. OF STATE.

117 I.C. 668=
10 Lah. 263=30 P.L.R. 384=
A. I. R. 1929 Lah. 528.

—Maintenance—Charge.

———Maintenance of an abandoned wife can be made a charge upon the husband's share.

In this respect it is difficult to make any distinction between the position of a widow and that of an abandoned wife: 27 Mad. 45, *Expl.*; 9 Bom. H. C. R. 283; A. I. R. 1927 Mad. 1187 and A.I.R. 1925 Mad. 757, *Foll.* (*Phillips and Odgers, JJ.*). GOPALA PATTAR *v.* PARVATHI AMMAL.

117 I.C. 785=A.I.R. 1929 Mad. 47.

———Maintenance charged by decree takes precedence over subsequent purchaser, in execution of money-decree binding on estate: 43 Mad. 800 and 2 Bom. 494, *Foll.* (*Phillips, Offg. C.J., Odgers and Srinivasa Ayyangar, JJ.*). THIMMANAYANIM *v.* VENKATAPPA NAYANIM.

109 I.C. 872=
27 M.L.W. 544=A.I.R. 1928 Mad. 713 (F.B.).

———*When charge can be made on the whole property.*

HINDU LAW—Maintenance—Claim for.

No doubt generally speaking if the yield from what may be regarded as the possible share of the deceased co-parcener in the property should be the maximum of maintenance allowable to his widows the payment of such maintenance might reasonably be charged on such interest alone. But if there are any special circumstances, there is no reason why the payment of such maintenance should not be charged on the entire property in the hands of the co-parcener: 27 Mad. 45, *Foll.* (*Srinivasa Ayyangar and Reilly, JJ.*). KARUPPA *v.* CHINNA NALLAMMAL.

1927 M.W.N. 775=
A. I. R. 1927 Mad. 1189.

———The right of a Hindu widow to maintenance is not a charge on property, and she cannot retain possession of property in lieu of maintenance. (*Raza, J.*). MT. PHULJHARI *v.* HAR PRASAD.

93 I. C. 378=1 Luck. 318=3 O. W. N. 181=
13 O. L. J. 548=A.I.R. 1926 Oudh 338.

———*Charge by decree of Court takes precedence over debts.*

Generally, in the administration of a Hindu's estate binding debts would take precedence over mere claims for maintenance or residence on the part of the female members of the family. but if by the time a debt is sought to be recovered from a family property a claim for maintenance has by decree of Court been made a charge on that property, the charge will take precedence over the debt: 27 Mad. 45; 22 Mad. 305; 25 I. C. 759; 4 All. 296 and 5 All. 367, *Ref.* (*Oldfield and Seshagiri Aiyar, JJ.*). SOMASUNDARAM CHETTY *v.* UNNAMALAI AMMAL.

59 I.C. 398=43 Mad. 800=
28 M. L. T. 317=1920 M. W. N. 458=
12 M.L.W. 163=39 M.L.J. 179.

—Maintenance—Claim for.

———Wife leaving husband's house with her children, alleging that the husband being under the influence of a concubine was cruelly ill-treating her and had decided to give her daughters in marriage to undesirable persons—Husband instituting proceedings for the custody of the children—Wife's charges against the husband disproved in the custody proceedings—Wife living away from her husband for 23 years.

Held, that there was no real attempt to enforce a claim for maintenance or to procure a return to her husband's house during the long series of years which had elapsed prior to the bringing of this action and that the plaintiff voluntarily lived apart from her husband for a period of 23 years without justification and, therefore, the claim for maintenance must be disallowed: A.I.R. 1925 Mad. 757, *Reversed.* (*Lord Carson.*) NAGANNA NAIDU *v.* LAKSHMI DEVI AMMA GARU.

110 I C. 30=
48 C.L.J. 171=28 M.L.W. 105=
A.I.R. 1928 P.C. 187=55 M.L.J. 242 (P.C.).

———*Refusal by wife to live with husband—No separate maintenance.*

A wife, who is voluntarily living apart from her husband for no improper motive, may at any time return to her husband and claim to be maintained by him, but she cannot be held to be entitled to separate maintenance when the husband is willing to keep her in his house and she refuses to accept his offer without sufficient justification: 31 Mad. 338, *Ref.* (*Shadi Lal, C. J. and Bhide, J.*). SHER SINGH *v.* SHAM KAUR.

108 I.C. 175=
A.I.R. 1928 Lah. 502.

———*Widow—Claim arises since husband's death.*

Unless there is any waiver or abandonment of her right to maintenance by the widow she is entitled to maintenance from the death of her

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husband. Such a waiver cannot necessarily be inferred either from the fact that no formal demand was made or from the circumstance that she is living in her parental house: 15 M. L. T. 95 and 24 Mad. 147 (P.C.), *Rel. on.* (*Wallace and Thiruvenkatachariar, JJ.*). SRINIVASA AYYAR *v.* LAKSHMI AMMAL. **108 I.C. 712=28 M.L.W. 328= A.I.R. 1928 Mad. 216=54 M.L.J. 530.**

———*Wife cannot claim unless there is legal cruelty or abandonment.*

In the absence of proof of continued ill-treatment amounting in law to legal cruelty and in the absence of clear proof of abandonment on the part of the husband, the wife cannot claim separate maintenance from him. When a wife departs from husband's house, it is a part of a Hindu husband's duty to go and ask the wife to return. That the husband has married a second wife is no excuse for a wife to abandon her husband's protection or to refuse to live with him. There can be no claim to separate maintenance where the wife is not justified in living apart from her husband: 31 Mad. 338, *Foll.* (*Odgers and Curgenven, JJ.*). A. SEENAYYA REDDI *v.* A. MANGAMMA. **99 I.C. 974=A.I.R. 1927 Mad. 1159.**

———*It is a personal obligation of the husband—Debts take precedence over widow's right of maintenance.*

The maintenance of a wife by husband is a personal obligation upon him arising from the existence of the relations. It is independent of the possession of any property by the husband and it is inevitably postponed to the claims of creditors. Of course, it is postponed to any alienation of the husband's property and any attempt to create a charge in favour of the wife would *a fortiori* be postponed in the event of an alienation of the husband's property to creditors and on bankruptcy the whole of his property vests for the benefit of his creditors in the Official Assignee: 27 Mad. 45, *Foll.* (*Coutts-Trotter, C. J. and Srinivasa Iyengar, J.*). UNNAMALAI AMMAL *v.* F. W. WILSON. **103 I.C. 869=39 M.L.T. 212=A.I.R. 1927 Mad. 1187.**

———Joint family debts take precedence of a widow's right to maintenance which has not ripened into a charge. (*Venkatasubba Rao, J.*). JAMNABHAI AMMAL *v.* BALAKRISHNA. **102 I.C. 101= 39 M L.T. 64=26 M. L. W. 24= A.I.R. 1927 Mad. 1092=53 M. L. J. 176.**

———Maintenance can be claimed in administration suit but arrears must be claimed in a separate suit. (*Rutledge, C.J. and Mya Bu, J.*). C. S. MAHA SABHA *v.* ANNA SOHAN LAL. **104 I.C. 119= 6 Bur. L.J. 105=A.I.R. 1927 Rang. 256.**

———A widow cannot claim to keep a portion of the family lands against an adopted son in lieu of maintenance. (*Kotval and Prideaux, A. J. Cs.*). MT. ANNAPURNABAI *v.* RUPRAO. **78 I.C. 284= A.I.R. 1924 Nag. 319.**

—Maintenance—Decree.

———Where upon a true construction of the decree for maintenance no charge was created on the estate but only a personal decree was passed against the judgment-debtor.

Held, that after the death of the judgment-debtor the decree-holder would not be entitled to any maintenance by execution of the decree against the holders of property after the judgment-debtor. (*B.B. Ghose and Panton, JJ.*). RADHA BALLAB DAS *v.* KRISHNA PRIYASHI DASYA. **120 I.C. 705=49 C.L.J. 267=A.I.R. 1929 Cal. 423.**

———*Widow—Personal decree for arrears against co-parceners—When can be passed.*

HINDU LAW——Maintenance—Deed.

Although the co-parceners are under no personal obligation to maintain the widow of a co-parcener and their obligation springs only from their possession of the property of the family, yet if the income for any particular period has been already received by the defendants and not duly accounted for by them, there can be no serious objection to any personal decree being passed in respect of such a period. (*Wallace and Thiruvenkatachariar, JJ.*). SRINIVASA AYYAR *v.* LAKSHMI AMMAL. **108 I.C. 712=28 M L.W. 328= A.I.R. 1928 Mad. 216=54 M.L.J. 530.**

———*Illegitimate daughters—Maintenance by consent.*

Where illegitimate daughters, though not entitled to maintenance from their father's family, were given a decree for maintenance by the trial Court in order to avoid any further litigation with the consent of the opposite party but they appealed against the decree for maintenance.

Held, that it was not a consent decree, and since there was a breach of agreement on the part of the daughters, they are not entitled to maintenance. (*Phillips, Offg. C.J. and Ananthakrishna Aiyar, J.*). NAGARATHNAMMAL *v.* CHINNU SAH. **107 I.C. 419=1927 M.W.N. 750= A.I.R. 1928 Mad. 127=53 M.L.J. 861.**

———A widow's right to recieve maintenance is one of an indefinite character which, unless made a charge upon the property, is enforceable only like any other liability in respect of which no charge already exists. (*Addison, J.*). BELI RAM *v.* PREM KUER, **100 I.C. 504= A.I.R. 1927 Lah. 218.**

———*Decree is executable against other properties if charged properties are exhausted.*

Where maintenance is awarded to a Hindu widow by a decree which charged specific properties for its payment, the decree may be executed against other properties in the event of the exhaustion of the charged ones, provided that the other properties sought to be proceeded against belonged to the widow's husband. No application under O. 34, R. 6, Code of Civil procedure is requisite. (*Mullick and Bucknill, JJ.*). SHACHARI PEARI *v.* RAM KISHORI KUER. **74 I.C. 867=2 Pat. 796= A.I.R. 1924 Pat. 262.**

—Maintenance—Deed.

———*Unchastity bars claim for maintenance.*

A Hindu wife is entitled to maintenance from her husband so long as she is chaste though perhaps if having been unchaste she is penitent, she has a right to a bare subsistence. This incident of chastity attaches even where the maintenance is granted by a registered deed of annuity containing no such specific *dum casta* clause: 39 Mad. 658, *Ref.* (*Kulwant Sahay and Macpherson, JJ.*). SITA DEVI *v.* GOPAL SARAN. **111 I.C. 762=9 P.L.T. 397=A.I.R. 1928 Pat. 375.**

———The words "for ever" and "in proprietary rights" would not necessarily enlarge the scope of a maintenance grant: 23 All. 194 (P.C.); 23 All. 324 (P.C.) and 25 Bom. 563, *Rel. on.* (*Findlay, J.C. and Macnair, A.J.C.*). RAMLAL *v.* INDRARAJ SINGH. **102 I.C. 785=10 N.L.J. 146= A.I.R. 1927 Nag. 273.**

———Words "with absolute rights, etc." in maintenance deed are not to be construed in a different manner from similar words in other documents. (*Venkatasubba Rao, J.*). NARAYANASWAMY DEVAROYAR *v.* THANGAVELU PADAYACHI. **82 I.C. 67=1924 M.W.N. 571= A.I.R. 1924 Mad. 800.**

HINDU LAW—Maintenance—Liability.

—Maintenance—Liability.

———*Income from ancestral property alone bears all maintenance charges.*

The income from ancestral property alone bears all maintenance charges. Therefore, the income from Deshmukhi and Patwaripari should not be taken into consideration in fixing a person's maintenance allowance because the income from these sources is dependant on personal service. (*Subhedar, A.J.C.*). SHAMRAO *v.* CHANDRABHAGABAI.
118 I.C. 868=A.I.R. 1929 Nag. 366.

———*Widows of one branch not provided for at partition—If other branches are liable.*

Co-parceners belonging to different branches of joint family do not continue to be responsible for the maintenance of widows and of persons, who are entitled to a share belonging to another branch even though they do not make provision for them at the time of partition or obtain their consent to it : 35 Mad. 147, *Expl.* (*Rup Chand, A.J.C.*). RAMBHABAI *v.* DOONGERSI NAGJI. **116 I.C. 105= A.I.R. 1929 Sind 102.**

———*Manager is bound to maintain widow and children of deceased male member.*

A grandfather may be under no personal obligation to maintain his grandchildren, but the manager of a joint Mitakshara family is under a legal obligation to maintain all male members of the family, their wives and their children, and on the death of one of the male members he is bound to maintain his widow and his children. (*Campbell and Tek Chand, JJ.*). BHAGWAN SINGH *v.* MT. KAWALKAUR. **101 I.C. 201=8 Lah. 360= 9 L. L. J. 117=28 P. L. R. 201= A.I.R. 1927 Lah. 280.**

———*Liability to maintain wife is personal one—No charge is created on property unless declared by Court.*

The liability of the husband to maintain his wife or to provide for her maintenance is a personal one quite independent of any property in his possession. It does not form any charge on property although if he has property, charge will be given against the property : 29 Mad. 508 and 16 M. L. T. 551, *Dist.* ; 27 Mad. 45, *Rel. on.* (*Devadoss, J.*). RATTAMMA *v.* SESHACHALAM SARMA. **101 I.C. 806=1927 M.W.N. 314= A.I.R. 1927 Mad. 502=52 M.L.J. 520.**

———*Whole family property is liable.*

If the sons divide the family property after the death of the father they must make provision for the maintenance of the mother and for the maintenance of any widows of the family.

The whole of the family property would be liable for the maintenance of the mother and the other widows and apportionment between sons and step-sons cannot be made. (*Devadoss, J.*). YANDRU VEERANNA *v.* YANDRU SITAMMA. **98 I.C. 536= 1926 M.W.N. 921=A.I.R. 1927 Mad. 83.**

———*Sale to defeat daughter-in-law's right to maintenance.*

The maintenance of the widow of a pre-deceased son is a charge on the properties of her father-in-law in the hands of a genuine purchaser for consideration if the sale is made with an intention to defeat the rights of the widow and the purchaser had knowledge of her existence. (*Cuming and B. B. Ghose, JJ.*). ABU MAHOMED BARKET ALI *v.* SARASWATI DASI. **97 I.C. 194=43 C.L.J. 604= A.I.R. 1926 Cal. 1068.**

———Daughter-in-law's right against father-in-law's self-acquisition is merely moral.

HINDU LAW—Maintenance—Persons entitled to.

This being so, a widowed daughter-in-law has no sort of right or control over his alienations during his lifetime and she cannot possibly be allowed to realise her maintenance from the property which he has seen fit to sell or gift, although this doubtless has the effect of depriving the widow of her legal rights of maintenance before they are fully born, for during the father-in-law's lifetime her rights are merely in embryo, being nebulous moral rights which she cannot enforce. (*Abdul Raoof and Harrison, JJ.*). MT. BHAGWANTI *v.* THAKUR MAL. **91 I.C. 476=A.I.R. 1926 Lah. 198.**

———Heir is legally bound to maintain out of estate inherited, persons whom late proprietor was morally or legally bound to maintain.

The reason is that the estate is inherited subject to the obligation to provide for such maintenance. (*Scott-Smith and Fforde, JJ.*). MT. BHOLI BAI *v.* DWARKA DAS. **84 I.C. 168=5 Lah. 375= A.I.R. 1925 Lah. 32.**

—Maintenance—Persons entitled to.

———The term dasiputra no doubt originally meant sons of a female slave, but in Western India, at all events, it has come to mean sons by a kept mistress of one of the lower castes.

Dasiputras are entitled to maintenance during their lives out of their father's estate : 1 Bom. 97 and 4 Bom. 37 (F.B.), *Rel. on.* (*Sir George Lowndes.*) RAOJI *v.* KUNJALAL HIRALAL AGARWALA. **123 I.C. 709=34 C.W.N. 627= 51 C.L.J. 434=A. I. R. 1930 P.C. 163 (P.C.).**

———*Father-in-law gifting portion of his self-acquired property to one of his sons—Widow-daughter-in-law is entitled to maintenance out of such property.*

Father-in-law is under a moral obligation to maintain a widow of a pre-deceased son and this moral liability becomes a legal obligation in the hands of his surviving sons who inherit father's estate ; and no distinction should be drawn in this respect between property which is inherited from the father-in-law and property which is gifted by him. Thus if father-in-law gifts a portion of self-acquired property to one of his sons, daughter-in-law is entitled to maintenance out of such property : 25 Bom. 263, *Not foll.*; A.I.R. 1924 Cal. 364; 11 All. 194 and 22 Mad. 305, *Rel. on.* (*Dalal, J.*). JEOT RAM *v.* MT. LANJI. **119 I.C. 253= A.I.R. 1929 All. 751.**

———Illegitimate son of a Sudra is entitled to maintenance: A.I.R 1927 Mad. 386; 17 Mad. 160 ; 34 Mad. 68; A.I.R. 1926 Mad. 261, *Rel. on.* (*Devadoss and Walsh, JJ.*). RATHINASABAPATHY ODAYAR *v.* GOPALA ODAYAR. **121 I.C. 126= 29 M.L.W. 696=A.I.R. 1929 Mad. 545= 56 M.L.J. 673.**

———*Concubines are entitled.*

A concubine is entitled to maintenance from the estate of the paramour even though the connexion with him is an adulterous one : 26 Bom. 163 ; A.I.R. 1926 P.C. 73, *Rel. on* ; A.I.R. 1924 Bom. 311, *Not appr.*; A.I.R 1923 Bom. 130, *Ref.* (*Macnair, A. J. C.*). KAMPTABAI *v.* LIMABAI. **117 I.C. 209=12 N.L.J. 51= A.I.R. 1929 Nag. 127.**

———*Daughter-in-law—Right against persons setting father-in-law's property by inheritance or survivorship.*

When a Hindu joint family consists of a father and sons but is possessed of no family property, the widow of one of the sons, dying in the lifetime of his father and brother, is entitled to maintenance

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as against the property which the father acquires after the death of her husband and which on the death of the father comes into the possession and enjoyment of the surviving son and the son of the latter, whether such possession is in the right of an heir or in the right of a survivor: 11 All. 194 (F.B.), *Foll*; 17 Cal. 373 ; 22 Cal. 410 ; 29 Cal. 557 ; 11 Bom. 199; 23 Bom. 608; 22 Mad. 305; 31 Mad. 338, *Rel. on.* (*Wazir Hasan, Ag. C. J., Misra and Pullan, JJ.*). JAI NAND *v.* MT. PARANDEI.

118 I.C. 419=6 O.W.N. 436=4 Luck. 491= A.I.R. 1929 Oudh 251 (F.B.).

———Illegitimate daughters are not entitled to maintenance from their father's family : A.I.R. 1927 Mad. 386, *Foll.* (*Phillips, Offg. C. J. and Ananthakrishna Aiyar, J.*). NAGARATHNAMMAL *v.* CHINNU SAH. **107 I.C. 419=1927 M.W.N. 750= A. I. R. 1928 Mad. 127=53 M.L.J. 861.**

———*Illegitimate daughter of Sudra is not entitled.*

An illegitimate daughter of a Sudra is not entitled to any maintenance out of the estate of her putative father. There is no legal basis in Hindu Law for the view that the father is bound to maintain his illegitimate daughter; he is under no more than a personal obligation to do so under the Cr. P. Code. (*Krishnan and Odgers, JJ.*). VELLAIYAPPA CHETTY *v.* NATARAJAN. **100 I.C. 655= 50 Mad. 340= 25 M.L.W. 493=A.I.R. 1927 Mad. 386= 52 M.L.J. 229.**

———*Illegitimate son of a Sudra is entitled to maintenance for life out of his father's estate in the hands of his co-parceners.*

The fact that the woman kept is a dasi or slave, or a dancing-girl is immaterial.

His right to maintenance is in recognition of his status as a member of his father's family and the maintenance is in lieu of his rights in his father's estate: *Case-law discussed.* (*Krishnan and Odgers, JJ.*). VALLAIYAPPA CHETTY *v.* NATARAJAN. **100 I.C. 655=50 Mad. 340= 25 M.L.W. 493=A.I.R. 1927 Mad. 386= 52 M.L.J. 229.**

———*Permanent concubine is entitled.*

Provided the concubinage be permanent, (awarudha stri) until the death of the paramour, and sexual fidelity to him be preserved, the right to maintenance is established, although the concubine be not kept in the family house of the deceased : 26 Bom. 163, *App.* (*Lord Darling.*) NAGUBAI MANGLORKAR *v.* MONGHIBAI.

96 I.C. 20=50 Bom. 604=53 I.A. 153= 24 A.L.J. 729=1926 M. W. N. 514= 3 O. W. N. 599=44 C. L. J. 53= 24 M. L. W. 309=28 Bom. L.R. 1143= 31 C. W. N. 128=A. I. R. 1926 P.C. 73= 51 M.L.J. 577 (P.C.).

———*Illegitimate sons of Sudra are entitled to maintenance.*

In order to give rise to the rights of an illegitimate son of a Sudra either to succession or maintenance, all that is necessary is that the connexion between the parents should be continuous and neither adulterous nor incestuous. The fact that the woman kept is a dasi or a dancing-girl makes no difference as regards the rights of the illegitimate children. (*Kumaraswami Sastri, J.*). NATARAJAN *v.* MUTHIAH CHETTY. **95 I.C. 972= 22 M. L. W. 650=1926 M. W. N. 73= A.I.R. 1926 Mad. 261.**

———*Persons not entitled to succeed—Right to maintenance of.*

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According to the Hindu Law, persons who by reason of certain circumstances are not entitled to a share in the estate, are entitled to maintenance by those to whom the estate passes by survivorship. The liability to maintain is on the co-parceners by virtue of the fact that they take the estate of their deceased relations. Under the Hindu Law even though the parties are not Sudras but belong to the higher classes, *e.g.*, Vysias, they still have got rights to get maintenance though they may have no right of succession. When the parties are Sudras there is the limitation that where the father is a member of a joint and undivided family and the properties of the father pass by survivorship to other members of the family, the illegitimate children of Sudras, in case the father had no self-acquired property, would not succeed to his estate but have only rights of maintenance out of the property, and such a maintenance can be made a charge on the family property. (*Kumaraswami Sastri, J.*). NATARAJAN *v.* MUTHIAH CHETTY. **95 I.C. 972=22 M.L.W. 650= 1926 M.W.N. 73=A.I.R. 1926 Mad. 261.**

———*Illegitimate daughter is entitled to maintenance until she is married or attains majority.*

So far as Hindu Law is concerned, the maintenance of females goes as a necessary corollary to their exclusion from inheritance and so long as they are members of the family, there is no reason why maintenance should not be given to them. If maintenance is given to an illegitimate daughter, it cannot be for her lifetime for she could not be in a better position than a legitimate daughter, but can only be given until she attains the age of 18 or is married earlier, and if she belongs to the caste of the dancing-girl, maintenance should continue till her marriage in case she were to marry or till she is able to earn her living according to the rules of her caste : (*Case-law considered.*) (*Kumaraswami Sastri, J.*). NATARAJAN *v.* MUTHIAH CHETTY. **95 I.C. 972=22 M.L.W. 650= 1926 M.W.N. 73=A.I.R. 1926 Mad. 261.**

———*Avaruddha stree—Meaning of—Woman of alien faith is no Dasi or avaruddha—Not entitled to maintenance.*

The literal translation of "avaruddh stree" is a "protected or confined woman." It really applies to a woman kept permanently by a person in his house as confined under his own protection in a manner so as to make it impossible for her to have connexion with a stranger. The English expression "continuously kept concubine" is the closest approach to the meaning of "avaruddh stree" and connotes an open residence and avowed connexion with the man. The woman in order to come within the definition of the term "avaruddh stree" must be a concubine living, under a man's immediate protection and control. The connection should not be secret, but the evidence must show that she lived with the man openly as a member of his family. Unless the woman is such as may be considered fit to work in a household she would not fall under the category of "woman kept in concubinage," or "permanent concubine." In order to fulfil this condition she must be a woman occupying a recognized status in the house and living in the family as a member thereof. Liability to maintenance in the case of such females exists only where the connexion was of a permanent nature, analogous to that of the female slaves who in former times were recognized members of a man's family. The word "dasi" or "stree" as used in the

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Mitakshara cannot include within its definition a woman professing a faith different from the Hindu faith. A dasi or an avaruddh stree as used in the Yajnavalkya Samhita, and interpreted in the Mitakshara, must belong to one of the four castes, and, therefore, must be a Hindu. (*Ashworth and Misra, JJ.*). MT. HAIDARI *v.* NARIANDRA BIKRAMAJIT SINGH. **93 I. C. 677=1 Luck. 184=13 O. L. J. 245=3 O. W. N. 284=A. I. R. 1926 Oudh 294.**

——*Permanently kept concubine is entitled.*

A concubine is entitled to maintenance against the estate of the man who kept her, but this rule is applicable only to those women who are continuously and exclusively kept in a man's family and are, in other words, what is known as "Avaruddha Stree" and who remain chaste : 33 M.L.J. 455 and A.I R. 1923 Bom. 150, *Foll.* The rule in favour of the maintenance of concubines is not limited only to cases where there are no other heirs and the property would otherwise escheat to the Sovereign : 33 M. L. J. 455, *Foll.* (*Spencer and Ramesam, JJ.*). RAMA RAJA *v.* PAPAMMAL. **90 I. C. 983=48 Mad. 805=22 M. L. W. 710=A. I. R. 1925 Mad. 1230=49 M. L. J. 348.**

——*Illegitimate sons of durgas are entitled.*

Among the regenerate classes according to the Mayukh illegitimate sons are entitled to maintenance which does not cease on their attaining majority though they are not entitled to marriage expenses. (*Macleod, C.J. and Shah, J.*). MOTICHAND GIRDHARSHET *v.* CHANDRABAI. **80 I.C. 418=26 Bom. L. R. 488=A.I.R. 1924 Bom. 421.**

——A kept mistress whose husband is alive is not an *avarudha stree*; consequently she is not entitled to maintenance out of the estate of her paramour on his death. (*Shah, Ag. C.J. and Crump, J.*). ANANDILAL BHAGCHAND *v.* CHANDRABAI. **80 I.C. 536=48 Bom. 203=26 Bom. L. R. 63=A. I. R. 1924 Bom. 311.**

——*Widowed daughter-in-law is entitled to maintenance from her father-in-law's heirs of donees even if the property is father-in-law's self-acquired property.*

A widowed daughter-in-law has no legal right to maintenance as against the self-acquired property of her father-in-law if her husband died during the lifetime of her father-in-law. But although the obligation of the father-in-law is only moral and not legal when he has no ancestral assets in his hands, the position of the heir who takes his estate by inheritance is different. What is a moral obligation in respect of the father ripens into a legal obligation when the estate passes into the hands of his heirs. The principle is applicable even when the father-in-law has made a testamentary disposition of his property or has during his lifetime made a gift of his property: 10 W.R. (F.B.) 89; 37 Mad. 396; 11 All. 194; 29 Cal. 557; 23 Bom. 608; 22 Mad. 305; 25 Bom. 263, *Dist.*; 17 C.W.N. 1141, *Foll.* (*Mookerjee and Chotzner, JJ.*). GOPAL CHANDRA PAT *v.* KADAMBINI DASI. **73 I.C. 235=A.I.R. 1924 Cal. 364.**

——*Concubine can claim maintenance only if she was an avaruddha-stree.*

In order to entitle a concubine of a deceased Hindu to claim maintenance for herself from the heirs of the Hindu, she must show that she was an "*avarudha stree*" that is to say she must show that she lived as his permanent concubine openly and as a member of his family.

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The deceased Vasanji had a wife and two sons. He was on bad terms with them and they lived in a house at Mandvi while deceased himself lived in another house at Masjid Bunder. He appears to have formed connection with plaintiff about 1915; she lived at several different places in the city and the deceased maintained and visited her. But there was no evidence that they ever openly lived together. She appears to have had her own establishment, and to have paid her own rent. He fell ill in her house, and was there for a short time until just before his death. This connection was not precisely secret but on the evidence it could not be said that she lived with him openly as a member of his family,

Held, plaintiff was a "*Bhujishya*" but not "*avarudha*" and therefore was not entitled to claim maintenance from the estate of the deceased. (*Shah, Ag.C.J. and Crump, J.*). BAI MONGHIBAI *v.* BAI NAGUBAI. **69 I. C. 291=24 Bom. L. R. 1009=47 Bom. 401=A.I.R. 1923 Bom. 130.**

——*Woman living in adultery with a Hindu.*

A concubine who lives with a Hindu up to the time of his death is in general entitled to maintenance from his estate in the hands of his widow. The right of maintenance cannot be extended to a case of adulterous connection.

If the plaintiff's claim fails under Hindu Law she cannot fall back on an agreement between her and the widow with regard to the maintenance inasmuch as it is a mere promise to pay unsupported by consideration. (*Daniels, A.J.C.*). CHANDRA KUNWAR *v.* MT. RUKMIN. **66 I.C. 86=9 O. L. J. 60=25 O. C. 145=A. I. R. 1922 Oudh 27.**

—Maintenance—Suit for.

——*Partition during the pendency of the suit is affected by "dis pendens."*

Where a widow of a co parcener has instituted a suit for a declaration that her right of maintenance should be made a charge on the joint family property before partition, the doctrine of *lis pendens* would apply, and any partition which takes place subsequent to the institution of her suit cannot affect her right. (*Rupchand, A.J.C.*). RAMBHABAI *v.* DOONGERSI NAGJI. **116 I.C. 105=A. I. R. 1929 Sind 102.**

——*Excessive claim by widow—But defendants failing to give information and raising vexatious pleas—Order directing defendants to pay costs is proper.*

Where, in appeal from a suit for maintenance by widow of a deceased co parcener against surviving co-parceners, the defendants contended that as the claim of the plaintiff was considerably exaggerated and the lower Court decreed less than half of what she claimed, the proper order as to costs should have been to direct the parties to pay and receive proportionate costs, but it was found by the lower Court that, as the defendants withheld all the information from the plaintiff as to the resources of the family, the plaintiff was not in a position to know what the income of the family was and also that the defendants put forward in the lower Court some vexatious pleas as to the maintainability of the suit.

Held, that the direction that the defendants should not only bear their own costs but pay the plaintiff's costs also was a proper one. (*Wallace-*

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and Thiruvenkatachariar, JJ.). SRINIVASA AYYAR *v.* LAKSHMI AMMAL. **108 I.C. 712=28 M. L. W. 328=A. I.R. 1928 Mad. 216=54 M.L.J. 530.**

———Widow—Suit by, for maintenance—Right to maintenance, and rate thereof only, should be considered. (*Spencer, J.*). NARASAMMA *v* VENKATARAJU. **93 I.C. 686=23 M.L.W. 364=A.I.R. 1926 Mad. 534.**

———*Agreement not to molest husband—Maintenance in consideration of—Validity.*

A suit is not maintainable by a wife for an allowance for maintenance on an agreement, for which the sole consideration is a stipulation that the wife is not to communicate with or molest her husband : 16 W.R. 250, *Foll.*

In such a case there can be no question of S. 25, Contract Act, applying ; for obviously no natural love and affection can exist between the parties. The wife must establish some valid and legal consideration for any such agreement. (*Findlay, J.C.*). MT. I. *v.* MR. G. **98 I.C. 217=9 N.L.J. 148=A.I.R. 1926 Nag. 501.**

———A member of a joint Hindu family, who cannot file a suit for partition without the consent of certain members of that family, if he is driven out from the family, can sue for maintenance out of the family property: 16 Bom. 29 (F.B.), *Ref.* (*Macleod, C.J. and Shah, J.*). BHUPAL TAVANAPPA KASTURI *v.* TAVANAPPA GANGARAM KASTURI. **64 I.C. 568=46 Bom. 435=23 Bom. L.R. 1236=A.I.R. 1922 Bom. 292.**

———*Leper husband—Wife can live separately and claim maintenance.*

That a Hindu husband is suffering from a loathsome disease such as leprosy is a good defence to his suit for the restitution of conjugal rights, and if a leprous husband cannot enforce co-habitation upon an unwilling wife, he equally cannot make his disease a defence to her suit for maintenance so long as he has means to maintain her. If a wife cannot be penalised by depriving her of her *Srithanam* for her refusal to live with a husband, who is suffering from a loathsome disease, it is equally impossible to conceive that the ancient law-givers intended that she should be allowed to starve for an act which no code of humanity or morality would condemn. Granting that desertion by the wife is a good defence to a wife's suit for maintenance, it by no means follows that such a defence can be pleaded irrespective of the wife's counterplea that the separation from her husband is for good and sufficient cause. (*Spencer and Venkatasubba Rao, JJ.*). H. SHEENAPPAYYA *v.* RAJAMMA. **69 I.C. 25=45 Mad. 812=16 M.L.W. 139=1922 M.W.N. 459=31 M L.T. 412=A.I.R. 1922 Mad. 399=43 M.L.J. 174.**

———*Form of decree—Decision as to who should pay.*

In a suit by a Hindu widow for maintenance against several defendants in possession of her husband's estate, the Court should direct that the amount should be paid by one or more of them on particular dates, but it need not decide as to who is legally entitled to the estate. (*Tudball and Sulaiman, JJ.*). SARASUTTI TEWARIN *v.* NANDAN **60 I.C. 99=18 A.L.J. 828=2 U P.L.R. All. 280.**

—Maintenance—Transfer of family property.

———*Suit for maintenance by wife against husband—Husband disposing of his property pending suit—*Lis pendens *does not apply.*

When a wife brings a suit against the husband for maintenance and asks for a charge on the property belonging to him, she does not ask for any right directly and specifically in respect of the property. In order to get maintenance properly paid she is entitled to ask for a charge and the Court in decreeing maintenance gives her charge on the property. The charge so given takes only from the date of the decree. (*Devadoss, J.*). RATTAMNA *v.* SESHACHALAM. **101 I.C. 806=1927 M.W.N. 314=A.I.R. 1927 Mad. 502=52 M.L.J. 520.**

HINDU LAW—Maintenance—Widow.

———*Purchase with knowledge of maintenance right—Subject to such right.*

Though it cannot be laid down that a person entitled to maintenance out of and residence in the family property has a vested and indefeasible lien on the family property merely by reason of the fact that she is entitled to such maintenance and residence yet she has a right and that right cannot be defeated by a trick. Where then the purchaser of family property knows that a person entitled to maintenance from and residence in family property is actually confined to that property for the purpose and where he knows that his purchase of such property will defeat that right of maintenance and residence then he is presumed to have purchased with such intention and the Courts will not permit his intention to be carried into effect. That is they will decree that he has bought subject to the right of the person to be maintained and provided with residence. (*Kennedy, J. C. and DeSouza, A.J.C.*). MOOLCHAND KISINDAS *v.* THAKURBAI. **96 I.C. 997=A.I.R. 1926 Sind 18.**

—Maintenance—Widow.

———A simple money creditor of a joint Hindu family has no priority over a charge for maintenance created by decree in the absence of fraud or collusion. (*Wallace and Ananthakrishna Ayyar, JJ.*). SEETHARAMANJACHARYULU *v.* VENKATASUBBAMMA. **1930 M.W.N. 625=32 L.W. 416=A.I.R. 1930 Mad. 824=59 M.L.J. 485.**

———*Maintenance in lieu of share—Subsequent unchastity if affects.*

Where a widow gives up her claim to share as an heir in the property of her deceased husband on certain terms and conditions, her subsequent unchastity is no defence unless there is an express stipulation to that effect: 26 All. 321, *Foll.* (*Percival, J.C. and Aston, A.J.C.*). VERHOMAT *v.* MT. RADHANBAI. **A.I.R. 1930 Sind 223.**

———Allowance made many years before to a widow in family—Family circumstances changed—It cannot form precedent to claim for maintenance by another widow in the family. Nor the fact that the maintenance then allowed was one-fourth of the then net income can be used as a principle of law to be applied in all cases. (*Lord Shaw.*) MT. EKRADESHWARI BAHUASIN *v.* HOMESHWAR SINGH. **116 I.C. 409=1929 M.W.N. 468=8 Pat. 840=56 I.A. 182=6 O.W.N. 526=30 M.L.W. 1=49 C L.J. 579=31 Bom. L.R. 816=10 P.L.T. 345=1929 A.L.J. 695=33 C.W.N. 637=A.I.R. 1929 P.C. 128=57 M.L.J. 50 (P.C.).**

———*Income of family property large—Co-parceners cannot insist upon widow living frugally and thus award small amount as maintenance.*

Widow is not bound to reside with the co-parceners nor are they under any personal obligation to maintain her. Their liability to do so arises only if they have taken the assets of her deceased husband either by inheritance or by survivorship. It is also the chief element to be considered in fixing the widow's maintenance. The right of the widow to maintenance out of the estate of her deceased husband in the hands of his heir or

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successor is in the nature of a burden upon the estate subject to which he takes the property and her right is to be maintained in comfort having regard to the extent of the assets of her husband taken over by his successor. The standard of comfort must necessarily vary with the means of the family, due regard being also paid to the wants of the other members of the family who also have to be maintained out of the income of the family properties. Each case has to be decided upon its facts. The co-parceners of her deceased husband who have taken his properties by survivorship have no right to prescribe any arbitrary standard as regards the comforts the widow is entitled to have or the style in which she should live. It is not open to them to say: "Though we get a large income from the family properties we prefer to live as frugally as possible and we would go on saving the bulk of our income as the family has been doing heretofore and you should also be content with barest necessaries of life." (*Wallace and Thiruvenkatachariar, JJ.*). SRINIVASA AYYAR *v.* LAKSHMI AMMAL. **108 I.C. 712=28 M.L.W. 328=A.I.R. 1928 Mad. 216=54 M.L.J. 530.**

———*A grant out of love and affection is not affected by subsequent unchastity.*

A grant by a husband to his wife, which is not a provision for maintenance but a grant of a different character, over and above the requirements of maintenance, made out of the love and affection which he bore to the grantee, is not affected by the subsequent unchastity of the wife and the husband is not entitled to rescind it or to revoke it on that ground. (*Kulwant Sahay and Macpherson, JJ.*). SITA DEVI *v.* GOPAL SARAN. **111 I.C. 762=9 P.L.T. 397=A.I.R. 1928 Pat. 375.**

———*Agreement securing maintenance becomes inoperative on her unchastity.*

The unchastity of a Hindu widow disentitles her to receive maintenance and the mere fact of the maintenance being secured to her by an agreement will not prevent her being deprived of such right after she has become unchaste. All that such an agreement does is to fix the amount of maintenance: 26 All. 321, *Dist.*; 17 Mad. 392 and 15 All. 382, *Rel. on.* (*Iqbal Ahmad, J.*). BIRJBHUKAN DUBE *v.* MT. RAM DULARI. **103 I.C. 393=A.I.R. 1927 All. 695.**

———*Past maintenance—No demand necessary—Failure to pay is withholding.*

In order to entitle a widow to past maintenance no demand is necessary. The non-payment of maintenance to a person entitled thereto constitutes *prima facie* proof of wrongful withholding. The claim for past maintenance is a legal right and unless adequate grounds are shown for inferring that she has waived or abandoned that claim, the defendant cannot escape liability: 24 Mad. 147 (P.C.); 21 M.L.J. 482 and 21 M.L.J. 706, *Rel. on.* (*Coutts-Trotter, C.J. and Sundaram Chetty, J.*). PANCHAKSHARA CHETTY *v.* PATTAMMAL. **39 M.L.T. 32=A.I.R. 1927 Mad. 865.**

———*Non-residence with relatives is neither a ground for refusing maintenance nor for reduction.*

A Hindu widow is not bound to reside with the relatives of her husband; that the relatives of her husband have no right to compel her to live with them; and that she does not forfeit her right to property or maintenance merely on account of her going and residing with her family or leaving her husband's residence from any other cause than unchaste or improper purposes.

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If non-residence at her husband's house is no ground for refusing maintenance to a Hindu widow, it is equally no ground for reducing it: 12 B.L.R. 238 (P.C.); 36 Bom. 131; 29 Cal. 557 and 5 I.A. 55 (P.C.), *Foll.* (*Wazir Hasan, J.*). MT. BHAIRON DEI *v.* RAM SEWOK LAL. **1 L.C. 648=A.I.R. 1927 Oudh 623.**

———*Income of property insufficient for maintaining widow, she is not bound to keep corpus intact for reversioners.*

Where the income of the estate is insufficient for the maintenance of the widow, the Hindu Law does not impose upon her any obligation to preserve the corpus and keep intact for the benefit of the ultimate reversioner. Any such onerous duty is not cast upon a Hindu widow. She can certainly alienate the property for necessary purposes and the most obviously necessary purpose is her own maintenance. (*Venkatasubba Rao, J.*). RAMALINGA *v.* PARVATHAMMAL. **97 I. C. 759=1926 M.L.W 657=A.I.R. 1926 Mad. 1122.**

———Widow—Unchastity—Return to chastity—Bare maintenance is due. (*Shah, Ag. C.J. and Kincaid, J.*). BHIKUBAI YESHWANTRAO *v.* HARIBA SWALARAM. **94 I. C. 665=49 Bom. 459=27 Bom. L.R. 13=A.I.R. 1925 Bom. 153.**

———An agreement by a widow not to claim enhancement of the maintenance is a binding agreement and must be enforced: 14 M.L.J. 339, *Dist.* (*Phillips and Venkatasubba Rao, JJ.*). MAULESWAR RAO *v.* DURGAMBA. **78 I.C. 831=47 Mad. 308=19 M.L.W. 165=34 M.L.T. 47=1924 M.W.N. 266=A.I.R. 1924 Mad. 637=46 M.L.J. 189.**

———*Widow can get her maintenance charged on what would have been her husband's share.*

Obiter—The right of a widow under the Hindu Law to be maintained out of her late husband's share in the family property in the hands of surviving co-parceners, it is true, creates no immediate charge upon the property but if it became necessary to do so, she could, by proper steps obtain such a charge upon a reasonable portion of the joint property not exceeding her husband's share: 27 Mad. 45, *Foll.* (*Dawson-Miller, C. J. and Foster, J.*). RAJASHIVA PRASAD SINGH *v.* KING EMPEROR. **82 I.C. 653=5 P. L. T. 497=1924 P.H.C.C. 234=2 Pat.L.R.Cr. 233=4 Pat.73=A.I.R. 1924 Pat. 679.**

—Maintenance—Will.

———*Widow's right to, cannot be defeated by will.*

A Hindu from the Punjab is *prima facie* subject to the principles of the Mitakshara School of Hindu Law and the principles of that School impose a primary duty and charge upon a husband of maintenance of his wife or wives, and a testator cannot by will defeat that claim. (*Rutledge, C.J. and Mya Bu, J.*). C. S. MAHA SABHA *v.* ANNA SOHAN LALL. **104 I.C. 119=6 Bur. L.J. 105=A.I.R. 1927 Rang. 256.**

———Maintenance and right of residence awarded by will—Claim for, is not one under rules of Hindu Law.

Where the lady claims maintenance under the terms of the will, she cannot be said to claim a right of maintenance as against her step-son or even against her own son under the rules of Hindu Law. (*Mookerjee and Chotzner, JJ.*). PULIN BEHARI DEY *v.* SATYA CHARAN. **70 I.C. 548=36 C.L.J. 367=A.I.R. 1923 Cal. 79.**

—Maintenance—Miscellaneous.

———The existence of debts diminishes the estate out of which the maintenance is to be paid. (*Macnair, A.J.C.*). KAMPTA BAI *v.* UMABAI. **117 I.C. 209=12 N.L.J. 51=A.I.R. 1929 Nag. 127.**

HINDU LAW—Maintenance—Miscellaneous.

———*Daughter-in-law—Father-in-law may assign a portion of joint property for her maintenance.*

It is quite in keeping with the sentiments of a Hindu father-in-law to assign some portion of the joint family property to his daughter-in-law in lieu of her right to maintenance so that she may enjoy its usufruct during her lifetime. Even if such portion is mutated in her name her possession does not go to convert the property into a stridhan nor does her possession become adverse to the legal heirs of father-in-law: 27 Cal. 515 (P. C.), *Ref.* (*Kinkhede, A.J.C.*). YESHAWANT *v.* DAULAT.

89 I.C. 663=A.I.R. 1926 Nag. 129.

———Widow—Mithila School—Grant of immovable property by karta of joint family for maintenance does not constitute her stridhan, nor does it create a widow's estate—After widow's death properties revert to donor.

The estate created by a maintenance grant, leaves a residuary estate still untransferred in the grantors, just as happens in the case of grants of leases and usufructuary mortgages. The reversion in such circumstances would be not the reversion as the term is used in Hindu Law, but the reversion of English Law such as is vested in a lessor for a term: 6 M. I. A. 1 (P. C.), *Dist.* (*Dowson Miller, C. J. and Foster, J.*). PHEKU PANDE *v.* GENA LAL PANDE. **96 I. C. 161= 1926 P.H.C.C, 241=A.I.R. 1926 Pat. 481.**

———A provision for the future maintenance of his wife by a husband is not illegal under Hindu Law. (*Schwabe. C. J., Coutts-Trotter and Kumaraswami Sastri, JJ.*). MADAM PILLAI *v.* BADRAKALI AMMAL. **68 I.C.687=45 Mad. 612= 15 M.L.W. 464=1922 M.W.N. 345=30 M.L.T. 274= A.I.R 1922 Mad. 311=42 M.L.J. 410 (F. B.).**

—Marriage.
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—Marriage—Ceremonies.

———*Contract of betrothal in regard to unborn daughter is void.*

A contract of betrothal made in regard to a girl not born at the time of the contract is null and void and cannot form a basis for damages: 60 P. R. 1886, *Foll.*

B arranged for the marriage of *A* with the cousin of *P* whom *B* gave his own daughter *M* in exchange and in consideration for this *A* bound himself to place his daughter if and when one was born at the disposal of *B* to be given away in marriage by him to any one he liked or to find a wife for a member of *B*'s family whenever required to do so,

Held, that the arrangement was void and unenforceable, both by reason of uncertainty as well as being contrary to public policy. (*Tek Chand and Agha Haidar, JJ.*). ATMA RAM *v.* BANKU MAL.

A.I.R. 1930 Lah. 561.

———*Ante-natal betrothal of children is not permissible.*

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It is essential in a contract of betrothment under Hindu Law that both persons whom it is intended to unite in marriage must be in existence at the time and Hindu Law does not permit of ante-natal betrothal of children. (*Tek Chand and Agha Haidar, JJ.*). ATMA RAM *v.* BANKU MAL.

A.I.R. 1930 Lah. 561.

———*Non-performance of prescribed rites vitiates marriage.*

Per *Spencer, Offg. C.J.*—In order to constitute a lawful marriage among Hindus, it is essential that certain nuptial rites should be performed; otherwise the marriage is only a Gandharva marriage or a marriage importing an amorous connection founded on reciprocal desire, *i.e.*, a marriage in a form which has become obsolete. (*Spencer, Offg. C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705= 48 Mad. 1= A.I.R. 1925 Mad. 497.**

———*Saptapadi and Vivaha homa—Non-performance of—Marriage—Validity of.*

No prescribed ceremony is necessary to constitute marriage, provided that if any ceremony is customary and regarded by the caste as essential then it must be performed. The ceremony of *Saptapadi* is necessary to complete a marriage performed according to the orthodox rites, and that of *Vivah Hom* is also usually performed, but their non-performance does not invalidate a marriage, *if otherwise completed.* (*MacColl, J.*). RAMPIAYAR *v.* DEWA ROMA. **76 I.C. 475=1 Rang. 129= A.I.R. 1923 Rang. 202.**

———Among Vaishnabs, a marriage by what is known as the Kantibadal ceremony is valid. (*Ghose, J.*). BENODE BEHAY AUDIKARY *v.* SHASHI BHUSAN BHUR. **59 I.C. 882=24 C.W.N. 958.**

—Marriage—Custom.

———Woman marrying second husband—Second husband should refund costs of first marriage (*obiter*). (*Hallifax, A.J.C.*). KSHAMADHER PRASAD *v.* MT. SARASWATI. **108 I.C. 446= 11 N.L.J. 74=A.I.R. 1928 Nag. 196.**

———*Sword marriage—Tanjore Royal family—Sword wives have the status of permanent concubines.*

A sword marriage is an institution peculiar to Kshatriyas and it is not common to persons of other castes. It is a form of union which by custom has been recognised by Rajputs and some other communities. No such general custom amongst Marattas exists. In the Tanjore Raja's family there were unions by which women were admitted to the seraglio and were known as sword wives. But the sword wives though of a much higher status than dancing girls had only the status of permanent concubines attached to the Palace and their issues could claim only the rights of illegitimate offspring. (*Subject elaborately discussed.*) (*Spencer, Offg.C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.**

———*Permanent concubine—Status of.*

The position in the Hindu households of permanently kept concubines who often reside in the same building is very analogous to the married wife. There is nothing in the ceremonial law or Shastras prohibiting permanently kept women in Hindu households from performing the various vrathams or ceremonies which married women perform, and the performance of such ceremonies does not necessarily show that the women must have been married. The tying and wearing of talis are not inconsistent with the permanent

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concubinage though they betoken the negation of relations such as those with dancing girls and temporarily kept mistresses. Even the observance of sattee does not necessarily indicate legitimate wifehood ; it is quite in keeping with the idea of permanent concubinage. (*Spencer, Offg. C. J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I. C. 705= 48 Mad. 1=A.I.R. 1925 Mad. 497.**

———*No presumption exists against customary form of marriage being Brahma or Asura.*

It is therefore manifest that there may be customary forms of marriage which are perfectly valid and which do not strictly come within the definitions of any of the eight forms. When customary forms of marriage are allowed, they may be (provided such is the custom) in any one of the eight forms or an approach to any one of them. It is not correct to say that unless it be shown that the customary marriage is in the *Asura* form, it must always be conclusively presumed that it is in the *Brahma* form. (*Sulaiman and Daniels, JJ.*). MT. KISHAN DEI *v.* SHEO PATTAN. **90 I.C. 358= 48 All. 126=23 A.L.J. 981=6 L.R.A. Civ. 557= A. I. R. 1926 All. 1.**

———*Dangua wife—Rajbansis of Bengal.*

When a widow lives by herself and a man goes to the house with a dang or stick in his hand and strikes a blow with it on the roof of the house and so enters in and takes possession of the woman such woman is called a Dangua wife. (*C. C. Ghosh and Panton, JJ.*). SANTALA BEWA *v.* BADASWARI DASI. **75 I.C. 11=27 C.W.N. 669= 50 Cal. 727=A. I.R. 1924 Cal. 98.**

———*Marriage between Khatri male and Brahmani woman is not valid.*

It would be dangerous to extend custom by such logical processes as analogy. The final presumption in the case of high caste Hindus is in favour of such Hindus following their personal law, and the onus of proving any special or general agricultural custom lies on the person asserting its existence. It cannot be held that by custom general or special a marriage between a Khatri male and a Brahmani woman is valid: 50 P. R. 1900, *Dist.* (*Broadway, J.*). PARS RAM *v.* HUKMAN SINGH. **73 I.C. 239=A.I.R. 1924 Lah. 243.**

———*Marriage with wife's sister's daughter allowed by custom.*

The marriage of a Hindu with his wife's sister's daughter is not illegal. The custom of allowing a Brahmin to marry his wife's sister's daughter has been recognised by judicial decisions ; that custom applies especially in the case of Sudras, such as Telugu Velamas who generally follow the Brahmin custom. The rule in *Grihya Parisishta* prohibiting such a marriage among the twice-born classes is merely directory and not mandatory. (*Wallis, C.J. and Krishnan, J.*). RAMAKRISHNA RAO *v.* SUBBANNA RAO GARU. **59 I.C. 268= 43 Mad. 830=1920 M.W.N. 474=12 L.W. 155= 39 M. L.J. 183.**

—Marriage—Dissolution.

———A marriage is not severed by mere desertion. (*Kumaraswami Sastri and Odgers, JJ.*). PICHAI PILLAI *v.* GOPAL PILLAI. **70 I.C. 122= 15 M.L.W. 15=A.I.R 1921 Mad. 647= 42 M.L.J. 276.**

—Marriage—Divorce.

———*Divorce at wife's request—She should return ornaments given by her husband.*

With Hindus, among whom divorce and remarriage are permitted, it is a very common if not universal custom that when a woman is divorced for misconduct or at her own request she returns to her husband all the ornaments he has given her, whether at the wedding or later. (*Hallifax, A.J.C.*). KSHAMADHAR PRASAD *v.* MT. SARASWATI. **108 I. C. 446=11 N. L. J. 74= A. I. R. 1928 Nag. 196.**

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—Marriage—Factum valet.

———It is established that when a person not strictly entitled to do so gives a girl in marriage the doctrine of *factum valet* prevails. (*MacColl, J.*). RAMPIAYAR *v.* DEVA RAMA. **76 I.C. 475= 1 Rang. 129=A.I.R. 1923 Rang. 202.**

—Marriage—Forms of.

———The marriage in the *Bhaisnaba* form has to be established by legal evidence. It cannot be said to be proved by the mere fact of the parties living as husband and wife and of having such repute in the village wherein they lived. (*Graham and Mitter, JJ.*). GOPAL JANA *v.* BROJA MOHAN SWAMI. **34 C.W.N. 944.**

———Gandarva form of marriage was even in ancient days considered lawful only for the warrior tribe. It has now become obsolete. (*Pullan and Bisheshwar Nath, JJ.*). RAM PEARY *v.* KAILASHA. **7 O. W. N. 753= A. I. R. 1930 Oudh 426.**

———Gandharva form was lawful only among warrior tribe—It is obsolete now. (*Srivastava and Pullan, JJ.*). RAM PEARY *v.* MT. KAILASHA. **A.I.R. 1930 Oudh 426.**

———Rakshasa form of marriage, *viz.*, the seizure of a maiden by force from her house, is at the present day practised among certain class of Gonds of Berar and of Betul. (*Hallifax, A.J.C.*). GARAB SINGH GOND *v.* EMPEROR. **103 I.C. 195= 28 Cr. L.J. 659=A.I.R. 1927 Nag. 279.**

———The widow re-marriage in the *karao* form is a *Brahma* form of marriage. (*Sulaiman and Daniels, JJ.*). MT. KISHAN DEI *v.* SHEO PHALTAN. **90 I.C. 358=48 All. 126=23 A.L J. 981= 6 L.R.A. Civ. 557=A.I.R. 1926 All. 1.**

———*Asura form—Incidents of.*

Although presents made to the bride's parents which are either small or relatively small having regard to the scale on which the rest of the expenses of the marriage are incurred do not necessarily make a marriage an Asura marriage ; a substantial contribution towards the expenses of the marriage must be regarded as equivalent to taking a bride price, and lends support to the suggestion that the marriage is in Asura form. The prevalence of a general custom of taking contribution from the bridegroom's party among Asaris renders every Asari marriage an Asura form of marriage, and on the ground of the general prevalence of such a custom any particular marriage cannot be regarded as one in the Brahma form. (*Ramesam, J.*). SAMU ASARI *v.* ANACHI AMMAL. **91 I.C. 561=22 M.L.W. 462= A.I.R. 1926 Mad. 37=49 M.L.J. 554.**

———*Asura form—Incidents of.*

A marriage by exchange, where a girl from one family is married to a boy of another family and *vice versa*, is not an Asura Marriage as the essence of the Asura form is the taking price for a bride. (*Baker, J.C.*). FUNJABRAO *v.* ATAMARAM. **87 I.C. 1018=A.I.R. 1926 Nag. 124.**

———*Forms other than Brahma and Asura are obsolete.*

Per *Kumaraswamy Sastry, J.*—So far as the eight forms of marriage referred to in the Sastras are concerned, it is now accepted law that all except

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the Brahma and the Asura forms are obsolete. (*Spencer, Offg. C. J. and Kumaraswamy Sastry, J.*). MAHARAJAH OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I C. 705=48 Mad. 1= A.I.R. 1925 Mad. 497.**

———Bridegroom paying money to bride's parents for expenses of marriage as a condition of the contract—Marriage is in Asura form: 3 M. L. J. 261, *Foll.* (*Spencer and Ramesam, JJ.*). RATNATHANNI *v.* SOMASUNDRA MUDALIAR. **62 I.C. 931= 13 M L W. 582=1921 M.W.N. 635= A.I.R. 1921 Mad. 608=41 M.L.J. 76.**

—Marriage—Identity of caste.

———Pratiloma marriages, that is, marriages in the reverse order of castes, have been held to be invalid in the Bombay Presidency: 2 Bom. L. R. 128; 14 Bom. L. R. 547, *Ref. to.*

But the marriage of a Brahmin male with a Dharala woman of the Sudra caste is a marriage of the Anuloma type, valid in Hindu Law. The issue of such a marriage is legitimate: 46 Bom. 871, *Foll. Hindu texts reviewed.* (*Patkar and Shingne, JJ.*). NATHA *v.* CHHOTALAL. **32 Bom. L.R. 1348.**

———Marriage *inter se* between different sub-divisions of Sudra caste are valid: 13 M.I.A. 141 and 14 M.I.A. 346, *Foll.* (*Tek Chand and Johnstone, JJ.*). SOHAN SINGH *v.* KABLA SINGH. **112 I.C. 593= 29 P L R. 423=10 Lah. 372= 10 L.L.J. 348= A.I.R. 1928 Lah. 706.**

———*Marriage with woman of lower grade in same caste—Effect of.*

A man may marry a woman of a lower class or grade within his caste and may, by such a marriage fall into the class or grade to which his wife belongs, but in the absence of any clear and definite evidence to show that such a marriage would not be recognised as valid by the custom of the community to which either the husband or the wife belongs neither he nor his issue can lose their right of inheritance in the family property. (*Sulaiman and Kanhaiya Lal. JJ.*). HAR PRASAD *v.* KEWAL. **83 I.C. 163=22 A L.J. 1009= 47 All. 169=6 L. R. A. Civ. 7= A. I. R. 1925 All. 26.**

———Anuloma marriage between a vaishaya male and an illegitimate girl of a vaishya, born of a Sudra woman is valid.

Marriage out of practice or obsolete is not necessarily prohibited by Hindu Law. (*Macleod, C.J. and Shah, J.*). BHAI GULAB *v.* JIVANLAL HIRALAL. **65 I.C. 602=24 Bom. L R. 5= 46 Bom. 871= A.I.R 1922 Bom. 32.**

———If there has been a marriage in fact, there would be a presumption in favour of there being a marriage in law.

Under the Hindu Law in Bengal a marriage between members of different sub-castes of the Sudras is valid, unless a special custom or usage is proved to the contrary: 13 M.I.A. 141 (P.C.) and 14 M.I.A. 346 (P.C.), *Foll.*; 1 Cal. 1 and 48 Cal. 643, *Ref.* (*Sanderson, C.J. and Richardson, J.*). BISHWANATH DAS *v.* SARASIBALU DASI. **66 I.C. 590= 48 Cal. 926=25 C. W. N. 639= A. I. R. 1921 Cal. 48.**

—Marriage—Legitimacy.

———*Capacity to perform sradh is a test.*

Per *Kumaraswami Sastry, J.*—One test of the legitimacy of children is the capacity to perform funeral ceremonies and sradhas. The importance of the sradha ceremonies from a legal point of view cannot be overrated. The competence of a person to offer these oblations forms the test of his title to the inheritance. (*Spencer, Offg. C. J. and*

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Kumaraswami Sastri, J.). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705= 48 Mad. 1=A. I. R. 1925 Mad. 497.**

—Marriage—Prohibited degrees.

———*Maternal aunt.*

The marriage by the chadar andazi ceremony with his maternal aunt by an Arora, who is governed by Hindu Law, cannot be a legal marriage. (*Harrison, J.*). SODAGAR *v.* EMPEROR. **107 I.C. 98=29 Cr.L.J. 210=9 A.I.Cr.R. 413= A.I.R. 1928 Lah. 165.**

———*Sagotras.*

So far as twice born classes are concerned, marriages between members of the same gotra and Pravara are absolutely forbidden, and, if performed, would be invalid; among Sudras this rule does not apply. (*Spencer, Offg. C. J. and Kumaraswami Sastri, J.*), MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I. C. 705=48 Mad. 1= A.I.R. 1925 Mad. 497.**

—Marriage—Presumptions as to legality.

———*Bairagi—Marriage with a woman of different sect.*

Owing to their belief in the efficacy of ritual observances, choice in matrimony among the Bairagis is very little fettered. And so unless it is shown to the satisfaction of the Court that a formal admittance to the sect is a necessary preliminary on the part of the woman to constitute a legal marriage among the Bairagis, the marriage of a Bairagi with a female of a different sect cannot be annulled. (*Cuming and Pearson, JJ.*). ADWAITA DAS BAIRAGI *v.* LALIT MOHAN MOHANTI. **121 I. C. 413=33 C. W. N. 967= A.I.R. 1930 Cal. 57.**

———Presumption is in favour of marriage in approved form: 11?M.I.A. 139 (P.C.) and 38 Cal. 700 (P.C)., *Rel. on.* (*Kinkhede, A.J.C.*). BHAGWANDAS *v.* GAJADHAR. **98 I.C. 669=23 N.L.R. 9= 9 N.L.J. 221= A. I. R. 1927 Nag. 68.**

———*Should be presumed to be in the approved form.*

The leading principle is that a marriage is presumed to be in an approved form unless it is shown to be in a disapproved form. This is a reasonable principle and is not contradicted by anything in the Hindu Law texts. If a marriage is valid at all the natural presumption is that it is valid in all respects and carries the full privileges and obligations of an approved marriage: *Case-law discussed.* (*Sulaiman and Daniels, JJ.*). MT. KISHAN DEI *v.* SHEO PALTAN. **90 I. C. 358=48 All. 126= 23 A.L.J. 981=6 L.R.A. Civ. 557= A.I.R. 1926 All. 1.**

———Per *Kumaraswami Sastri, J.*—The mere designation of sword wife does not raise any necessary implication of marriage. (*Spencer, Offg. C. J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I. C. 705= 48 Mad. 1= A.I.R. 1925 Mad. 497.**

———*Long co-habitation cannot establish marriage where proof to the contrary exists.*

Though where nothing more is known than that persons have been living together as husband and wife and treated as such by the community for a long series of years, a presumption of marriage may, if nothing more appears, be drawn, the presumption will be considerably weakened and it will be altogether rebutted where facts are shown which make it more consistent with continued concubinage than with legal marriage.

The so-called sword wives of the Tanjore Raja were held to be mere concubines though permanent

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concubines and though treated in many respects as legally married wives. (*Spencer, Offg. C.J. and Kumaraswami Sastri, J.*). MAHARAJA OF KOLHAPUR *v.* SUNDARAM AYYAR. **93 I.C. 705= 48 Mad. 1=A.I.R. 1925 Mad. 497.**

———There is a presumption, in the absence of any evidence to the contrary, that the marriage was in one of the approved forms. (*Dalal, J.C.*). MT. UMRAO KUAR *v.* SARABJIT SINGH. **85 I.C. 618= A.I.R. 1925 Oudh 620.**

—Marriage—Re-marriage.

———Discarded wife of Kori cannot re-marry in absence of legal divorce. (*Subhedar, A. J. C.*). EMPEROR *v.* BHAIYA LAL. **118 I.C. 681= 30 Cr. L.J. 960=1929 Cr. C. 454= A.I.R. 1929 Nag. 278.**

———*Re-marriage not censured by the caste should be considered to be in the Brahma form.*

When re-marriage is allowed by the custom of a caste, such a marriage may not have any disapprobation attaching to it. On the other hand even among castes which allow the validity of re-marriages such marriages may be regarded as not praiseworthy and of superior form but as blameworthy and of inferior form.

If a virgin widow has not passed out of her parents' family and is still under its control, and her parents or other legal guardians in pursuance of the caste custom which allows such marriage, give her away in marriage a second time as if she were a maiden, the marriage though a widow marriage, would undoubtedly be in the *Brahma* form if there is no social censure attaching to it. On the other hand, if a widow, who is not a virgin, herself enters into a matrimonial alliance in a form considered blameworthy by the caste, though recognized by custom as valid, and there is no gift of her by legal guardians it may be difficult to see any analogy between such a marriage and the *Brahma* form of marriage even though there be no consideration paid to her guardians. It may rather be an approach to the *Gandharba* form where the marriage takes place with the mutual desire of the parties. In this latter case, it would be of an inferior form, particularly when such a marriage is looked down upon by the caste people; but if such a marriage is not considered the least blameworthy, it would be deemed to be of the *Brahma* form. (*Sulaiman and Daniels, JJ.*). MT. KISHAN DEI *v.* SHEO PALTAN. **90 I.C. 358= 48 All. 126=23 A.L.J. 981=6 L.R.A. Civ. 557= A.I.R. 1926 All. 1.**

———*All ceremonies are not necessary to validate a widow re-marriage of a* Khatri *girl.*

It is not necessary for the validity of a marriage by a *Kkatri* widow that all the usual ceremonies which have to be performed in the case of a *Khatri* girl on her first marriage should be performed and in such cases if the parties go through such ceremonies as they can reasonably arrange for and clearly and unequivocally express their intention to enter into the marriage relation with each other and as a fact thereafter live together as husband and wife, such a union is a valid marriage: 49 P.R. 1903, *Foll.* (*Martineau, J.*). MT. RAM RAKNI *v.* DAULAT RAM. **90 I.C. 1056=26 P.L.R. 744= A.I.R. 1926 Lah. 31.**

———*Re-marriage during lifetime of first husband —Custom as to, must be proved.*

Sagai in the form of remarriage of widows is the normal condition in all except the five or six highest castes of Hindus in Bihar. But a custom

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of *sagai*, while the first husband is still alive is, even assuming the custom to be a valid defence under S. 494, something which would require strict proof in respect of the particular caste in the particular area and in respect of the conditions in which the custom operates: 19 Cal. 627, *Dist.* (*Macpherson, J.*). FAGU TANTI *v.* CHOTE LAL TANTI. **96 I.C. 115=7 P.L.T. 443=27 Cr. L.J. 867= A.I.R. 1926 Pat. 346.**

—Marriage—Restitution of conjugal rights.

———*Living in adultery with wife's sister—Defence to husband's suit for restitution.*

Under the Indian Law cruelty in the legal sense need not necessarily be physical violence. A course of conduct which if persisted in would undermine the health of the wife is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights.

A woman was married when she was 10 years of age. After consummation of marriage at the age of 15 years she came to her husband's place but found him living in adultery with her elder sister from whom he had two children. She protested against this conduct of her husband, who subsequently executed an agreement in her favour covenanting to give up his illicit connexion, but he had not kept his agreement. The wife obtained a decree for maintenance. Subsequently the husband sued for restitution of conjugal rights,

Held, that decree for conjugal rights should not be passed: *Russel* v. *Russel*, (1897) A. C. 393 and *Swatman* v. *Swatman*, 164 E.R. 1467; 8 All. 78; 34 Cal. 971; A.I.R. 1924 Mad. 49 and 11 M.I.A. 551, *Rel. on.* (*Gokaran Nath Misra, J.*). MT. CHILHA *v.* CHEDI. **115 I.C. 299=6 O. W.N. 10= 4 Luck. 355=A.I.R. 1929 Oudh 121.**

———While Hindu Law lays down the duty of the wife of implicit obedience to her husband, it does not provide any such procedure as compulsion by Courts to force her to return to him against her will: A.I.R. 1927 Bom. 264, *Foll.* (*Bhide, J.*). GURMUKH SINGH *v.* MT. HARBANS KUAR. **113 I.C 777=A.I.R. 1928 Lah. 902.**

———*Defences—Abandonment and ill-treatment.*

The principle, that where a wife is turned out or ill-treated so as to make it impossible for her to live with her husband, or where the breach between the husband and wife is irremediable so that it is impossible for the latter to return to the former after many years' separation without leading to fresh trouble and dispute, she is entitled to maintenance by living separate from him applies equally to the case of a Hindu or a Mahomedan whether the question arises under S. 488, Criminal P.C., or in a suit for restitution of conjugal rights: 170 P.L.R. 1914, *Ref.* (*Kinkhede, A. J. C.*). MT. KURSHID BEGUM *v.* ABDUL RASHID. **100 I.C. 169=A.I.R. 1927 Nag. 139.**

——— *Principles to be followed—Legal cruelty in England and in India—Fear of bodily injury is not necessary—Cessation of marital relations is good cause—Personal violence to wife is not justified.*

Courts in India have jurisdiction to entertain suits for restitution of conjugal rights and to grant relief when the parties are Hindus or Mahomedans' 28 C. 37, *Ref.* and they are enjoined to decide according to justice, equity and good conscience.

Cruelty in the legal sense need not necessarily be physical cruelty. A course of conduct which, if persisted in would undermine the health of the wife, is sufficient justification for refusing to the husband a decree for restitution of conjugal rights.

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When a husband, who is guilty of a course of conduct which would be regarded as cruel to the wife, comes before a Court seeking its aid to compel his wife, to submit to his embraces; it is the duty of the Court to see whether the health of wife is likely to suffer by forcing her against her will to live with him.

In a case of restitution of conjugal rights by the husband the facts found were :—

1. The husband charged the wife with the attempted murder of her husband by poison.

2. He insulted her on more than one occasion and called her by the most vile epithet.

3. He treated her with loathing and disgust and abused her when she took some butter-milk to him, and he expressed his disgust by getting up from his unfinished meals.

4. He sent word through a servant that if she went back to him she would be dragged out by a Pariah and slippered.

5. He threatened her with violence by saying that he would lash her to pieces with a knife and allowed the second wife to abuse her and to say that she (meaning the 1st defendant) deserved to be made to stand in the road and be spat on by the passers-by, that it was enough that she had not wronged its (child's) neck and thrown it into the well and that if she touched the child again she would be beaten with broom-stick.

6. He used personal violence by pushing her by neck. The mother-in-law and the paternal aunt who treated her with kindness turned against her after the charge of an attempted murder was ventilated by the husband.

It was further found that the husband had no marital relations with his wife (1st defendant) for a period of more than 7 or 8 years,

Held, that these circumstances are sufficient to make out cruelty under English Law.

Held, further that it would be cruel now to force the wife to go back to her husband against her will.

No doubt, some times the Hindu Society overlooks personal violence to the wife by the husband, but when a Court's intervention is asked for, the Court should not be guided by the public opinion in a country village, but by what is just and equitable in the circumstances. (*Phillips and Devadoss, JJ.*). KONDAL RAYAL REDDIAR *v.* RANGANAYAKI AMMAL. **74 I.C. 166=46 Mad. 791=18 M.L.W. 465=1923 M.W.N. 499=A.I.R. 1924 Mad. 49=45 M.L.J. 186.**

———Marriage during minority of both the boy and girl—Repudiation after puberty or before consummation is not allowed in Hindu Law and is no defence to a suit for restitution of conjugal rights.

Among the Hindus, marriage generally takes place at a very early age, when in fact both the boy and girl are minors. It is also well known that among the Hindus a marriage once performed cannot be dissolved, for any reason whatever, and it would be repugnant to all notions and sentiments of Hindu society if the wife was given a freedom to repudiate her marriage as soon as she came of age or before consummation had taken place, merely on the ground that the marriage had been performed during her minority. (*Abdul Raoof and Moti Sagar, JJ.*). MUNSHI *v.* MT. BHAGWANI. **64 I.C. 356=13 P.L.R. 1922=A.I. R. 1922 Lah. 79.**

—Marriage—Validity.

———European lady convert into Hinduism after renouncing her own religion—She marrying a Hindu in accordance with Hindu religious rites—Marriage is valid: A.I.R. 1922 Bom. 32 and 14 Bom. L.R. 547, *Rel. on.* (*Venkatasubba Rao, J.*). RATANSI *v.* ADMINISTRATOR-GENERAL OF MADRAS. **111 I.C. 364=52 Mad. 160=1928 M.W.N. 848=A.I.R. 1928 Mad. 1279=55 M.L.J. 478.**

———*Macpherson, J.*—The marriage of a person converted to Hinduism by the Arya Samaj rites with a Hindu is valid. (*Kulwant Sahay and Macpherson, JJ.*). SITA DEVI *v.* GOPAL SARAN-NARAYAN SINGH. **111 I. C. 762=9 P.L.T. 397=A.I.R. 1928 Pat. 375.**

———In the charge of bigamy, where in the first marriage the giving away of the bride was with the consent of the legal guardian who was in jail,

Held, that the first marriage was valid and hence the subsequent marriage with the same woman constituted bigamy. (*Cuming and Gregory, JJ.*). BENODIN HOWLADAR *v.* EMPEROR. **100 I. C. 711=28 Cr.L.J. 327=7 A.I.Cr.R. 515=A.I.R. 1927 Cal. 480.**

———An illegitimate son of a Sonar father and Mallahin woman being a Sudra cannot validly marry a Baniya girl: 28 All. 458 and 10 A.L.J. 181, *Foll.* (*Walsh and Pullan, JJ.*). MUNNI LAL *v.* MT. SHYAMASONARAIN. **97 I.C. 347=48 All. 670=24 A.L.J. 757=A.I.R. 1926 All. 656.**

———Pat *marriage—Incidents of.*

Though a *pat* marriage may be most secular still it also has religious significance; for a son of a *pat* marriage is a legitimate son of his father, and entitled to succeed to his father's property. The wife by this ceremony is looked upon as a wife with a wife's duties, responsibilities and privileges.

A *pat* marriage is not merely a civil contract, and as such liable to be declared invalid because of fraud practised by one of the contracting parties on the other. The religious bond between the parties created by the marriage prevents it from being declared invalid on the ground that the woman while being married knowingly concealed from her would-be husband her pregnancy by some other person. (*Prideaux, A.J.C.*). MANI *v.* ZEBOO. **95 I.C. 705=22 N.L.R. 134=9 N.L.J. 160=A.I.R. 1926 Nag. 488.**

———The marriages between members of different Sudra castes are valid under the Hindu Law. Marriage between a Kayastha and a Dom is valid. The Bengali Kayasthas are treated as Sudras in Calcutta High Court.

Per *Greaves, J.*—Upon the authorities it does not appear that if a marriage is otherwise valid it becomes invalid because it is opposed to the usages of the community and is not recognised by them as valid. (*Greaves and Panton, JJ.*). BHOLANATH MITTER *v.* EMPEROR. **81 I.C. 709=51 Cal. 488=28 C. W. N. 323=25 Cr.L.J. 997=A.I.R. 1924 Cal. 616.**

———A marriage is not invalidated for want of the guardian's consent. (*Martineau, J.*). BALLU MAL *v.* HARDAWARI MAL. **79 I.C. 451=6 L.L.J. 219=A.I.R. 1924 Lah. 570.**

———*Marriage duly solemnised—Invalidity of.*

A Hindu marriage is a sacrament and a marriage which is duly solemnised and is otherwise valid is not rendered invalid merely because it is brought about without the consent of the guardian in marriage or even in contravention of an express order of the Court. A marriage tainted by fraud is a voidable transaction, but it is binding until it is set aside by a competent Court. Unless it is decided to be invalid, it can sustain an indictment for

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bigamy. (*Shadi Lal, C.J.*). GAJJA NAND *v.* EMPEROR. **64 I. C. 500=71 I.C. 215=24 Cr.L.J. 87=23 Cr.L.J. 20=8 P.L.R. 1922= 2 Lah. 288=108 P.L.R. 1921=A.I.R. 1922 Lah. 139.**

—Marriage—Who can give in marriage.

———*Right of father to arrange for marriage of his children is personal—It cannot be delegated except by testamentary provision.*

Under Hindu Law, as in most other systems of law, the right of a father to arrange for the marriage of his children is personal to him. He cannot delegate it to another person except by making a testamentary provision under certain conditions. He cannot, in his lifetime, assign it so as to substitute another person in his place. Indeed the power which the father possesses in this matter is in reality not a right strictly so called. It is a duty which he owns to the child and which, by the very nature of his relationship he is peculiarly fitted to perform to the benefit of the latter. In discharging this duty he is not to derive any ulterior gain for himself but must act in a manner which is most conducive to the interests of the child. (*Tek Chand and Agha Haidar, JJ.*). ATMA RAM *v.* BANKU MAL.

A.I.R. 1930 Lah. 561.

———*Marriage arranged by mother—Father's consent not obtained—Marriage is not invalid.*

In the absence of the father and paternal male relations, the right of selecting a husband for a female infant devolves upon the mother and the mother is, according to the rules of Hindu Law, fully competent to give her daughter in marriage. In the absence of force or fraud a Hindu marriage otherwise legally contracted and performed with the necessary ceremonies is not invalidated by the absence of consent of the father: (64 P.R. 1884, *Dist.*; 20 P.R. 1916, *Foll.* (*Moti Sagar, J.*). JAGAN NATH *v.* BASANT RAM. **75 I.C. 24=A.I.R. 1923 Lah. 595.**

———Under Hindu Law the mother is, after the father, the guardian of the minor daughter, and her right to select a bridegroom for the girl is prior to that of the paternal kindred. The consent of the girl's uncle, therefore, is unnecessary. (*Abdul Raoof and Martineau, JJ.*). MT. JIWANI *v.* MULA RAM. **67 I.C. 253=3 Lah. 29=67 P.L.R. 1922=A.I.R. 1922 Lah. 112.**

—Marriage—Miscellaneous.

———No obligation on mother to marry her sons by borrowing on security of property inherited from her father—(*Obiter*). 50 M.L.J. 221, *Not shaken by* 54 M.L.J. 618. (*Ananthakriskna Ayyar, J.*). ANANDRAO *v.* VENKATASUBBA RAO. **123 I.C. 812=1930 M.W.N. 40=31 M.L.W. 692=A.I.R. 1930 Mad. 287=58 M.L.J. 127.**

———A marriage gift to a son-in-law at the time of marriage made by the bride's parents or grandparents may be of a portion of the donor's property, but it cannot be of the property of the bride herself unless the girl could not be married unless accompanied by such a gift. (*Ramesam, J.*). P. GUNDAPPA *v.* NARASAPPA. **99 I.C. 691=A. I. R. 1927 Mad. 455.**

—Minority and guardianship.

———Although the appointment of a guardian by the Court supersedes the powers of natural and testamentary guardians, the powers of a natural guardian in the absence of such appointment are unaffected by the restrictions which the Guardians and Wards Act places upon the powers of guardians

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appointed by the Court. The validity of his acts must be determined by the general principles which govern the relations of a minor to the manager of his estate or, in the words of the Guardians and Wards Act, he may do all acts which are reasonable and proper for the realization, protection or benefit of the property. (*Rupchand Bilaram, A. J. C.*). LAKHUMICHAND ISARDAS *v.* FIRM OF KHUSALDAS MANGATRAM. **88 I.C. 116=18 S.L R. 230=A.I.R. 1925 Sind 330.**

—Minority and guardianship—Benefit to estate.

———A party filling a fiduciary character like that of a guardian is authorized to perform any act which is manifestly for the infant's benefit: 6 M. I. A. 393 (P.C.), *Foll.* (*Rupchand Bilaram, A. J. C.*). LAKHUMICHAND ISARDAS *v.* FIRM OF KHUSHALDAS MANGATRAM. **88 I.C. 116=18 S.L.R. 230=A.I.R. 1925 Sind 330.**

———Guardian taking crops of third person for benefit of estate—Estate is liable for value of the crops: 28 Bom. 330 and 40 Mad. 632, *Foll.* (*Kotval, A. J. C.*). CHATARIA *v.* DAWALAT. **66 I.C. 468=5 N.L.J. 206=A.I.R. 1922 Nag. 48.**

—Minority and guardianship—Brother.

———*Brother—When* de facto *guardian of his minor sister.*

The elder brother of his minor sister assumed control and management of the family property and the minor sister was allowed to live in her family and received support from out of the family property during her minority,

Held, that there was enough to hold that the elder brother occupied fiduciary relationship of a *de facto* guardian. (*Sundaram Chetty, J.*). SORIMUTHU THONDAMAN *v.* PERUMAL AMMAL, **A.I.R. 1930 Mad. 708.**

—Minority and guardianship—Compromise by guardian.

———*Improper compromise by* de facto *guardian does not bind minor.*

Where the *de facto* guardian of a minor reversioner entered into a compromise by which substantial rights of the minor were given up to the plaintiffs, who, the guardian should have known, had no manner of right thereto,

Held, that inference that the compromise was obtained improperly, is almost irresistible. The guardian could not bargain away the ward's right which was only a *spes successionis*. It was not a settlement of a *bona fide* family dispute such as has been recognised by the Privy Council. The minor himself could not be considered a party to the suit, as no guardian had been appointed. He, therefore, could not be personally bound as a party to the compromise and decree: A.I.R. 1917 P. C. 95, *Foll.* (*Ryves and Gokul Prasad, JJ.*). NARAIN SINGH *v.* RAJ KUMAR SINGH. **66 I.C. 62=44 All. 428=20 A.L.J. 251=A.I.R. 1922 All. 217.**

—Minority and guardianship—Father's power to appoint.

———Whether a Hindu father has power to appoint a testamentary guardian of joint family property by will was gravely doubted. (*Marten, C. J. and Crump, J.*). VENKATARAMAN *v.* JANARDHAN. **106 I.C. 79=52 Bom. 16=29 Bom. L.R. 1522=A.I.R. 1928 Bom. 8.**

———Where the property is a Hindu joint family property the father is not competent to appoint by will a guardian of the property of his minor son to take effect after the death of the testator. (*Krishnan, J.*). K. SUBBARAYADU *v.* K. SUBBANNA. **85 I.C. 457=A.I.R. 1925 Mad. 371=47 M.L.J. 765.**

HINDU LAW — Minority and guardianship — Father's power to appoint.

———A Hindu father can by word or writing nominate a guardian for his children, the nomination taking effect after his death, and he is unrestricted in the choice of a guardian and may exclude even the mother from the guardianship. (*Mears, C.J. and Sulaiman, J.*). DEBA NAND *v.* ANANDMANI.
59 I.C. 909=43 All. 213=A.I.R. 1921 All. 346.

———Testamentary guardian—Sole owner of ancestral property can appoint guardian for son to be adopted after his death: 41 Mad. 561 (F.B.) and 43 Bom. 778 (P.C.), *Dist.* (*Ayling and Odgers, JJ.*). VENKATARAMA NAGANATHA RAO *v.* K. RAMAYAMMA. **62 I.C. 437=44 Mad. 189=13 M.L.W. 91=A. I. R. 1921 Mad. 132=40 M.L.J. 46.**

———*Father's power to exclude mother by testamentary appointment.*

The father acts as guardian by delegation until superseded, as he is the person next after the sovereign who would best look to the interests of the minor. There is no presumption, however, that he will make the best choice of a guardian when necessary. The reasons for the implied delegation of the sovereign's guardianship to the father do not apply so far as the delegation of the power of appointment is concerned. The mother is the sovereign's delegate next after the father and she cannot be excluded by the father's selection and testamentary appointment of a guardian: 13 M.I.A. 209, *Dist.*; (1917) M.W.N. 744 and 40 Mad. 672, *Foll.* (*Kotval, A. J. C.*). JIWANDAS *v.* RAJRANI.
64 I.C. 433=A.I.R. 1921 Nag. 97.

—Minority and Guardianship—Grand-mother.

———In the absence of the father and the mother the paternal grandmother is a natural guardian of her grandchildren: 38 Mad. 1125 and 26 Cal. 820, *Ref.* (*Devadoss and Jackson. JJ.*). SUBAYYA *v.* SUBAMMA. **106 I.C. 863=1927 M.W.N. 911=A. I. R. 1928 Mad. 42=53 M.L.J. 677.**

—Minority and guardianship—Husband.

———*Husband is entitled to the custody of his minor wife unless good cause is shown to the contrary.*

Under Hindu Law the husband is the natural guardian of his minor wife, unless good cause be shown to the contrary. The fact that a girl is not mature would be a ground for the Court refusing to give the custody of his wife to a husband unless her parents were dead and the Court could be convinced that no attempt to enter into conjugal relations would be made before maturity; 23 W.R. 178 and 28 Cal. 37, *Appr.* (*Macleod, C.J. and Coyajee, J.*). NAVANITLAL *v.* PURSHOTTAM. **94 I.C. 11=50 Bom. 268=28 Bom. L. R. 143=A. I. R. 1926 Bom. 228.**

—Minority and guardianship—Joint family.

———No guardian in respect of the minor's interest in the property of an undivided Hindu Mitakshara family should be appointed: 25 All. 407, *Rel. on.* (*Lindsay and Sulaiman, JJ.*). RATTAN CHAND *v.* RAM KISHAN. **114 I. C. 743=26 A.L.J. 777=A.I.R. 1928 All. 447.**

———Court cannot appoint one member guardian of another in respect of joint family property. Under the Hindu Law itself the active eldest member is manager of joint family property without any order of Court. (*Dalal, J.C.*). BALBIR *v.* CHEDI LAL. **85 I. C. 276=A.I.R. 1925 Oudh 642.**

—Minority and guardianship—Liability.

———Neither the minors nor their estates are liable for the debts borrowed by a guardian which do not purport to bind their estate. (*Subhedar, A.J.C.*). HAZARIMAL *v.* GOVINDA. **119 I.C. 683 (Nag.).**

HINDU LAW — Minority and guardianship — Mother.

—Minority and guardianship—Marriage.

———*Minor is obliged to provide for marriage expenses of sister suitably to position of family.*

By general principles of Hindu Law a minor is under an obligation to provide out of the family property the funds necessary for performing the marriage ceremonies of his sister in a manner suitable to the social position of the family and its pecuniary resources: 32 All. 325, *Foll.* Such provision is "necessary" and one which the minor is "legally bound" to make within S. 68.

Per *Daniels, A.J.C.*—Providing for the marriage of a sister is certainly not what is ordinarily understood by the phrase "supplying an infant with necessaries suited to his condition in life". (*Daniels and Wazir Hasan, A.J.Cs.*). JAI INDRA BAHADUR SINGH *v.* MT DILRAJ KUAR.
61 I.C. 278=8 O. L. J. 94=A. I. R. 1921 Oudh 14.

—Minority and guardianship—Mother.

———*Widow is competent to collect debts, even mortgage debts as a natural guardian of her minor son.*

A widowed mother of a Hindu minor as his *de facto* and natural guardian has full power to collect debts. The mere fact that there is a lien on property for the debt cannot make any difference. The mortgagors of the property mortgaged to her late husband can pay the mortgage amount to her in good faith in the ordinary course of business. (*Addison, J.*). LABHU RAM *v.* SAZAWAR.
100 I.C. 129=A.I.R. 1927 Lah. 237.

———Mother as guardian of the minor son is not competent in law to revive time-barred debt due from the deceased father: 7 O.C. 46, *Foll.* (*Stuart, C.J. and Wazir Hasan, J.*). BRAMHADIN *v.* RAM LAKHAN. **99 I.C. 215=3 O.W.N. 980=A.I.R. 1927 Oudh 52.**

———Under Hindu Law in the absence of any custom to the contrary, the mother is a *de jure* guardian of the minor after the death of the father. (*Campbell and Dalip Singh JJ.*). ICHHAR *v.* NATHA. **98 I.C. 514=8 L.L.J. 479=27 P. L. R. 623=A. I. R. 1926 Lah. 693.**

———On the death of a Hindu leaving sons, all of whom are minors, and separate property, the minors' mother is their natural guardian in respect of the property. (*Mears, C.J. and Mukerji, J.*). SWARATH RAM *v.* RAM BALLABH. **89 I.C. 27=47 All. 784=23 A. L. J. 625=6 L.R.A. Civ. 465=A.I.R. 1925 All. 595.**

———Mother is the lawful guardian of her infant sons where the sons are the sole owners of their property: A.I.R. 1922 Nag. 201, *Expl.* and A.I.R. 1924 Nag. 354, *Foll.* (*Kinkhede, A.J.C.*). SHAMPURI *v.* RAMCHANDRA.
88 I.C. 268=A.I.R. 1925 Nag. 385.

———*Mother is guardian of minor son's person and property after father.*

There is no support in Hindu Law for the proposition that a Hindu mother is not the legal guardian of the property of her minor son, after the father. On the contrary there is overwhelming authority in support of the proposition that under Hindu Law after the father the mother is the natural and legal guardian of her minor son's person and property, in a family where a minor son is the sole owner of the property and there are no other undivided co-parceners entitled to a share therein: A.I.R. 1922 Nag. 201, *Not foll.* and *Dist.*; 10 N.L.R. 133. (*Kinkhede, A. J. C.*). GANPAT SAMLAJI *v.* MAHADEO. **78 I.C. 946=24 N.L.R. 8=A.I.R. 1924 Nag. 354.**

HINDU LAW — Minority and guardianship — Mother.

———The mother continues to be the natural guardian of her infant son, even after her re-marriage if the infant son lived with her. (*Shah and Crump, JJ.*). REWJI THAKARAM PATIL *v.* HEMRAJ SADURAM. **75 I.C. 561=A.I.R. 1923 Bom. 213.**

———*Right to guardianship—Not lost by re-marriage of mother.*

A Hindu widow, who is allowed to re-marry by the custom of her caste, does not, on re-marriage, lose her right of guardianship of her minor son. (*Prideaux, A.J.C.*). SHAHU *v.* MOHIDIN.

63 I.C. 397=4 N.L.J. 80.

—Minority and guardianship—Powers of.

———The powers of a *de facto* guardian are the same as those of a lawful guardian under the Hindu Law: A.I.R. 1928 Mad. 226; 38 Mad. 1125 and 12 C.L.J. 586, *Foll.* (*Devadoss and Mackay, JJ.*). ALAGUMPERUMAL KARALAYER *v.* VINAYAGATHAMMAL. **117 I.C. 731=29 M.L.W. 6= A.I.R. 1929 Mad. 110=55 M.L.J. 861.**

———*Guardian cannot bind minor's estate with personal covenant to sell even for necessary purposes.*

The Full Bench case in 42 Mad. 185 means that so far, and only in so far, as the contract by the guardian embodies the personal Hindu Law liability of the minor, it is enforceable against the minor and in so far as it goes beyond it, comes under the general rule that a guardian cannot bind his ward by a personal covenant.

Hindu Law does not compel a minor to discharge debts for necessary purposes by contracting to sell his property; it merely compels him to discharge the debts; it does not lay down the method in which he shall discharge or restrict him to any one method; it is not concerned with what method he adopts provided the debts are discharged and therefore a guardian of a Hindu minor cannot bind his award by a personal covenant for sale of the minor's estate though contracted for necessary purposes so that specific performance of the contract may be decreed against the minor: A.I.R. 1924 Mad. 863, *Reversed*; 42 Mad. 185 (F.B.), *Expl.*; 15 Cal. 8 (P.C.), *Dist.*; 18 Mad. 415, *Diss. from*; 39 Cal. 232 (P.C.), *Rel. on.* (*Wallace and Thiruvenkatachariar, JJ.*). RAMAKRISHNA *v.* CHIDAMBARA. **108 I.C. 282=27 M.L.W. 322= 1928 M.W.N. 185=A.I.R. 1928 Mad. 407= 54 M.L.J. 412.**

———*Liability of minor for contracts by guardian explained.*

Thiruvenkatachariar, J.—As regards the powers of a natural guardian of a minor to deal with the minor's estate and bind the minor by his contracts the following propositions are well established: (1) the guardian may in case of necessity sell or mortgage his ward's property to the extent of such necessity; (2) the guardian may also without charging the estate contract loans for necessary purposes which he could not otherwise meet; the term "necessary purposes" being understood as comprising all that is necessary to meet the wants of the minor and of other members of the family who have claims either against him personally or against his estate. The creditor in such cases cannot enforce the claim against the minor personally, but may enforce it against his properties; and (3) the guardian cannot enter into any covenants in the name of the ward so as to impose a personal liability upon him. (*Wallace and Thiruvenkatachariar, JJ.*). RAMAKRISHNA *v.* CHIDAMBARA. **108 I.C. 282=27 M.L.W. 322=1928 M.W.N. 185= A.I.R. 1928 Mad. 407=54 M.L.J. 412.**

HINDU LAW — Partition — Accounts—Absence of fraud.

———There is no distinction between the expressions 'manager' and '*de facto* guardian', because both as a matter of fact do guard, manage or look after the interest of the minor as regards his person or property, or both. (*Kinkhede, Offg. A. J. C.*). PUNJABRAO *v.* RAMAKRISHNA. **95 I. C. 553= 9 N. L. J. 70=A.I.R. 1926 Nag. 332.**

———A guardian of Hindu infants is not authorised to carry on trade embarking the minor's property in the business in order to liquidate family debts. Minors do not become partners by virtue of any contract of partnership made by their guardian. (*Abdur Rahim and Sadasiva Aiyar, JJ.*). VENKATASURYANARAYANA *v.* A. RAMAYYA. **62 I. C. 802= 1921 M.W.N. 100=13 M.L.W. 551= A. I. R. 1921 Mad. 98=40 M. L. J. 153.**

—Minority and guardianship—Who can be.

———*Minor widow—Nearest sapinda of husband is preferred to her father.*

If a Hindu female becomes a widow when she is a minor, the eldest among the nearest sapindas of her husband becomes her guardian in preference even to her father or other paternal relations: 16 Cal. 584; 2 Hay. 196; 8 B. H. C. A. C. 31 and 17 Cal. 298, *Rel. on.* (*Devadoss and Mackay, JJ.*). ALAGUMPERUMAL KARAYALAR *v.* VINAYAGATHAMMAL. **117 I. C. 731=29 M.L.W. 6= A.I.R. 1929 Mad. 110=55 M.L.J. 861.**

———The ordinary rule of Hindu law as stated in the text books is that no relation except the parents is entitled as of right to the guardianship of a minor and that failing the father and mother another relative must derive his authority from the Courts. (*Campbell, J.*). CHANDULAL *v.* MUKANDI. **87 I.C. 45=26 P.L.R. 120=A.I.R. 1925 Lah. 503.**

—Partition.

Accounts.
Agreement.
Alienation.
Award.
Burden of proof.
Custom.
Daughters.
Declaration of intention.
Division in status.
Effect of.
Equities.
Evidence of.
Father.
Female sharer.
Institution of suit.
Minor.
Partial partition.
Provision.
Re-opening of.
Re-union.
Right to.
Shares.
Subject-matter.
Suit for.
Miscellaneous.

—Partition—Accounts—Absence of fraud.

———*No accounting for past transactions.*

In an ordinary suit for partition in the absence of fraud or other improper conduct, the only account the manager is liable to render is as to the existing state of the property divisible. The parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters: 43 Cal. 459, *Foll.* (*Courtney-Terrell, C.J. and Kulwant Sahay, J.*). JYOTIBATI *v.* LACHHMESHWAR. **A.I.R. 1930 Pat. 260.**

HINDU LAW — Partition — Accounts—Absence of fraud.

———*Manager is not liable to pay interest on savings from income till date of decree.*

In ordinary suit for partition where no fraud or improper conduct is alleged against the manager, he is not liable to pay interest on the savings from income, bonds realised, savings withdrawn from Bankers, from the date when savings were made or bonds realised and savings withdrawn nor from the date of institution of the suit for partition but only from the date of decree. (*Courtney-Terrell, C. J. and Kulwant Sahay, J.*). JYOTIBATI *v.* LACHHMESHWAR **A.I.R. 1930 Pat. 260.**

———*Manager is not liable for barred debts.*

No relief can be granted against the manager in respect of barred debts in the absence of fraud or dishonesty on his part. (*Courtney-Terrell, C.J. and Kulwant Sahay, J.*). JYOTIBATI *v.* LACHHMESHWAR. **A. I. R. 1930 Pat. 260.**

———*Manager need only account for existing state of property—Subsequent to suit for partition, he must strictly account.*

In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the karta or manager is liable for, is as to the existing state of the property divisible, and the parties have no right to look back and claim relief against past inequality or enjoyment of the members or other matters. In the absence of any proof of fraud what the Court has to proceed upon is the assets of the family as they existed at the date of the suit; but subsequent to the date of the suit, the parties become only tenants-in common or co-sharers and therefore the karta is strictly bound to account for all receipts and expenses and can take credit only for such expenses as have been incurred for the benefit or necessity of the estate, and the net income after deduction of such expenses will have to be divided equally between him and the plaintiff: 43 Cal. 459, *Rel. on.* (*Coutts-Trotter, C.J. and Sundaram Chetty, J. and afterwards Srinivasa Aiyangar, J.*). SRI RANGA THATHACHARIAR *v.* SRINIVASA THATHACHARIAR. **104 I.C. 472=50 Mad. 866=26 M.L.W. 125= 39 M.L.T. 234=A.I.R. 1927 Mad. 801= 53 M.L.J. 189.**

———*Accounts to be submitted by the Manager is of the existing assets on the date of partition—Propriety of past transactions cannot be questioned.*

All that a co-parcener seeking partition is entitled to is an account of the property which exists at the date of the partition or at the date when owing to demand for partition there had been a severance of *status*. The manager being the accounting party has to file an account as to the properties available for partition. But the other members of the family are not bound to accept the statement of the manager and it is the duty of the Court to try to discover what properties do really belong to the family. Any member also is at liberty to show that the expenditure which the manager says has been incurred has not been incurred or that savings have not been entered into account. But the account is merely an enquiry into the existing assets and that the head of the family cannot be called upon to defend the propriety of his past transactions except in case of fraud, misappropriation or gross reckless waste. (*Spencer and Kumaraswamy Sastri, JJ.*). TADIBULLI TAMMIREDDI *v.* TADIBULLI GANGIREDDI. **70 I.C. 337= 45 Mad. 231=16 M.L.W. 55= 30 M.L.T. 323=A.I.R. 1922 Mad. 236= 42 M.L.J. 570.**

HINDU LAW—Partition—Accounts—Manager.

———*Manager's duty to account is only on the basis of what is available for partition.*

In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the Karta is liable, for, is as to the existing state of the property divisible; the parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters. But the Karta is the accountable party and the enquiry directed by the Court must be conducted in the manner usually adopted to discover what in fact the property now consists of, not what the Karta says it is. (*Mookerjee and Panton, JJ.*). NIBARAN CHANDRA *v.* NIRUPAMA DEBI. **69 I.C. 476=34 C. L. J. 563= 26 C.W.N. 517=A.I.R. 1921 Cal. 131.**

———*Manager is liable to account for assets as they existed at time of partition.*

A Hindu manager is not responsible for the manner in which he has disposed of the family income in the past, except in the case of a fraud or misappropriation, but when a partition is demanded he cannot evade his liability to give an account of the assets of the family as it existed at the time of partition. The parties are not bound to accept the statement of the Karta as to what the properties consist of, and the manager is the accountable party and the Court can order an account to be taken: 43 Cal. 459, *Ref.* (*Phillips and Krishnan, JJ.*). K. KRISTNAYYA *v.* K. GURAVAYYA. **70 I.C. 146= 14 M.L.W. 668= 1921 M.W.N. 742=A.I.R. 1921 Mad. 443= 41 M.L.J. 503.**

—Partition —Accounts—Agreement.

———*Agreement to maintain separate accounts does not necessarily show agreement to debit amounts in partition.*

The mere fact that a certain agreement was come to, that accounts should be opened in the name of each of the co-parceners in which the separate expenditure of each co-parcener, should be entered, does not show that it was also agreed that the amounts should be debited in partition, because it might well be that it was, thought advisable to keep the accounts in this way, just to show whether the enjoyment during the state of non-division was fair, as between the parties. (*Wallis, C.J. and Hughes, J.*). L. VARADA RAGHAVIAH *v.* L. VENKATA RAMAYYA. **61 I.C. 772= 13 M.L.W. 262=A.I.R. 1921 Mad. 542.**

—Partition—Accounts—Excluded co-sharer.

———*Excluded member is entitled to mesne profits.*

There is no absolute rule that in a partition suit each and every claim for mesne profits is necessarily unsustainable. Where plaintiff was excluded from the property the claim clearly lies: 32 Mad. 271; 44 Bom. 179, *Dist.*; 7 Mad. 564; 9 N.L.R. 145, *Foll.*; 19 Bom. 532, *Appr.* (*Findlay, Offg. J. C.*). NILKANTH *v.* GAJANAN. **92 I.C. 364= A.I.R. 1926 Nag. 248.**

—Partition—Accounts—Manager.

———*Manager is not accountable for rents and profits but is bound to keep proper accounts.*

The manager of a joint Mitakshara Hindu family is not accountable for the rents, issues and profits, which came into his hands during his management of the properties as manager. But he is still bound to keep true and correct accounts and to share the savings effected from the income of the properties: A.I.R. 1921 Pat. 487, *Rel. on.* (*Courtney-Terrell, C. J. and Kulwant Sahay, J.*). JYOTIBATI *v.* LACHHMESHWAR. **A.I.R. 1930 Pat. 260.**

HINDU LAW—Partition—Accounts—Manager.

———*Plaintiff can demand accounts to ascertain the amount of savings available for partition.*

A member of a joint family, in asking for an account in a partition suit, cannot object to the various items of past expenditure by the karta, but he can call for an account for the purposes of ascertaining how much was saved each year out of the income so that it may be at the disposal of the joint family for partition. (*Mullick, J.*). SITA RAM *v.* HANUMAN PRASAD. **100 I.C. 632=8 P.L.T. 145=A.I.R. 1927 Pat. 413.**

———*Manager's liability to account—Capital monies traced into his hands must be accounted for.*

A managing member is not bound to give a general account of his dealings and in the absence of fraud or misappropriation the managing member cannot be called upon to justify his past transactions : the manager is not bound to keep general accounts and co-parceners cannot complain if the manager in his discretion favours in his expenditure one of the co-parceners at the expense of the others. In this matter there is no difference between the position of an infant co-parcener and another. In respect of assets proved to have come into the hands of the manager, he has to account. It is not enough for him to say that he has no longer got those assets. Once it had been proved that the assets came into his hands, the co-parcener is not required to prove that they remained in his hands at the date of the partition. Capital monies proved to have come into the hands of a manager must be considered as available for partition in the absence of some evidence showing what has happened to them: 32 Mad. 271; 41 M.L.J. 503, *Foll.* (*Schwabe, C. J. and Waller, J.*). OFFICIAL ASSIGNEE OF MADRAS *v.* N. RAJABADAR PILLAI. **78 I.C. 536=1924 M.W.N. 192=19 M.L.W. 597=34 M L.T 341=A.I.R. 1924 Mad. 458=46 M.L.J. 145.**

———*Manager liable to account for profits subsequent to suit.*

In a partition suit the plaintiff is not ordinarily entitled to claim an account of past profits but he is entitled to have an account taken of the profits of the properties subsequent to the date of suit. A member of a Hindu family suing for partition and for the profits of his share is really suing for an account of the profits received by the person in possession so that the proceeds received by the latter which are also divisible property, may be divided and his share therein also given to him. Such profits awarded to him is not awarded as *mesne profits* received by a person in wrongful possession but as appurtenant to the plaintiff's right in his share of the lands. (*Oldfield and Venkatasubba Rao, JJ.*). T. RAMASWAMI AIYAR *v.* T. SUBRAMANIA AIYAR. **74 I. C. 804=16 M.L.W. 297=46 Mad. 47=A.I.R. 1923 Mad. 147=43 M.L.J. 406.**

—Partition—Accounts—Mesne profits.

———*Manager cannot be called upon to render account for the suit period.*

Mesne profits cannot be claimed by co-parceners for the period between filing a partition suit and the passing of decree therein ; the manager of a joint family is not obliged to keep accounts of the family property immediately the suit for partition is filed. Although there is a severance of interest from the date of the suit it does not follow that the family property does not remain joint till it is actually divided: 44 Bom. 179, *Rel. on* ; 15 N.L.R. 31, *Ref.* (*Baker, J. C.*). JANARDHAN *v.* WASUDEO. **79 I.C. 19=A.I.R. 1924 Nag. 315.**

HINDU LAW—Partition—Accounts—Past transactions.

———*Suit impeaching alienation by manager—Mesne profits before suit cannot be granted against alienee.*

It is not usual to allow mesne profits before suit, in suits for partition against managers of joint families and unless it is shown that there was no necessity for the sale as a whole, the purchaser from the manager should not be made to account for the profits which the family might have received if they had retained possession of the property. (*Schwabe, C. J.*). MEENATCHI AYYAN *v.* RANGA CHARLU. **1922 M.W.N. 719=A.I.R. 1923 Mad. 120=16 M.L.W. 595.**

———*Mesne profits cannot be decreed in the absence of exclusion.*

In a suit for partition between one brother and the auction-purchaser in execution of a decree against another brother, the auction purchaser will not get mesne profits unless it is shown that he was obstructed in taking possession of any part of the joint property. (*Kotval, A.J.C.*). RAM NATH *v.* SITARAM. **74 I.C. 81=19 N.L.R. 147=A.I.R. 1923 Nag. 288.**

—Partition—Accounts—Mode of taking.

———*Propriety of expenditure by manager cannot be questioned.*

It is not open to any member of the family to assert that any particular item of expenditure incurred by the manager was improper. What can only be shown is that no such expenditure was in fact incurred. The propriety of the expenditure cannot be questioned by any member of the family. (*Courtney-Terrell, C. J. and Kulwant Sahay, J.*). JYOTIBATI *v.* LACHHMESHWAR. **A.I R. 1930 Pat. 260.**

———*Account to be ordered is of assets and liabilities as on date of plaint.*

An account in a partition suit is an account of the assets and liabilities of the joint family, as they existed on the date of the plaint. What has to be ascertained is what are really the assets of the joint family and if any of the co-parceners has attempted to misappropriate any of the joint family property by putting it in the name of third parties, or otherwise, it may still be followed and made available for division. But it is not the case that disproportionate expenditure by any co-parcener in the past is a matter, which can be taken into account, when a partition in being effected. (*Wallis, C.J. and Hughes, J.*). L. VARADA RAGHAVIAH *v.* L. VENKATA RAMAYYA. **61 I. C. 772=13 M.L.W. 262=A.I.R. 1921 Mad 542.**

—Partition—Accounts—Nature of.

———*Object is only discovery of property liable for partition.*

The nature of account which a manager is liable to render is unlike that required of a trustee and the object of taking accounts is to discover what are the joint family properties liable to be partitioned : A.I.R. 1930 Pat. 1 ; A I.R. 1921 Pat. 487, *Foll.* (*Courtney-Terrell, C.J. and Kulwant Sahay, J.*). JYOTIBATI *v.* LACHHMESHWAR. **A. I. R. 1930 Pat. 260.**

—Partition—Accounts—Past transactions.

———*Not ordinarily ordered.*

In a partition suit the Court will not, except in special circumstances, order an account to be taken of past transactions. Where it is impossible to predicate how much will ultimately be realized out of the outstanding debts, it is sufficient to give the plaintiff a declaration that he is entitled to his proportionate share of whatever may be recovered.

HINDU LAW—Partition — Accounts—Presumption.

Any property acquired by a member with his own money after the passing of the preliminary decree for partition would not be liable to partition, but when, it is shown that he possessed ancestral funds from which such property could be acquired, it lies on him to show that these funds were not employed for the purpose. If he fails to discharge this burden, it must be presumed, that the property was acquired with money belonging to the joint family, and it is, therefore, liable to partition. (*Broadway and Brasher, JJ.*). LACHHMAN DAS *v.* NANAK CHAND. **70 I. C. 810= 3 P.W.R. 1923=A.I.R. 1923 Lah. 20.**

—Partition—Accounts—Presumption.

———Presumption is that Government demands regarding properties must have been paid and expenses on this account must therefore be deducted. (*Courtney-Terrell, C. J. and Kulwant Sahay, J.*). JYOTIBATI *v.* LACHHMESHWAR. **A.I.R. 1930 Pat. 260.**

—Partition—Agreement.

———By an unregistered deed of 1908 a father of joint Hindu family purported to make a division between himself and his minor sons. The minor sons brought a suit in 1912 for a declaration that they continued as members of an undivided family and that the partition deed was fraudulent and not binding on them. The suit, however, ended in a compromise decree in 1914 under the terms of which the properties were divided,

Held, that the suit, when instituted was a suit for declaration and therefore not a suit for partition at all,

Held, further: that the partition was effected by the compromise decree in 1914. (*Coutts-Trotter, C. J. and Walsh, J.*). DORAISWAMI NADAN *v.* NAGASAMI NAICKEN. **121 I.C. 863= A.I.R. 1929 Mad. 898.**

———Deed—Construction—Partition-deed between father and son providing that if either should fail to pay debts allotted to him under the deed, and thereby caused loss to other, it should be collected from property allotted in partition—Father paying debts allotted to son can get personal decree against son: 33 M.L.J. 58; A.I.R. 1924 All. 105, *Dist.*; 23 Mad. 441; 36 Mad. 348 and 34 Mad. 479, *Rel. on.* (*Odgers, J.*). RAMASAMI AYYAR *v.* DORAISAMI AYYAR. **114 I.C. 226=A.I.R. 1929 Mad. 137.**

———*Partition suit—Compromise—If all parties to the action should join.*

A compromise of a partition suit is not necessarily ineffectual because every party to the action does not join in it. It is undoubtedly true that in some cases there may not be a valid and lawful compromise unless all the parties join in effecting it; but each case must depend upon its own facts.

Where one member, on receiving a certain sum of money goes out of the family altogether and the property then belongs to the remaining members, such a compromise is a valid and lawful compromise. (*Venkatasubba Rao, J.*). THIRUVENGADA *v.* THANGAVELU. **108 I.C. 221= A.I.R. 1928 Mad. 594.**

———*Step-mother given a share for maintenance—Nature of estate in the share.*

Prima facie, when an arrangement is come to by which the step-mother is to receive a sum for maintenance the presumption would be that in no case could an absolute interest be intended to be conferred. But a presumption of this kind must yield to other circumstance that the lady was being made responsible for a definite share of the debts

HINDU LAW—Partition—Alienation.

which had been incurred by her late husband; when such a transaction has stood for a very long period of time, it would not be disturbed. (*Lord Shaw.*) SAHIB RAI *v* SHAFIQ AHMAD. **101 I.C. 426=4 O.W.N. 534=1927 M.W.N. 480= 26 M.L.W. 82=31 C.W.N. 972= A.I.R. 1927 P.C. 101=53 M.L.J. 507 (P.C.).**

———*Partition suit by blind co-parcener compromised by recognising his title—Agreement is conclusive.*

Where in a partition suit the defendant pleads that plaintiff is not entitled to any share as he is congenitally blind, but the defendant does not proceed with the trial of the issue and enters into an agreement with the plaintiff by which the dispute is settled and one of the conditions of which is the recognition of the plaintiff's title by the defendant, the agreement is binding on the defendant and his descendants and is conclusive of the plaintiff's right to share in the joint property. (*Lindsay and Kanhaiya Lal, JJ.*). BUDH SAGAR *v.* BISHUN SAHAI. **86 I.C. 554=47 All. 327= 23 A.L.J. 141=A.I.R. 1925 All. 366.**

—Partition—Alienation.

———*Co-parcener's right to mortgage challenged—His long silence raises presumption of absence of his claim.*

Although time cannot run against a claim to partition joint family estate unless there has been definite exclusion, yet the fact that when a co-parcener's right to mortgage was challenged 14 years prior to suit and he took no steps, strongly suggests that at that time when evidence might have been more readily available he had no great faith in the value of his claim. (*Lord Buckmaster.*) ANNAMALAI CHETTY *v.* SUBRAMANIAN CHETTY. **113 I.C. 897=49 C.L.J. 93=1929 M.W.N. 39= 29 M.L.W. 91=6 O.W.N. 104=1929 A.L.J. 9= 31 Bom. L.R. 280=33 C.W.N. 435= 10 P.L.T. 283=A.I.R. 1929 P.C. 1= 56 M.L.J. 435 (P.C.).**

———Order vesting insolvent's property in Official Assignee is not analogous to attachment. (*Phillips, Offg. C. J., Ramesam and Madhavan Nair, JJ.*). OFFICIAL ASSIGNEE, MADRAS *v.* RAMACHANDRA. **112 I.C. 541=51 Mad. 417=1928 M.W.N. 294= 28 M.L.W. 109=A.I.R. 1928 Mad. 735= 55 M.L.J. 175 (F.B.).**

———*Prior alienation by co-parcener—Co-parcener cannot insist that the part sold must go to his vendee.*

If there are numerous items of property and if the joint family consists of a large number of members, it would not be proper for any member to alienate any specific item in favour of a stranger and insist upon that item being conveyed to his vendee. Whether it is an actual sale, or contract of sale, the question, whether the vendee or one who has contracted to buy a specific item of the joint family property should be given that item would depend upon the circumstances of each case. (*Devadoss, J.*). VENKATARAMAYYA *v.* RAGHAVALU. **85 I.C. 1054= 21 M.L.W. 62=A.I.R. 1925 Mad. 492.**

———A sale by the father, after the separation in status between him and his adopted son cannot bind the son to the extent of the son's share. (*Ramesam and Jackson, JJ.*). VENKATA SESHAMMA *v.* APPA RAO. **80 I.C. 79=20 M.L.W. 181= A.I.R. 1925 Mad. 125.**

———*Alienee from co-parcener must sue for partition—Purchased property might be allotted to purchaser.*

HINDU LAW—Partition—Alienation.

The purchaser of an unascertained share of joint family property must bring a suit for partition in which the whole of the joint family property should be included and all necessary parties joined. In a suit of that nature the Court in making the partition would endeavour to give effect to the alienation and so to marshal the family property among the co-parceners as to allot that portion of the family estate or so much of it as may be just, to the purchaser: A. I. R. 1922 Bom. 137; A.I.R. 1922 Bom. 413, *Foll.* (*Baker, J.C.*). NARAYAN *v.* DHUDA BAI. **92 I.C. 663= 21 N. L. R. 38=A.I.R. 1925 Nag. 299.**

———A member of a joint family by purporting to alienate his own share does not effect separation. (*Dalal and Simpson, A.J.Cs.*). DWARK PRASAD *v.* RAM DEBI. **77 I. C. 329=10 O.L.J. 360= 27 O C. 140=A.I.R. 1924 Oudh 120.**

———*Alienee should be given the portion sold to him by allotting it to his vendor.*

A purchaser from one member of a joint family, of a property, can enforce the sale only by a partition of the entire family property and if in such partition the property sold, can, with due regard to the interests of the other sharer, etc., be wholly allotted to the vendor's share, the purchaser will be entitled to the whole property which the vendor professed to convey to him. In other words, the alienee will be decreed the possession of the specific property purchased by him, if that can be done, without substantial injustice to the other members and no co-parcener has a right to insist, in the absence of proof of such injustice, on his being given on division a share in the alienated item: 25 Mad. 690; 38 M. 684, *Appl.* (*Schwabe, C.J. and Wallace, J.*). BEEVI AMMAL *v.* RADHAKRISHNA IYER. **72 I.C. 81=17 M.L.W. 332= 32 M.L.T. 263=1923 M. W. N. 202= A.I.R. 1923 Mad. 467=44 M.L.J. 309.**

———*Alienee of part suing the alienee of the whole of the property for partition—Suit, if lies.*

The purchaser of an unascertained share (in a joint family property) cannot insist upon the possession of any definite piece of property. The remedy of the purchaser lies in a suit to have that share and interest ascertained by instituting a suit for general partition in which the whole of the joint family property should be included and all necessary parties joined: *Pandu Fithoji* v. *Goma Ramji*, 43 B. 472. In a suit of that nature the Court in making the partition would endeavour to give effect to the alienation and so to marshal the family property amongst the co-parceners as to allot that portion of the family estate, or so much of it as may be just to the purchaser": 11 B. H. C. R. 76. When however, it has been proved that the whole of the family interest in the property has been disposed of by joint action between the members of the family or by separate action against which no dispute has been raised, then an action for partition between strangers in respect of a particular item may be allowed in the plainest of cases. (*Macleod, C.J. and Coyajee, J.*). ISHRAPPA GANAPPA HEGDE *v.* KRISHNA PUTTA SHANKAR HEGDE. **67 I.C. 833=46 Bom. 925= 24 Bom. L.R. 428=A.I.R. 1922 Bom. 413.**

———*Decree against family property and separate property of a co-parcener—Co-parcener's property earned after separation cannot be proceeded against.*

Where the decree was against the joint family property including the separate property of a certain member of a joint family and the member quitted the family:

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Held, all of his property that remains liable for the satisfaction of the decree is (1) his share in the joint family property, (2) his separate property such as it was up to the date on which he quitted the family. His separate property acquired after he quitted the family is not and never was joint family property. (*Le Rossignol and Campbell, JJ.*). GOKUL CHAND *v.* HUKAM CHAND NATHU MAL. **65 I.C. 731=3 Lah. 14=A.I.R. 1922 Lah. 84.**

———*Suit against father by sons—Alienees from father included so as to set aside alienations—When alienee is entitled to a return of his purchase money.*

In suits for partition between sons and their father in which alienees are joined for the purpose of setting aside the father's alienations of the joint family property, the setting aside of the alienations cannot be made conditional on the refund by the sons of the moneys paid to the father in consideration of the alienations on the ground that the father becomes liable to make such a refund on the setting aside of the alienations and that his sons at the same time incur a pious obligation to discharge the liability. The setting aside of such alienations can be made conditional on the refund to the alienees of such part of the consideration as is shown to have been advanced by them for necessary purposes, including in that term the discharge of the father's debts antecedent to the alienations in discharge of which the son's shares have been brought to sale by reason of their pious obligation to discharge their father's debts, and a similar equity would be recognized if it were shown that the purchase-money has been carried to the joint family assets, but the setting aside cannot be made conditional on the refund by the sons of the consideration for the alienations paid by the alienees to the father. (*Wallis, C. J. and Seshagiri Aiyar, J.*). SREENIVASA AIYANGAR *v.* KUPPUSWAMI AIYANGAR. **64 I.C. 698=44 Mad. 801= 14 M. L. W. 78=1921 M. W. N. 630= A. I. R. 1921 Mad. 447.**

—Partition—Award.

———*Award granting extra sum to eldest brother is not invalid.*

An award is not illegal within the meaning of para. 14 (*c*) of Sch. II of Civil Procedure Code, simply because the arbitrator to whom Hindu brothers have referred a dispute as to partition has allowed the eldest brother a certain sum of money in excess of his share in consideration of his having to care for and to educate his younger brother for many years. But the sum awarded to the eldest brother in such a case cannot be called *Jeshtabhagam.* (*Krishnan and Waller, JJ.*). VAITHINATHA AIYAR *v.* SUBRAMANIA AIYAR. **78 I.C. 238=A.I.R. 1925 Mad. 301.**

—Partition—Burden of proof.

———*Plaintiff to prove that property is joint.*

The burden of proving in an action for partition of joint family property that any particular item of property is joint, primarily rests upon the plaintiff. Circumstances no doubt may readily cause the onus to be discharged, but where this has not been done and in the face of direct evidence accepted by the High Court, Privy Council is not at liberty to speculate as to alternative possibilities. (*Lord Buckmaster.*) ANNAMALAI CHETTY *v.* SUBRAMANIAN CHETTY. **113 I.C. 897=49 C.L.J. 93= 1929 M.W.N. 39=29 M.L.W. 91=6 O.W.N. 104= 1929 A.L.J. 9=31 Bom. L.R. 280= 33 C.W.N. 435=10 P.L.T. 283= A.I.R. 1929 P.C. 1=56 M.L.J. 435 (P.C.).**

HINDU LAW—Partition—Burden of proof.

———*Divided member suing for declaration of title to his share—Plaintiff to prove the suit is within 12 years of partition.*

In a suit by a Hindu for a declaration of his title to a one half-share in certain property, it was common ground between the parties that there was no joint family on the date of the suit. It was also admitted by both parties that for the last eight or nine years they had been living and messing separately. According to the plaintiff every joint family property had been divided between them except the property in dispute. Bar of limitation was pleaded in defence.

Held, that the *onus* lay on the plaintiff to prove the point of time at which the status to the joint family broke and that the alleged partition by which his one half-share to the property was determined did take place within twelve years immediately preceding the institution of the suit: A. I. R. 1925 P. C. 132 and A.I.R. 1926 All. 453, *Expl.* and *Rel on.* (*Wazir Hasan and Raza, JJ.*). SARJOO PRASAD *v.* DEO DAT LAL. **105 I.C. 410= 4 O.W.N. 958=A. I. R. 1927 Oudh 499.**

———Where the family is admitted to be separate on the date of the suit, it is on the party that alleges that the acquisitions were made at a time when the family was joint, to prove that they were so made: 3 Cal. 315 (P.C.), *Foll.* (*Kanhaiya Lal and Boys, JJ.*). PRATAP NARAIN SINGH *v.* RAM KUMAR SINGH. **94 I.C. 944=24 A.L.J. 513= A.I.R. 1926 All. 453.**

———*Separation—Party alleging must prove.*

It is well-established law that those who allege that the members of a joint Hindu family had separated must prove, unless it is admitted, that there was a separation at some material time. A separation proved to have taken place at a time subsequent to the material time does not shift the burden of proving separation at the material time, on the opposite party. (*Sir John Edge.*) MT. BHAGWANI *v.* MOHAN SINGH. **88 I.C. 385= 29 C.W.N. 1037=23 A.L.J. 589=41 C.L.J. 591= 22 M.L.W. 211=1925 M.W.N. 421= A.I.R. 1926 P.C. 132=49 M.L.J. 55 (P.C.).**

———*Congenital blindness—Proof of.*

The *onus* of proving that a party was congenitally blind so as to be excluded from a share in joint property lies on the party asserting the same. (*Lindsay and Kanhaiya Lal, JJ.*). BUDH SAGAR *v.* BISHUN SAHAI. **86 I.C. 554= 23 A.L.J. 141=47 All. 327=A.I.R. 1925 All. 366.**

—Partition—Custom.

———*Nattukottai Chetties—Custom as to Moopu and Patni Bhaga.*

Among the Nattukottai Chetties inhabiting seven villages in the Madura District, Madras Presidency, there exist customs by which where a man marries a second wife in the life of the first, the first wife is entitled to have some property set aside for her maintenance which would descend to her son if she had one, and is then called *Moopu* and by which the property is notionally divided after the death of the father, one moiety going to the sons of the first wife and the other to the sons of the second. An agreement to the same effect does not show that the custom does not exist. (*Lord Phillimore.*) PALANIAPPA CHETTIAR *v.* ALAGAN CHETTI. **64 I. C. 439= 26 C.W.N. 417=15 M.L.W. 521= 30 M.L.T. 208=48 I.A. 539=44 Mad. 740= 1921 M.W.N. 687=A.I.R. 1922 P.C. 228 (P.C.).**

———*Custom of impartibility cannot be inferred from estate remaining undivided for a long period.*

HINDU LAW—Partition—Declaration of intention.

The fact that for a number of generations a particular estate has remained undivided would not by itself show that this was on account of a family custom or tenure of the estate. The custom of impartibility must be strictly proved in order to control the ordinary Hindu Law of Property. Exclusive Managership is unknown to Hindu Law and there must be clear arrangement to prove its existence. (*Dhobley, A. J. C.*). KRISHNA RAO *v.* NILKANTHA. **69 I.C. 800=18 N.L.R. 163= 5 N.L.J. 25=A.I.R. 1922 Nag. 52.**

—Partition—Daughters.

———*Life-estate can be partitioned.*

The right of partition or separate enjoyment is a necessary incidence of co-ownership, whether permanent or temporary, and therefore daughters in joint possession of a life-interest in property are entitled to a partition of the property so as to enjoy their respective rights separately and conveniently but so as not to impair the reversionary rights: 12 All. 51 (P.C.) and 33 All. 443, *Foll.* (*Abdul Raoof and Jai Lal, JJ.*). MT. LORANDI *v.* MT. NIHAL DEVI. **95 I.C. 701=6 Lah. 124= 26 P.L.R. 759= A.I.R. 1925 Lah. 403.**

———*If destroys right of survivorship.*

By a partition deed two step-sisters who inherited their father's properties divided his immovable properties. It closed with the following words :—Henceforth the only relationship between us will be one of friendship and not of property,"

Held, that the parties intended not merely to give their present right to the properties but to exclude the right of succession by survivorship in case one of them predeceased the other. (*Krishnan and Waller, JJ.*). RUKMANI AMMAL *v.* NARASIMHACHARIAR. **78 I.C. 173=19 M.L.W. 465= 34 M.L.T. 29=A.I.R. 1924 Mad. 696= 46 M.L.J. 285.**

—Partition—Declaration of intention.

———*Sale-deed by one brother to another—Apportionment of debts and properties therein—Intention to separate.*

In a previous suit brought for specific performance of an agreement for sale of his property, the sale-deed executed through Court by a Hindu vendor in favour of his brother, showed that some debts were taken as binding on both brothers and others on vendor's brother alone, and that some items of property were to go to the heirs of vendor.

Held, that there was an unmistakable intention that the brothers should thereafter be separate: 3 Bom. 54, *Rel. on*; 25 Mad. 690, *Expl.* and *Dist.*; 39 Mad. 265, *Dist.*; A. I. R. 1916 P. C. 104, *Ref.* (*Ramesam and Jackson, JJ.*). LAKSHMI ACHI *v.* NARAYANASAMI. **53 Mad. 188=30 M.L.W. 799= A.I.R. 1930 Mad. 57=57 M.L.J. 746.**

———*Notice of intention to separate withdrawn—No separation.*

Even where an unequivocal wish to separate is once declared by a notice, a separation will not be effected in law, if it be found, as a fact, that the intention was given up as the result of a subsequent agreement of all the parties including the member demanding a separation, by which the notice was expressly or impliedly withdrawn: A.I.R. 1928 All. 422, *Expl.*; 32 All. 415 and A.I.R. 1925 P.C. 49, *Rel. on*; A.I.R. 1928 All. 419, *Ref.* (*Mears, C.J. and Mukerji, J.*). BANKEY BEHARI LAL *v.* BRIJ BEHARI LAL. **116 I.C. 285= 51 All. 519=1929 A.L.J. 115= A. I. R. 1929 All. 170.**

HINDU LAW—Partition—Declaration of intention.

———*Partition—Test of—Intimation of intention to separate—Conduct as intention.*

To prove whether a joint Hindu family is separated the test is whether there has been an unambiguous and definite intimation of intention on the part of one member of the family to separate himself or to enjoy his share in severalty. If so, that has the effect of creating a division in interest. That expression of intention may be by the institution of a suit or by some express intimation, or may be inferred from a consistent long course of conduct.

The members of a joint Hindu family lived separately and had their properties divided excepting a particular property which was left undivided and for a large number of years the income of this property was divided in equal shares.

Held, that the joint Hindu family separated as regards the interest in the property although no actual partition took place: A.I.R. 1924 Bom. 31; A.I.R. 1922 P.C. 201; A.I.R. 1916 P.C. 104, *Foll.*; 18 Bom. 611, *Not foll.* (*Marten, C.J. and Murphy, J.*). MULJI NAROTAM *v.* HIRALAL RAMCHANDRA.

121 I.C. 439=31 Bom. L.R. 1067=
A.I.R. 1929 Bom. 424.

———*Submission to arbitration—Separation effected.*

Submission by members of joint family, for partitioning their shares by metes and bounds to an arbitration, operates as a disruption of the joint status involving the conversion of a joint tenancy into a tenancy-in-common: 35 All. 80 (P.C.); A.I.R. 1916 P.C. 104; A.I.R. 1917 P.C. 39 and A.I.R. 1922 P.C. 353, *Rel. on*; A.I.R. 1925 P.C. 49, *Dist.* (*Das and Allanson, JJ.*). BALMAKUND LAL *v.* MT. SOHANO KUERI. **119 I.C. 817=8 Pat. 153=**
10 P.L.T. 259=A.I.R. 1929 Pat. 164.

———*Unambiguous declaration of intention—Filing of plaint, application for mutation, notice, reference to arbitration—Intention inferred from conduct—Renunciation of intention—No separation.*

Partition is the severance of the status of a joint family, which may be effected by the exercise of individual volition indicating an intention to separate from the other members of the family.

The said intention must be manifested clearly and unambiguously.

The intention to separate may be established either by explicit declaration or from a uniform and consistent course of conduct of the party concerned or of other members of the family. The intention may be declared orally or in writing, and may manifest itself from the filing of a plaint for partition, from an application for mutation of names to the Tahsildar in specific shares with a view to separate enjoyment, from a written notice served upon the members of the family demanding a partition of the property, from an agreement executed by the various members of the family whereby the shares of the individual members are defined with the object of securing separate enjoyment of the profits, or from an agreement of reference to arbitration for the partition of the property. Instances like these may be enumerated but cannot be exhausted.

It is not necessary that there should be a consensus or agreement among the co-parceners for the severance of status of a joint family.

Where severance is effected by explicit declaration, the result is decisive, and the legal result cannot be affected or controlled by the subsequent conduct of the parties.

In the absence of an explicit declaration, an inference in support of the intention may be drawn from evidence of conduct which will necessarily be different according to the varying postures of each case.

Where there is evidence of intention to separate, this can only be annulled by clear evidence of the renunciation of such intention, and in some cases, by consensus or agreement on the part of the members of the family to re-unite.

Partition may also result from a definement or ascertainment of shares with a view to separate enjoyment of property.

The separation of one member of a co-parcenary is not necessarily a separation of the other members *inter se*: A.I.R. 1927 P.C. 224 and 1 I.A. 55, *Dist.*; 31 All. 412 (P.C.); A.I.R. 1925 P.C. 49; 26 A.L.J. 349; A.I.R. 1922 P.C. 201; 4 Cal. 434 and A.I.R. 1926 Mad. 388, *Discussed.* (*Sen and Niamatullah, JJ.*). MT. RAM KALI *v.* KHAMMAN LAL.

111 I.C. 33=51 All. 1=26 A.L.J. 857=
A. I. R. 1928 All. 422.

———*Separation—Unambiguous declaration of intention—How evinced.*

What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy-in-common must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation, but to have that effect the intention must be unequivocal, and clearly expressed, and the intention to separate may be evinced in different ways either by explicit declaration or by conduct, and it is for the Court to determine whether the conduct of the parties showed that there is such an unequivocal and explicit intention to separate: A. I. R. 1927 Oudh 265, *Rel. on.* (*Raza and Nanavutty, JJ.*). BRIJLESHARI PRASAD *v.* KASHI PRASAD.

110 I. C. 886=5 O. W. N. 589=
A.I.R. 1928 Oudh 365.

———An agreement appointing a certain person to partition the joint family property of the parties to a Hindu family and agreeing to accept the partition made by the arbitrator is sufficient to effect a severance in interest: A. I. R. 1922 P. C. 353, *Foll.* (*Mukerji and Ashworth, JJ.*). PARSHADI LAL *v.* HURDAS RAI. **101 I.C. 554=8 L.R.A. Rev. 130=**
A.I.R. 1927 All. 790.

———*Claim for share by one member—Subsequent appointment of arbitrators to partition properties—Severance of joint family.*

Where a member of a joint Hindu family governed by the Mitakshara claims his share of the family property and the members of the family agree to appoint an arbitrator to partition the property among them, the claim and the agreement effect a severance of the joint status of the family. What may amount to a separation, or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy-in-common, must depend on the facts of each case: A. I. R. 1922 P. C. 353 and 35 All. 80 (P. C.), *Foll.* (*Spencer, Offg. C. J. and Viswanatha Sastri, J.*). PERIASWAMI *v.* KANDASAMI. **99 I.C. 720=**
A.I.R. 1927 Mad. 1128.

———*Will by a co-parcener with consent of other co-parceners makes him divided in status.*

(*Obiter*)—If a person who is a member of an undivided family wants to get himself divided, he can do so by simply making a statement in the will

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"I want to get myself divided and want to execute this will." So if a person who is a member of an undivided family leaves a will with the consent of the other co-parceners has become divided in status. (*Kumaraswami Sastri and Ramesam, JJ.*). LAKSHMAMMA *v.* SREERAMULU. **104 I.C. 650= A.I.R. 1927 Mad. 1066.**

———*Definite and unambiguous intention to separate by one member is sufficient to effect separation—Inference of intention from conduct.*

What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy-in-common must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct, it will be for the Court to determine whether it was unequivocal and explicit : A.I.R. 1916 P.C. 104, *Foll.*

Therefore, mere conduct, as can be based upon evidence of the nature of separate arrangements for food, separate control of servants, the carrying on of separate business by a member does not collectively establish separation where there is no evidence upon which Court can rely to establish anything in the nature of a declared intention to separate : 4 M.I.A. 137 (P. C.) and 11 M. I. A. 75 (P. C.), *Rel. on.* (*Stuart, C.J. and Wazir Hasan, J.*). BISHUNATH KAUR *v.* SHEO BAHADUR SINGH. **104 I.C. 587= 4 O.W.N. 550= A.I.R. 1927 Oudh 265.**

———*Unequivocal intention to separate is enough—Partition by metes and bounds is not necessary.*

Partition is a severance of joint status and as such it is a matter of individual volition. All that is necessary to constitute a partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. Once a member of a joint family has clearly and unequivocally intimated to his co-sharers his desire to sever himself from the joint family, his right to obtain and possess his share is unimpeachable, whether or not the co-sharers agree to a separation and there is an immediate severance of the joint status. It is a mistake to suppose that there can be no partition until there is a division of the joint family property by metes and bounds : 11 M.I.A. 75, *Foll.* (*Wazir Hasan and Raza, JJ.*). BANSIDHAR *v.* MATA DIN. **98 I.C. 303= 3 O.W.N. 849.**

———*Notice of intention to separate to other co-parceners is not necessary.*

For the severance of interest notice to other co-parceners of the intention to separate unequivocally expressed is not a condition precedent. The separation is an act of individual volition and does not depend for its effect on the consent or agreement of the other co-parceners. A separation may take place even in the absence of other co-parceners : 43 I.A. 151 ; A.I.R 1922 P.C. 201 ; A.I.R. 1922 P.C. 353, *Ref.*; 44 I.A. 358, *Rel. on.* (*Wazir Hasan and Neave, JJ.*). MT. RACHCHAPALI *v.* MT. CHANDRESAR. **78 I.C. 256= 10 O.L.J. 595= 27 O.C. 114= A. I. R. 1924 Oudh 252.**

———*Unilateral intention not communicated is not sufficient to effect division in status.*

An agreement between all the co-parceners is not essential to the disruption of the joint status; and separation, so far as the separating member

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is concerned, is a matter of individual volition. The intention to separate may be evinced in different ways either by explicit declaration or by conduct, and if it is an inference derivable therefrom, it will be for the Court to determine whether the conduct or declaration was unequivocal and explicit. Coupled with declarations or conduct, there must be a communication of intention to the other members ; then alone a division in status would result. A document therefore, which merely contains a declaration or affords evidence of conduct, does not of itself create a division in status. (*Spencer and Venkatasubba Rao, JJ.*). SARASWATAMMA *v.* PADDAYYA. **71 I.C. 274= 46 Mad. 349= 18 M.L.W. 418= A.I.R. 1923 Mad. 297= 44 M.L.J. 45.**

———*Clear declaration of intention will effect.*

Unequivocal and manifest declaration of an intention to become divided in estate amounts to a valid separation and a disruption of the joint family: 8 W. R. 82 ; 35 All. 80 ; 43 Cal. 1031, *Foll.* (*Jwala Prasad and Adami, JJ.*). RAMJATAN RAI *v.* BALIRAM PRASAD. **70 I.C. 846= A.I.R. 1923 Pat. 25.**

———*Co-parcener claiming his share and reference to arbitration for partition—Severance effected.*

It is settled law that in a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place ; and the commencement of a suit for partition has been held to be sufficient to effect a severance in interest even before decree. Where it was proved that the transferor claimed his half share of the ancestral property and that after discussion, all the joint holders signed the agreement for appointing the arbitrator to partition the property and agreeing to accept whatever partition he might make,

Held, the claim and agreement were quite sufficient to effect a severance in interest and to prevent the share of the transferor from passing by survivorship. In these circumstances the sale by vendor could not be set aside at the instance of the joint owners but only (if at all) at that of the vendor, or his representatives : 11 M. I. A. 75 ; 4 Cal. 434 (P. C.) ; A. I. R. 1916 P. C. 104 ; A.I.R. 1917 P.C. 39, *Foll.* (*Viscount Cave.*) SYED KASIM *v.* JORAWAR SINGH. **68 I.C. 573= 49 I. A. 358= 16 M.L.W. 223= 31 M.L.T. 46= 5 N.L.J. 209= 18 N. L. R. 127= 50 Cal. 84= 25 Bom. L.R. 1= 37 C L.J. 73= 21 A.L.J. 57= 27 C.W.N. 179= A.I.R. 1922 P.C. 353= 43 M.L.J. 676 (P.C.).**

———*Definite intimation of intention to separate creates division.*

Under the Law of Mitakshara an unambiguous and definite intimation of intention to separate has the effect of creating a division of interest and after notice to that effect no obligation rests on the joint family in respect of the son's marriage : *Girja Bai* v. *Sadashiv Dhundiraj*, A.I.R. 1916 P. C. 104, *Foll.* (*Mr. Ameer Ali.*) RAMALINGA ANNAVI *v.* NARAYAN ANNAVI. **68 I. C. 451= 45 Mad. 480= 1922 M. W. N. 399= 30 M. L. T. 255= 26 C. W. N. 929= 20 A.L.J. 839= 49 I. A. 168= 24 Bom. L.R. 1209= 16 M. L. W. 639= 37 C. L. J. 15= A. I. R. 1922 P.C. 201= 43 M.L.J. 428 (P.C.).**

———*Specification of shares in a Will is sufficient to constitute separation.*

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The fact that the shares were specified in the Will was held to suffice to constitute a separation in law, an unequivocal declaration by a member of the co-parcenary body of his intention to be divided in status being sufficient to effect a severance without an agreement between all the co-parceners being required. (*Broadway and Martineau, JJ.*). JUMMA RAM *v.* MUNGAL RAI. **67 I. C. 812= A. I. R. 1922 Lah 473.**

———*Clear and unequivocal declaration of intention constitutes severance in status.*

To constitute a severance in status, a declaration of intention by a member of a joint Hindu family must be absolutely unequivocal. It must be couched in such a language or the behaviour must be such that the Court can draw no other inference from the circumstance than that the party did desire to separate himself from one from whom it is now alleged that he did separate: 35 All. 81, *Ref. to.* (*Napier and Odgers, JJ.*). KRISHNASWAMI BATTAR *v.* SREENIVASA BATTAR. **76 I.C. 881= 30 M.L.T. 168= A.I.R. 1922 Mad. 341= 42 M.L.J. 124.**

—Partition—Division in status.

———*Separation—Division of interest necessary.*

In order to constitute separation it is not necessary that there should be any partition of the property by metes and bounds. What is necessary to establish separation is that there must be a division of interests and not of the property itself: 11 M.I.A. 75, *Foll.* (*Misra and Raza, JJ.*). KHUSHWAQT RAI *v.* JAGANNATH PRASAD TANDAN. **119 I.C. 872= A.I.R. 1930 Oudh 184.**

———*Ascertainment of shares is presumptive proof of separation.*

A mere ascertainment of shares of the members of a joint family is not conclusive evidence of separation, but there is a presumption that there was separation and the burden of proving that notwithstanding the ascertainment of shares of the various members of the family, the family continued to be joint family lies on the person making the assertion: A.I.R 1925 P.C. 49, *Foll.* (*Ashworth and Iqbal Ahmad, JJ.*). MT. BETI *v.* SIKHDAR SINGH. **108 I.C. 721=50 All. 180= 25 A.L.J. 1014= A.I.R. 1928 All. 39.**

———*Physical division of property is not necessary.*

Physical or *de facto* division is not essential to a separation. If the parties agree to hold the property in defined shares as separate owners, such an agreement, evidencing as it does an intention to separate (for intention is the decisive test), operates as an immediate partition; there is a division of title and interest, what is postponed being a division by metes and bounds: 11 M.I.A. 75 (P.C.), *Foll.* (*Venkatasubba Rao, J.*). BABU *v.* GOKULDOSS GOVARDHANDOS. **112 I.C. 184=28 M.L.W. 824= A.I.R. 1928 Mad. 1064=55 M.L.J. 132.**

———In a suit by a grand-daughter for her father's share who died separate against his brothers, if she is unable to prove the specific items of property held by her father, she is entitled to demand that the equivalent of his share shall be divided and given to her. (*Hallifax and Mitchell, A.J.Cs.*). JIJI BAI *v.* CHOUDHARY. **99 I.C. 448= A.I.R. 1927 Nag. 113.**

———*Shares of members defined—Severance in status is effected—One member being minor is no bar to partition.*

Partition or separation, which means the severance of the status of jointness, is a matter of "individual volition": A.I.R. 1916 P.C. 104, *Foll.*

HINDU LAW — Partition — Effect of — Joint business.

But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share although the property itself has not been actually severed and divided. Such members may elect either to have a partition of their shares by metes and bounds, or to continue to live together and enjoy their property in common as before. Whether they do one or the other will affect the mode of enjoyment, but not the tenure of the property or their interest in it. Their interest is determined by the allotment to them of defined shares which converts them from joint holders into tenants-in-common. The fact that one member is a minor does not prevent a partition from taking place: 30 Cal. 738 (P.C.), *Foll.*; 11 M.I.A. 75 (P.C.); *Foll.* (*Wazir Hasan and Gokaran Nath Misra, JJ.*). MT. MENDA KAUR *v.* MIRTINJAI BUX SINGH. **105 I.C. 337=1 L.C. 516= A.I.R. 1927 Oudh 489.**

———Either a Hindu is divided or he is not. If he is divided, then there can be no joint family property. It is true that part of the original possessions of the co-parcenary may for purposes of convenience be left undemarcated, but the interest of the separate members will be not undivided but separate: 30 Cal. 738 (P.C.), *Foll.* (*Kincaid, J.C. and Lobo, A.J.C.*). JETHANAND UDHAVDAS *v.* KEWALRAM. **97 I.C. 505= 20 S.L.R. 295= A.I.R. 1926 Sind 216.**

———Where the plea of out and out division was raised and proved false in the lower Court,

Held, that it could not be pleaded for the first time in appeal that there was at least a severance in status. (*Venkatasubba Rao, J.*) N. ACHYUTAM *v.* V. SURAYYA. **79 I.C. 902=1924 M.W.N. 485= A.I.R. 1924 Mad. 845.**

—Partition—Effect of—Interpretation of decree.

———*Partition decree without actual partition—Later decree declaring alienation void is not a decree for physical possession.*

Where the estate had not been partitioned,

Held, a decree declaring certain alienation by father void, cannot reasonably be intended as a decree to put the plaintiff into physical possession of that which still remains one undivided half of the whole. It only means that he has been excluded from his proper share of the property jointly held and that he is entitled to possession for the purpose of securing his position. (*Lord Buckmaster.*) NARAIN DAS *v.* ABINASH CHANDAR. **69 I. C. 273= 31 M.L.T. 217= 16 M.L.W. 780=1922 M.W.N. 791= 27 C.W.N. 299=21 A.L.J. 201=37 C.L.J. 457= A.I.R. 1922 P.C. 347=44 M.L.J. 728 (P.C.).**

—Partition—Effect of—Joint business.

———*Family business becomes an ordinary partnership governed by Partnership Act.*

Where a separation is effected between brothers and the business is carried on by the brothers, the business becomes an ordinary partnership subject to the Partnership Act. On the death of one brother the partnership is dissolved and a right to an accounting arises. If, however, on the brother's death the widow of the deceased brother is admitted as a partner to a new partnership, then the date of dissolution would only be the rising of the suit

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and no limitation can apply. The fact that the brother's share still continued to be dealt with in the books is no evidence of a partnership with his widow. (*Lord Dunedin.*) MUSAMMAT JATTI *v.* BANWARI LAL. **74 I.C. 462=21 A.L.J. 582=18 M. L. W. 273=50 I.A. 192=4 Lah. 350=25 Bom. L.R. 1256=33 M.L.T. 283=1923 M.W.N. 687=4 L.R.P.C. 135=28 C.W.N. 785=A.I.R. 1923 P.C. 136=45 M.L.J. 355 (P.C.).**

—Partition—Effect of—Jointness of father and son.

———*One brother separating from other two—Separation of the other two* inter se *can be presumed but not that of the separated brother and his sons,* inter se.

Although, when it is established, that one brother has separated from two other brothers (the three forming members of a joint Hindu family governed by the Mitakshara Law) there is a presumption that the two remaining brothers have separated *inter se*, there is no presumption that such a brother has separated from his own sons. In fact the presumption is the other way to the effect that such a brother with his descendants will form the members of a joint Hindu family governed by the Mitakshara Law : A.I.R. 1924 P.C. 126, *Foll.* (*Stuart, C.J. and Raza, J.*). DY. COMMR., PARTABGARH *v.* SHEO NATH. **100 I.C. 689=2 Luck. 459=4 O.W.N. 215=A.I.R. 1927 Oudh 149.**

———*Separation between branches—No presumption of separation within the branches.*

The fact of a separation having been effected between brothers, who constitute a joint Hindu family governed by the Mitakshara, raises no presumption that there was a separation within each branch or a separation of the joint family; constituted by one of the brothers and his descendants: A.I.R. 1924 P.C. 126, *Foll.* In the absence of any evidence to the contrary the presumption that the descendants of each branch remained joint amongst themselves continues. (*Kanhaiya Lal and Ashworth, JJ.*). JAGMOHAN DAS *v.* KUNWAR SINGH. **95 I. C. 135=A.I.R. 1926 All. 532.**

———*Partition between father and son—Grandson is presumed to continue to be joint with his father.*

In ordinary cases of partition between a Hindu father and his sons, the grandsons, though they take an interest in the family property as from their birth, can only derive that interest through their fathers with whom the presumption is, that they remain joint after partition, but there is no presumption that the grandson remains joint with his grandfather. (*Macleod, C.J. and Crump, J.*). JADAVBAI LAKHICHAND *v.* MULTANCHAND HARABHCHAND. **87 I.C. 936=27 Bom. L.R. 426=A.I.R. 1925 Bom. 350.**

———*Partition between brothers does not necessarily create partition between the brothers and their own sons.*

When a Hindu governed by the law of the Mitakshara, who has sons living, separates from his brothers, there is no presumption of law that he separates also from his sons and that he and his descendants cease to constitute amongst themselves a joint family: 30 Cal. 725 (P.C.), *Expl.*; A.I.R. 1924 P.C. 126, *Ref.* (*Sir John Edge.*) LALA JAINARAIN *v.* PRAG NARAIN. **85 I C. 2=1925 M.W.N. 13=21 M.L.W. 162=2 O.W.N. 157=6 L.R.P.C. 73=27 Bom. L.R. 713=29 C.W N. 775=3 Pat. L.R. 255=A.I.R. 1925 P.C. 11=48 M.L.J. 236 (P.C.).**

HINDU LAW — Partition — Effect of—Presumption of tenancy-in-common.

———*Separation between brothers—No separation between brothers and their descendants.*

The effect of the separation and partition between brothers does not cause by implication of law a separation between a brother and his descendants or make them cease to constitute amongst themselves a joint family unless it was proved that they had agreed not to continue to be a joint Hindu family : 30 I. A. 130; 30 I. A. 139 ; A. I. R. 1923 P.C. 136, *Dist.* (*Sir John Edge.*) HARI BAKHSH *v.* BABU LAL. **83 I.C. 418=22 A.L.J. 254=34 M.L.T. 70=5 Lah. 92=5 L.R.P.C. 113=51 I.A. 163=28 C.W.N. 953=1924 M.W.N. 650=20 M. L. W. 406=26 Bom. L.R. 1108=A. I. R. 1924 P.C. 126=47 M.L.J. 938 (P.C.).**

—Partition—Effect of—Minor.

———*Son separating from his father and minor brother—Minor's share ascertained but not partitioned—Father managing minor's share.*

X separated from his father and minor brother but in the partition that took place although the share of the minor was ascertained it was not actually separated from the father's share. Further the father all along was managing not only his share but that of his minor son also. But since the mother of the minor was dead and the father had married again there was fear that subsequent births would reduce the minor's share and so it was in the interest of the minor that there should be separation,

Held, that the circumstances showed that the father and the minor son did not continue to be joint but there was complete separation: 30 Cal. 725 (P.C.) ; A.I.R. 1925 P.C. 93 ; A.I.R. 1925 P.C. 49, *Rel. on.* (*Sulaiman and Sen, JJ.*). KUNDAN LAL *v.* RAJ BEHARI LAL. **121 I.C. 243=1929 A.L.J. 597= A.I.R. 1929 All. 513.**

—Partition—Effect of—Presumption of tenancy-in-common.

———*Partition decree defining shares—Brothers living jointly subsequently—Tenancy-in-common to be presumed.*

Two of the three members of a joint Hindu family lived joint even after partition decree was passed and the other member became separate. These two members were not co-plaintiffs but only one was plaintiff and the other defendant. The decree in the partition was based on a compromise which not only defined the shares of the different members but further declared that all the disputes between the members were settled by the compromise and that they would not have any claim against one another. The two members though living joint, their conduct was consistent with their being tenants-in-common,

Held, that though living jointly they must be deemed to be separate and the compromise decree was binding on them: 10 M.L.W. 438, *Ref.*; 30 Cal. 231 (P. C.); A. I. R. 1925 P. C. 132, *Dist.*: A. I. R. 1925 P. C. 49, *Cons.*; 1 All. 437, *Not appr.* (*Ramesam and Jackson, JJ.*). SOUNDARARAJA AIYANGAR *v.* RUKMANI AMMAL. **119 I.C. 147=A.I.R. 1929 Mad. 500.**

———*Document by one member—Shares allotted to members—Option given to live joint or separate—Presumption is of joint tenancy even if they live joint.*

Where a farighkhati executed by a member of a joint Hindu family states in clear terms that the defined shares in the whole joint family property have been allotted to the co-parceners and also gives